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(2022)03ILR A6
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 16.03.2022

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE IRSHAD ALI, J.

Special Appeal No. 96 of 2022

Babe Ke Edu. Charitable Society ...Appellant

Versus

Harikesh Singh ...Respondent

Counsel for the Appellants:
Shishir Singh Chauhan, Apoorva Tewari

Counsel for the Respondent:
C.S.C.

A. Civil Law – Alternative remedy - Indian Stamp Act: Section 47-A, 56; Indian Stamp Act: Entry 33 of Schedule 1-B - Availability of alternative remedy is no bar for this Court to entertain a petition u/Art. 226 of the Constitution of India in case order under challenge is without jurisdiction or has been passed without following the principles of natural justice. (Para 4)

Learned Single Judge dismissed the writ petition as not maintainable on the ground of non-exhaustion of statutory alternative remedy available to the appellant-petitioner u/s 56 of the Act before the Chief Controlling Revenue Authority. (Para 3)

The order passed by the Collector Stamp was without jurisdiction for the reason that the proceedings u/s 47A of the Act were not attracted in this case as the document which is said to have been deficiently stamped is a Gift Deed which in terms of the provisions of Entry 33 of Schedule 1-B of the Act, is chargeable for stamp duty not on the basis of "market value of the property" but on the basis of "value of the property". S. 47-A comes into play only where the market value of the property in the instrument or the document is disclosed to be lesser than that determined in accordance with the Rules. Hence, the remedy u/s 56 of the Act will not bar jurisdiction of this Court to entertain the petition u/Art. 226 of the Constitution of India. (Para 5, 11)

It is trite in law that rule of exclusion of jurisdiction of this Court u/Art. 226 of the Constitution of India in the wake of availability of an alternative remedy, be it statutory or otherwise, is not absolute. Art. 226 is couched in the widest possible term and unless there is an express bar to its jurisdiction, its power under this Article can be exercised when there is any act which is against any provision of law or is violative of constitutional provisions. (Para 8)

B. Though powers of High Court u/Art. 226 of Constitution of India are discretionary and no limits can be placed upon such discretion, nonetheless this jurisdiction must be exercised along recognized lines and not arbitrarily. Such jurisdiction is subject to certain self imposed restrictions. Thus, in appropriate cases jurisdiction u/Art. 226 of the Constitution of India is exercisable even in the wake of availability of alternative remedy, statutory or non-statutory. (Para 9)

C. **There does not lie any distinction between "statutory" or "non-statutory" or "alternative" remedies when these remedies are referred to in the context of exercising the discretionary jurisdiction u/Art. 226 of the Constitution of India by the High Court.** Every "statutory remedy" may be an alternative remedy and similarly every "non-statutory" or "executive" or "administrative" remedy can also be an alternative remedy, that is to say a remedy which is alternate to the remedy u/Art. 226 of the Constitution of India. (Para 6, 10)

Special appeal allowed. (E-4)

Precedent followed:

1. Whirlpool Corporation Vs Registrar of Trademark, (1998) (8) SCC 1 (Para 4)

2. Sumit Gupta Vs State of U.P. & ors., AIR (2011) (Allahabad) 135; {2011 (3) ALJ 732} (Para 6)

3. K. Venkatachalam Vs A. Swamickan, (1999) 4 SCC 526 (Para 8)

4. Smt. Vijaya Jain Vs St. of U.P. & ors., 2016 (3) ALJ 278 (Para 12)

Precedent cited:

1. Jagadguru Kripalu Parishat Vs State of U.P & others, AIR 2013 (Allahabad) 196 (Para 6)

2. Smt. Raj Goyal Vs A.D.M. (Finance & Revenue) Unnao, Writ Petition No.3923 (M/S) of 2008 (Para 6)

Precedent Single Bench referred to:

1. N.P. Ponnuswami Vs Returning Officer, 1952 SCR 218 (Para 6)

Present appeal challenges the validity of the judgment and order dated 25.02.2022, passed by learned Single Judge.

(Delivered by Hon'ble Devendra Kumar Upadhyaya, J.)

1. Questioning the validity of the judgment and order dated 25.02.2022 passed by learned Single Judge in Writ-C No.1132 of 2022, this intra-court appeal has been filed under Chapter VIII, Rule 5 of the Rules of the Court.

2. Before learned Single Judge, challenge was made to an order dated 30.12.2021 passed by the Collector Stamp/District Magistrate, District Lakhimpur Kheri under Section 47-A of the Indian Stamp Act (hereinafter referred to as the 'Act') whereby deficiency of stamp duty to the tune of Rs.82,53,800/- was determined and was ordered to be recovered from the appellant-petitioner and simultaneously penalty was also imposed to the tune of Rs.82,538/-. The Collector Stamp also ordered that interest at the rate of 1.5% per month be also recovered from the appellant-petitioner from the date of execution of the Gift Deed till the amount to be recovered from the appellant-petitioner is deposited.

3. Learned Single Judge, however, dismissed the writ petition as not maintainable on the ground of non-exhaustion of statutory alternative remedy available to the appellant-petitioner under Section 56 of the Act before the Chief Controlling Revenue Authority.

4. To meet the objection regarding maintainability of the writ petition reliance was placed by the appellant-petitioner before learned Single Judge upon the judgment of Hon'ble Supreme Court in the case of ***Whirlpool Corporation vs. Registrar of Trademark; (1998) (8) SCC 1*** and it was argued that availability of alternative remedy is no bar for this Court to entertain a petition under Article 226 of the Constitution of India in case order under challenge is without jurisdiction or has been passed without following the principles of natural justice.

5. The submission before learned Single Judge made on behalf of the appellant-petitioner was that the order passed by the Collector Stamp was without jurisdiction for the reason that the proceedings under Section 47-A of the Act were not attracted in this case as the document which is said to have been deficiently stamped is a Gift Deed which in terms of the provisions of Entry 33 of Schedule 1-B of the Act, is chargeable for

stamp duty not on the basis of "market value of the property" but on the basis of "value of the property".

6. Certain judgments of this Court were also cited on behalf of the appellant-petitioner before the learned Single Judge including the judgments in the case of ***Sumit Gupta vs State of U.P. & others, AIR (2011) (Allahabad) 135; {2011 (3) ALJ 732}, Jagadguru Kripalu Parishat vs. State of U.P & others, AIR 2013 (Allahabad) 196 and Smt Raj Goyal vs. A.D.M. (Finance & Revenue) Unnao, Writ Petition No.3923 (M/S) of 2008.*** However, argument based on these judgments did not find favour with the learned Single Judge who opined that none of these judgments refer to a constitution Bench judgment of the Apex Court in the case of ***N.P. Ponnuswami vs. Returning Officer, 1952 SCR 218*** which deals of the issue relating to maintainability of a writ petition in the wake of availability of "statutory remedy" whereas ***Whirlpool Corporation*** (supra) deals with a situation where there is an "alternative remedy". The learned Single Judge thus observed that there is a difference between "alternative remedy" and "statutory remedy" and held that in case of availability of "statutory remedy", writ petition would not be maintainable.

7. When we consider the aforesaid ground taken by learned Single Judge to hold that the writ petition was not maintainable, we find ourselves unable to be in agreement with the view taken by learned Single Judge.

8. It is trite in law that rule of exclusion of jurisdiction of this Court under Article 226 of the Constitution of India in the wake of availability of an alternative remedy, be it statutory or otherwise, is not absolute. Article 226 of the Constitution of India is couched in the widest possible term and unless there is an express bar to its jurisdiction, its power under this Article can be exercised when there is any act which is against any provision of law or is violative of constitutional provisions. Reference may be had in this regard to the judgment of ***Hon'ble Supreme Court in the case of K. Venkatachalam Vs. A. Swamickan; (1999) 4 SCC 526.***

9. It is however equally well settled that though powers of High Court under Article 226 of Constitution of India are discretionary and no limits can be placed upon such discretion, nonetheless this jurisdiction must be exercised along recognized lines and not arbitrarily. Such jurisdiction is subject to certain self imposed restrictions. Thus, in appropriate cases jurisdiction under Article 226 of the Constitution of India is exercisable even in the wake of availability of alternative remedy, statutory or non-statutory.

10. The fine distinction sought to be drawn by learned Single Judge between these two expressions, with utmost respect we may say, was unnecessary. Remedy in legal parlance is a mechanism available to an aggrieved person to take recourse to for getting some wrong undone. State, for redressal of grievances of its citizenry provides various such mechanisms/remedies. Sometimes a remedy may be provided by way of legislation which will be a statutory mechanism and sometimes remedy may be provided by State without framing any legislation or statute, that is, by providing simple administrative or executive mechanism. Therefore, in our considered opinion, there does not lie any distinction between "statutory" or "non-statutory" or

"alternative" remedies when these remedies are referred to in the context of exercising the discretionary jurisdiction under Article 226 of the Constitution of India by the High Court. Every "statutory remedy" may be an alternative remedy and similarly every "non-statutory" or "executive" or "administrative" remedy can also be an alternative remedy, that is to say a remedy which is alternate to the remedy under Article 226 of the Constitution of India.

11. Learned Single Judge appears to have ignored the binding precedents. In the case of ***Sumit Gupta*** (supra), a Division Bench of this Court considered the provisions of Article 33 of Schedule I-B of the Act vis-a-vis Section 47-A and has held that Section 47-A comes into play only where the market value of the property in the instrument or the document is disclosed to be lessor than that determined in accordance with the Rules. It is in this background that submission on behalf of appellant-petitioner was made that the order under challenge in the writ petition was without jurisdiction and hence the dictum of **Whirlpool Corporation** (supra) will apply and as such availability of remedy under Section 56 of the Act will not bar jurisdiction of this Court to entertain the petition under Article 226 of the Constitution of India.

12. We may also refer to another Division Bench judgment of this Court in the case of ***Smt. Vijaya Jain Vs. State of U.P. and others; 2016 (3) ALJ 278.*** In this case writ petition was held to be maintainable against an order of Collector (Stamp) notwithstanding availability of "statutory remedy", under Section 56 of the Act. We also note that in this case as well, learned Single Judge had refused to entertain the writ petition on the ground of availability of remedy under Section 56 of the Act, however the Division Bench upturned the judgment of learned Single Judge and held the writ petition to be maintainable.

13. It is needless to say that Division Bench judgment was binding upon learned Single Judge in the instant case as well.

14. Accordingly, the judgment and order dated 25.02.2022, passed by learned Single Judge in Writ-C No.1132 of 2022 is set aside and the appeal is ***allowed.*** Writ petition shall thus stand restored and shall be decided afresh.

15. We request the learned Single Judge to expedite the proceedings of the writ petition and decide the same as early as possible. If any application for interim relief is moved/has been moved in the writ petition, it shall also be decided with expedition.

16. There shall be no order as to cost.

(2022)03ILR A9
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.03.2022

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Writ A No. 5186 of 2001

Smt. Sarita Singh ...Petitioner
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:
S.K. Mehrotra, Abdul Shahid, Girish Chandra Verma, Jagroopan Nishad, Lalit Shukla, Mahendra Singh Rathore, Onkar Singh Kushwaha, Rakesh Kumar Yadav

Counsel for the Respondent:
C.S.C., Ghaus Beg, Jyotinjay Verma

A. Service Law – UP Basic Education Act, 1972 – UP Recognised Basic Schools (Junior High Schools) (Recruitment and Conditions of Service of Teachers) Rules, 1978 – No sanctioned post – Appointment claimed – Neither any permission to open additional class was granted nor additional posts were created by the competent Authority – Held, the petitioners were appointed by the management of the Institution while there being no sanctioned post and, their appointments were totally illegal, against the statutory prescription as provided under the Act, 1972 and the Rules, 1978 – Held further, petitioner's claim is based on untenable grounds, on allegedly forged and fabricated documents. (Para 14 and 37)

B. Constitution of India – Article 226 – Writ jurisdiction – Scope – Not approaching the Court with clean hand – Effect – Cost, when can be imposed – Held, when a person approaches the High Court under Article 226, either against State or other on allegations of infringement of his rights, such a person's conduct has to be unblamedworthy – One who comes to the Court, he must come with clean hands – Held further, the petitioners have approached this Court with unclean hands and, have made every effort to drag the litigation for the last long 21 years. They have wasted very precious and valuable time of the Court – While dismissing writ petition, the High Court imposed the cost of Rs.50,000/- to be deposited by the petitioners jointly in the Army Causalities Welfare Fund. (Para 38 and 39)

C. Constitution of India – Article 226 – Doctrine of restitution – Unjust benefit – Principle of 'actus curiae' – Application – Salary paid on the strength of interim order – Consequence of dismissal of writ petition – Merger of interim order in final order – Effect – Held 'actus curiae' principle is founded upon justice and good sense and, is a guide for administration of law – Held further, the doctrine of restitution is also applicable to interim orders and a litigant would not be allowed to gain by swallowing the benefits yielding out of the interim order. If the petition is dismissed, the injury, if any, caused by the act of the Court is required to be undone – High Court directed the petitioner to refund the amount of salary with interest @ 6% per annum. (Para 41, 43 and 44)

D. Interpretation of statute – Maxim '*actus curiae neminem gravabit*' – Scope and meaning – It means that 'act of Court shall prejudice no one' – This doctrine is basically founded on the idea that when a decree is reversed, law imposes an obligation on the party who received an unjust benefit of the erroneous decree to restitute the other party for what the other party has lost during the period, the erroneous decree was in operation. (Para 40 and 41)

Writ petition dismissed. (E-1)

List of Cases cited :-

1. St. of Guj.& ors. Vs Essar Oil Limited & anr.; (2012) 3 SCC 522

2. Amarjeet Singh & ors. Vs Devi Ratan & ors.; (2010) 1 SCC 417

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

1. This writ petition, under Article 226 of the Constitution of India, has been filed by the petitioners, seeking issuance of a writ of Mandamus commanding respondents to pay salaries to them on the basis of regular time-scale fixed by the State Government for primary teachers, as has been fixed for other teachers, out of the State Fund.

The petitioners have further prayed for issuance of a direction to the respondents to pay arrears of their salary

since the date, 'Kamla Nehru Balika Vidyalaya, Bachhuapar, Raje Sultanpur, District Ambedkarnagar started receiving grants-in-aid from the State Government.

2. That Kamla Nehru Balika Vidyalaya, Bachhuapar, Raje Sultanpur, District Ambedkarnagar (herein after referred to as "the Institution") was established for teaching students for Class-VI to VIII in the year 1984; the Institution is run and managed by a registered society, registered under the Societies Registration Act; the Institution was granted temporary recognition on 25.08.1986 and, thereafter permanent recognition was granted on 04.07.1987 by the Assistant Director (Basic) Faizabad (now Ayodhya).

3. The petitioners have claimed that when the Institution was started in the year 1984, the total staff was consist of one Principal, five assistant teachers, one clerk and three peons. The Institution was granted permission to start one section for each class from Class-VI to VIII. It was stated that in due course, the Institution received wide popularity and there was considerable increase in number of students, seeking admission in the Institution and, therefore, three new sections were opened for Classes-VI to VIII.

4. This writ petition was filed in the year 2001, however, after exchange of pleadings, an amendment application was filed, which was allowed by this Court vide order dated 16.03.2010. By way of amendment, some new facts and grounds got incorporated in the writ petition to the effect that the committee of management of the Institution had requested the District Basic Education Officer, Ambedkarnagar (hereinafter referred to as "the BSA") to permit the Institution for opening new sections as strength of the students was increasing.

5. It is said that the BSA considered the request of the management of the Institution and, permitted the Institution to open new sections for each classes i.e. Class-VI, VII and VIII through Letter No.3019/90-91 dated 15.12.1990.

6. By way of amendment, the petitioners claimed that their appointment was made for new sections, approved by the respondent no. 4 after following due process as prescribed under the U.P. Primary Education Act, 1971 and rules made thereunder. It was said that the appointments were approved by the BSA. By way of amendment, it had also been claimed that the petitioners have been working after their appointment got approved by the BSA, but they were not paid salary illegally and arbitrarily.

7. It is submitted that petitioner nos. 1, 2 and 3, namely, Smt. Sarita Singh, Smt. Suman Tripathi and Smt. Manju Singh were having M.A. B. Ed. degree to their credit and, they were selected and appointed by the management of the Institution. They were issued appointment letter dated 25.06.1991 and, were directed to join their posts with effect from 01.07.1991. The petitioner nos. 1 to 3 had joined the Institution on the date fixed i.e. 01.07.1991 and, since then they have been continuously working in the Institution to the entire satisfaction of the management and all concerned.

8. It was stated that the papers relating to appointment of petitioner nos. 1 to 3 were submitted by the management of the Institution to the BSA, but no response

came. However, by way of amendment, as was incorporated on 16.03.2010, it has been said that the BSA granted approval to the appointments of petitioner nos. 1 to 3 through letter no. 5231/91-92 dated 05.02.1992. The said letter of approval allegedly issued by the BSA has been placed on record as Annexure 3-A to the amendment application.

9. In respect of petitioner no. 4, Smt. Noor Jahan, it has been said that she was having qualification of B.A. and, the Institution required a Teacher for teaching Urdu subject. The petitioner no. 4 was selected by the management and, was given temporary appointment as assistant teacher vide letter dated 05.07.1996. She joined the Institution on 10.07.1996 and since then she had been performing the duties and work of assistant teacher (Urdu) to the entire satisfaction of the management of the Institution.

10. It is said that the papers relating to appointment of petitioner no. 4, Smt. Noor Jahan, were sent by the management of the Institution to the BSA. However, no response came to the appointment of the petitioner no. 4.

11. By way of amendment dated 16.03.2010, the Institution has taken a plea that appointment of the petitioner no. 4 was deemed to have been approved by the BSA under rule-10 of the Uttar Pradesh Recognised Basic Schools (Junior High Schools) *(Recruitment and Conditions of Service of Teachers) Rules, 1978* (hereinafter referred to "the Rules, 1978") inasmuch as the respondent no. 4 failed to communicate his decision within one month from the date when the relevant papers were sent for approval to him regarding appointment of the petitioner no. 4.

12. It is said that the committee of management had been paying the consolidated salary of Rs. 850/- per month to each of the petitioners, while regular scale of assistant teachers, as paid to teachers of the aided schools from the State Fund, was Rs. 4250-6400 per month. It is further said that the Institution was given grants-in-aid with effect from December, 1998. The petitioners were also working in the Institution as assistant teachers when the Institution started receiving Government Aid.

13. Though the writ petition was filed in the year 2001, however, this Court only on 21.02.2005, as an interim measure, directed that the petitioners must be paid respectable wages/salary in the minimum of the time scale fixed by the State Government for the assistant teachers with effect from 01.01.2005 along with other benefits. The interim order dated 21.02.2005 reads as under:-

"Heard Sri I.D. Shukla learned counsel for the petitioners, learned Chief Standing Counsel for opposite parties no. 1 to 3 and Sri Gaus Beg who has put in appearance on behalf of opposite party no. 4.

No counter affidavit has been filed by the opposite parties despite the petition being entertained on 6.11.2001.

The grievance of the petitioners is that they have been continuing as Assistant Teachers since 1.7.1991 except Smt. Noor Jahan, petitioner no. 4, who was appointed on 10.7.1996 in Kamla Nehru Balika Vidyalaya, Bachhupur-Raje Sultanpur, District Ambedkar Nagar. The school was placed on aided list of the State Government but still the petitioners are being given Rs.850/- per month. The grievance of the petitioners is that they are being deprived of their regular salary in the pay scale of Rs.4250-6400 which is being

allowed to similarly placed teachers performing the same duties.

Sri Gaus Beg has resisted the petition saying that the teachers of Junior Highschool are entitled for regular scale and only this, the institution has come under the Grant-in-aid scheme. Sri Shukla learned counsel for the petitioners has stated that they are imparting education to Junior HIghschool also. He further submitted that the school was raised to Junior Highschool and they were required to impart education to Junior Highschool classes also. The petitioners are Graduate and some are having Post Graduate qualifications also.

In view of above, it is provided that the petitioners must be paid respectable wages/salary in the minimum of the time scale fixed by the State Government for the Assistant Teachers of the institution in dispute from 1.1.2005. The petitioners shall be allowed the benefits of the pay scale admissible to the similarly placed Assistant Teachers performing the same duties and functions."

14. In the counter counter affidavit, filed on behalf of the BSA on 07.12.2005, it was said that there was only one sanctioned section in each of classes from Class-VI to VIII in the Institution. Under the grants-in-aid scheme, one post of head-master and four posts of assistant teacher were sanctioned and, the salary of the head-master and four teachers was being paid from the State Exchequer after the Institution was taken under the grants-in-aid scheme. It was specifically stated that neither any permission to open additional class was granted nor additional posts were created by the competent Authority. If the petitioners claim to have been appointed by the committee of management of the Institution then their appointment would be in violation of rules 4, 5, 7, 9, 10 and 11 of the Rules, 1978. It was said that the papers relating to selection and appointment of the petitioners were not available in the office of the BSA and, their appointments were never approved by the BSA and, therefore, the payment of salary to the petitioners from the State Exchequer was not possible.

15. In the counter affidavit, stands of the respondents is that at the time of obtaining recognition of the Institution, the management of the Institution did not mention names of the petitioners as assistant teachers working in the Institution nor their names were included when the grants-in-aid was sanctioned by the Government. Therefore, the claim of the petitioners for regular salary from the State Exchequer is totally untanable.

16. The writ petition got dismissed for non-prosecution vide order dated 25.01.2006 and, the interim order dated 21.02.2005 was vacated. However, the writ petition was restored on 03.03.2006, but the interim order was not extended. After the specific stand was taken by the BSA that neither any paper relating to appointment of the petitioners were available in the office of the BSA nor appointment of the petitioners was ever approved and, their names did not include in the strength of the teachers when recognition was granted or grants-in-aid was given, an amendment application, as mentioned above, came to be filed on 19.11.2009 and, the said amendment application was allowed vide order dated 16.03.2010.

17. An application for interim relief was again filed on 12.05.2010 on behalf of the petitioners. However, no order has been passed on the said application till date.

18. In the counter affidavit filed to the amended parts of the writ petition, it was reiterated that the appointment of the petitioners had been made without following due procedure prescribed under the law and, it was in violation of the rules 4, 5, 7, 9, 10 and 11 of the Rules, 1978 and, therefore, no salary could be paid to the petitioners from the State Exchequer and, it was only the management of the Institution, which would be responsible for payment of salary, if any, to the petitioners. It was further said that the BSA had written letter dated 27.04.2005 to the manager of the Institution in which the BSA had said that the appointment of the petitioners was made in violation of the Rules, 1978, without any permission/creation of the post by the Government and without permission/approval, appointment of the petitioners had allegedly been made. It was further said that when the Institution sent the papers for receiving grants-in-aid, the names of the petitioners were not mentioned in the list of teachers working in the Institution and, therefore, there was no question of making any payment of salary to the petitioners and, it was for the management of the Institution to make payment to the petitioners, as the management of the Institution had allegedly appointed them. A specific stand was also taken that the alleged letters of the BSA, regarding permission to open new sections and approval of appointment of the petitioners, were forged document.

19. After the interim order was obtained and the BSA wrote a letter dated 27.04.2005 to the management of the Institution, denying the payment of salary from State Exchequer, as mentioned above, contempt petition, bearing Contempt No.1515 (C) of 2005 came to be filed before this Court for alleged violation/non-compliance of the interim order dated 21.05.2005.

20. This Court, vide order dated 23.04.2013, directed the BSA as well as Finance and Accounts Officer, Ambedkanagar to remain present in the Court to show-cause as to why contempt proceedings be not initiated against them for not complying the interim order dated 21.02.2005. On 08.05.2013, as directed by this Court vide order dated 23.04.2013, BSA as well as Finance and Accounts Officer, Ambedkarnagar were present in person. It appears that sometime was asked by them regarding compliance of the order dated 21.02.2005. However, this Court again directed the BSA and the Finance and Accounts Officer to remain present on the next date of listing of the contempt petition on 22.05.2013.

21. On 22.05.2013, the BSA and the Finance and Accounts Officer remained present before this Court. On the said date, it appears that they assured the Court that the interim order dated 21.02.2005 would be complied with within a period of one month. Affidavits filed by the BSA and Finance and Accounts Officer were taken on record and, on the basis of the said assurance, framing of the charges against them was deferred and, it was observed that in case the interim order was not complied with, both the officers would appear in person again for framing of charges. The case was directed to be listed on 09.07.2013.

22. On 09.07.2013, the contempt Court noted contention of counsel that as per the interim order dated 21.02.2005 minimum of pay-scale was not being paid to the petitioners nor arrears of salary were paid to them. This Court again directed the

BSA and the Finance and Accounts Officer, Ambedkanagar to remain present in the Court on the next date of listing of the matter on 09.09.2013 and a cost of Rs.10,000/- was imposed. The Court directed the authorities to release arrears of salary to the petitioners. The Court also directed for filing affidavit of compliance.

23. Under the pain of contempt proceedings, the interim order dated 21.02.2005 was complied with despite filing of the counter affidavit in which a specific stand was taken that the petitioners had approached this Court by filing forged documents regarding their approval of appointment etc and, the writ petition got dismissed on 25.01.2006 for non-prosecution and, the same was restored on 03.03.2006, but no order for extending the interim order dated 21.02.2005 was passed, while restoring the petition. The arrears of salary were also paid to the petitioners and the contempt Court, in its order dated 09.09.2013, recorded that the interim order dated 21.02.2005 was complied with in letter & spirit and the cost of Rs.10,000/- was directed to be deposited with the Oudh Bar Association and in view of the aforesaid fact, the contempt petition was disposed of vide order dated 09.09.2003, which reads as under:-

"This petition seeks initiation of proceedings under the Contempt of Courts' Act 1971 against the respondent-contemners for willful disobedience of judgment dated 21.2.2005 rendered in Writ Petition No.5186 (SS) of 2001.

In deference to order dated 22.5.2013 Sri D.S. Yadav, Basic Shiksha Adhikari, Ambedkar Nagar, and Sri Krishna Kumar Yadav, Finance & Accounts Officer, Ambedkar Nagar, are present in court alongwith cost amount.

Affidavits filed by the contemners are taken on record.

This Court has taken note of the fact that the contempt petition was filed in the year 2005. Compliance of the order has been made in August 2013.

Let Rs.10,000/-(Ten thousand only) be deposited with Oudh Bar Association.

The two contemners, named above, state that the order at issue has been complied with in its letter and spirit. Arrears have been paid.

Learned counsel for the petitioner states that indeed the order has been complied with in its letter and spirit.

Considering the fact that the order at issue has been complied with, which fact has been admitted by learned counsel for the petitioner, this petition is disposed of."

24. This Court finds it strange and intrigue that despite the fact that the interim order dated 21.02.2005 was not extended vide the order dated 03.03.2006, which was passed on the application for recalling the order dated 25.01.2006 whereby the writ petition was dismissed for non-prosecution, the contempt proceedings continued and orders were passed for compliance of the non-existent interim order dated 21.02.2005. Not only current salary, but arrears of salary were also directed to be paid to the petitioners, which was not the scope of the interim order dated 21.02.2005. The order dated 03.03.2006, restoring the writ petition, reads as under:-

"This is application for recalling the order dated 25.01.2006.

Counsel for opposite party is present.

He has no objection for recalling the order on personal grounds.

Order dt. 25.1.06 is recalled.

List for hearing on 27the March, 2006"

25. After the interim order dated 21.02.2005 was obtained, the petitioners made no stone unturned to see that hearing of the case does not take place. The order-sheet is full of adjournment sought by the counsel for the petitioners on one pretext or the other.

26. On 23.09.2013, this Court, noticing the conduct of the petitioners, granted only one week's time to file rejoinder affidavit to the counter affidavit filed by the respondents and, made it clear that no further time shall be allowed to the counsel for the petitioners on the next date. It was also observed that in case the counsel for the petitioners again ask for adjournment, the interim order granted earlier would stand automatically vacated. The order dated 23.09.2013 reads as under:-

"Learned counsel for the petitioner prays for and is granted one week and no more time to file rejoinder affidavit.

List thereafter.

It is made clear that no further time shall be granted to the learned counsel for the petitioner on the next date. In case he seeks further time, the interim order granted earlier shall stand automatically vacated."

27. On 23.10.2013, when the case was listed before the Court, learned counsel for the petitioners again sought adjournment on the ground that he was not prepared with the case. Looking to the fact that the writ petition had remained pending since 2001 and the interim order dated 21.02.2005 amounted to allowing the final relief sought in the writ petition regarding the payment of salary to the petitioners, this Court passed the order and, kept the interim order dated 21.02.2005 in abeyance till the next date of listing. The order dated 23.10.2013 reads as under:-

"This writ petition is pending since 2001 wherein an interim order has been passed by this Court on 21.02.2005 allowing the relief which has been sought i the main petition regarding payment of the salary to the petitioner in terms of the interim order.

Thereafter, on one pretext or the other the writ petition was adjourned. A contempt petition has already been filed.

The contention of the opposite party that some forged paper has been placed on record regarding the approval of the appointment of petitioner.

Today also the counsel for the petitioner wants adjournment on the ground that he has not prepared the case.

The case is adjourned.

Interim order dated 21.02.2005 shall remain in abeyance till next date of listening.

28. On 17.12.2015, it appears that due to some inadvertent mistake, the interim order, which was kept in abeyance, was extended till further orders. However, this Court on the next date of listing i.e. on 27.01.2016, noticed the said order dated 17.12.2015, granted life to the interim order dated 21.02.2005, which was kept in abeyance vide order dated 23.10.2013. The Court noticed that the counsel for the respondents had prayed for extension of time, however, due to an inadvertent mistake, the interim order dated 21.02.2005 got extended. This Court also noticed that the counsel for the petitioners did not take

any proceeding against the order dated 23.10.2013 whereby the interim order dated 21.02.2005 was put in abeyance. In view thereof, vide order dated 23.10.2013, whereby the interim order dated 21.02.2005, was kept in abeyance, was extended till next date of listing of the petition. The order dated 27.01.2016 reads as under:-

"The previous interim order passed by this Court on 21.2.2005 continued to operate till 23.10.2013. After hearing the matter at some length, this Court passed the following order on 23.10.2013:

"This writ petition is pending since 2001 wherein an interim order has been passed by this Court on 21.02.2005 allowing the relief which has been sought i the main petition regarding payment of the salary to the petitioner in terms of the interim order.

Thereafter, on one pretext or the other the writ petition was adjourned. A contempt petition has already been filed.

The contention of the opposite party that some forged paper has been placed on record regarding the approval of the appointment of petitioner.

Today also the counsel for the petitioner wants adjournment on the ground that he has not prepared the case.

The case is adjourned.

Interim order dated 21.02.2005 shall remain in abeyance till next date of listening.

Later on, this Court passed the following order on

17.12.2015:

On the request of Mr. Jyotinjay Verma, learned Counsel for the opposite parties, interim order dated 21.02.2005 is extended, till further orders of the Court.

List the petition in the second week of January, 2016.

Sri Jyotinjay Verma, learned counsel for the respondent has submitted that the order passed on 17.12.2015 grants life to the earlier order passed by this Court on 21.2.2015 which was subsequently modified by an order dated 23.10.2013 conditionally. Learned counsel states that it was the order dated 23.10.2013 which was prayed to be extended. It appears that at an inadvertent error has crept in while passing the order dated 17.12.2015. It is also pointed out by Sri Verma, learned counsel, the petitioner has not taken up any proceedings against the order dated 23.10.2013 and the said order remains unaltered.

In view of above, the interim order dated 23.10.2013 is hereby extended till the next date of listing, subject to the statement recorded hereinabove.

List in the next cause list.

On the next date of listing, the writ petition itself may be disposed of finally."

29. The Director, Education (Basic), Government of Uttar Pradesh vide letter dated 30.10.2013 directed the Joint Director, Education (Basic), Ayodhya Division, Ayodhya to hold an inquiry for making payment of more than 50 Lakhs to the three petitioners in pursuance of the interim order dated 21.02.2005. In the inquiry report, the Joint Director of Education said that the BSA vide his order dated 17.06.2013 directed the Manager/Principal of the Institution to ensure compliance of the interim order dated 21.02.2005 and, the copy of the said letter was also given to the petitioners. The BSA made an inspection of school on 04.05.2013 and inspected the attendance register of the school and obtained

photocopy thereof. It was found that besides the persons working against sanctioned posts, in another register Smt. Sarita Singh and Smt. Suman Tripahti made signatures. However, petitioner, Smt. Noor Jahan was not found to have even signed the register and, she was not working in the school at all. Despite this, she was also made payment by the Finance and Accounts Officer (Basic Education) Ambedkarnagar and, he had written a letter seeking permission for making further payments to all the petitioners. The Joint Director said that release of payment in favour of Smt. Sarita Singh and Smt. Suman Tripathi, without there being any sanctioned post, would come within the purview of financial irregularities committed by the officials. The BSA was directed to ensure appropriate legal action in the matter.

30. After the departmental inquiry, a first information report came to be registered on 17.01.2005 on a written complaint of the BSA, Ambedkarnagar against Mr. K.K. Pandey, the then Finance and Accounts Officer in the office of BSA, Ambedkarnagar under Section 409 IPC at Police Station Akbarpur, District Ambedkarnagar. The Finance and Accounts Officer, Mr. K.K. Pandey was instrumental in making payment against the forged documents and, he had also made payment of more than 25 Lakhs to one Mr. Ram Roop Yadav, assistant teacher of Adarsh Janata Junior High School, Rasoolpur, Ambedkarnagar and, in the inquiry it was found that no appointment was approved of the said persons by the BSA and, the bills regarding payment were found to be forged and for the said offence, the case was pending against him. These documents have been brought on record by way of an affidavit dated 23.08.2016 filed by the BSA, Ambedkanagar. However, no response to the said affidavit has been filed on behalf of the petitioners.

31. The documents, which were never brought on record along with the writ petition, were subsequently brought on record by way of amendment and, supplementary affidavit, which have been found to be forged. Supplementary affidavit dated 15.09.2016 was filed by the petitioners to bring on record an alleged letter dated 18.02.1990 sent by the management of the Institution to the BSA, stating therein that at that time, the strength of the students was 288 and, therefore, request was made to create four more posts of assistant teacher. It is further said that the management of the Institution had written to the BSA a letter dated 09.04.2005, stating therein that vide Letter No.3019 dated 15.12.1990 the permission for starting new sections and, its approval was granted vide order dated 05.02.1992, however, nothing was done and, therefore, request was made for creation of the post. It is strange that after 15.12.1990 when the alleged persmission was granted for opening new sections, more than 13-15 years thereafter the request was made for creation of four posts of assistant teachers. It was further said that a similar request was made again vide letter dated 09.05.2005.

32. If the permission for opening new sections was granted on 15.12.1990 and the said sections were approved, this Court does not find any justification for writing the letter for creation of posts on 09.04.2005 i.e. after 13-15 years. These documents, which at no point of time were placed along with record of the writ petition, are shrouded in mystery and under deep clouds of suspicion. If the petitioners

had all these documents when the writ petition was filed, they would have certainly placed them on record in support of their claim.

33. It appears that the police filed a closure report in respect of the FIR against the Finance and Accounts Officer, which was submitted in the trial Court on 26.04.2016. However, the trial Court had rejected the said final report vide order dated 22.12.2016 and, directed the Station House Officer to make further investigation under Section 173(8) CrPC.

34. After the interim order dated 21.02.2005 was kept in abeyance vide order dated 23.10.2013, the petitioners have not been paid salary from the State Exchequer. The order-sheet from 11.07.2006 would show that the case was got adjourned on one pretext or the other by the counsel for the petitioners every time and, every effort was made to see that the case was not heard and decided finally.

35. This Court is not extracting the orders passed in the writ petition, adjourning the case on the request of learned counsel for the petitioners. Suffice it to mention that every time, the matter got adjourned on request of learned counsel for the petitioners. On 17.02.2022 when the case was listed before this Court, again request was made for adjourning the case, however, hearing the counsel for the respondents for sometime, the Court directed the case to be listed on next day i.e. 18.02.2022 for further hearing and, thus, the hearing could get concluded.

36. From the facts, as stated above, the petitioners' names were not included in the list of the teachers working when the request for taking the Institution under grants-in-aid was sent to the BSA. Under the grants-in-aid scheme, one post of head-master and four posts of assistant teachers were sanctioned in the year 1997, which did not include names of the petitioners. The letters for permission for opening new sections and, approval are stated to be forged for which the FIR has been registered. The claim of the petitioners by way of amendment and supplementary affidavit that there appointments were approved by the BSA has been found to be untenable inasmuch as no papers regarding their selection and appointment is available in the office of BSA and, the alleged approval letter is said to be completely forged document. This allegation of forgery gets cemented from the fact that if the appointments of the petitioners were approved in 1992 then there was no occasion for the management to write to BSA in 2005 for creation of posts.

37. For several years, in the State of Uttar Pradesh, the game of appointing teachers by the management of the educational institutions without prior permission for creation of posts and then coming to the Court for payment of salary has been going on and, several thousands crores of rupees of tax-payers money has been paid to such appointees on the basis of the interim/final orders passed by this Court. Therefore, it is not only committee of management and such appointees, who are culprits, but the officials in the Education Department have equal share in the culpability. There is nothing on record except the alleged letters regarding approval for opening new sections or sanctioning the additional posts, which were not part of the grants-in-aid scheme. This Court is of the view that the petitioners were appointed by the management of the Institution while there

being no sanctioned post and, their appointments were totally illegal, against the statutory prescription as provided under the U.P. Basic Education Act, 1972 (hereinafter referred to "the Act, 1972") and the Rules, 1978. This Court, therefore, finding no merit and substance in the writ petition in directing the payment of salary to the petitioners whose claim is based on untenable grounds, on allegedly forged and fabricated documents, **dismiss** the writ petition.

38. If a person approaches the Court with unclean hands, basing his claim on forged and fabricated documents, such a person is not entitled for any relief. The power of the High Court to be exercised under Article 226 of the Constitution of India is a discretionary power. When a person approaches the High Court under Article 226 of the Constitution of India, either against State or other on allegations of infringement of his rights, such a person's conduct has to be unblamed-worthy. In the present case, the petitioners have approached this Court with unclean hands and their conduct is blamed-worthy, therefore, this Court would refuse to exercise the discretion under Article 226 of the Constitution of India. The Supreme Court in the case of State of Maharashtra Vs. Digamber in paragraph-19 has held as under:-

"19. Power of the High Court to be exercised under Article 226 of the Constitution, if is discretionary, its exercise must be judicious and reasonable, admits of no controversy. It is for that reason, a person's entitlement for relief from a High Court under Article 226 of the Constitution, be it against the State or anybody else, even if is founded on the allegation of infringement of his legal right, has to necessarily depend upon unblameworthy conduct of the person seeking relief, and the court refuses to grant the discretionary relief to such person in exercise of such power, when he approaches it with unclean hands or blameworthy conduct."

39. It is well settled that one who comes to the Court, he must come with clean hands. In the present case, the petitioners have approached this Court with unclean hands and, have made every effort to drag the litigation for the last long 21 years. They have wasted very precious and valuable time of the Court. The order-sheet of the case bears the testimony of this fact, which is full of adjournments sought by the counsel for the petitioners. Thus, this Court feels that the petitioners need to be saddled with some costs and, thus, the writ petition is **dismissed with cost of Rs.50,000/- (Rupees fifty thousand)** to be deposited by the petitioners jointly in the Army Causalities Welfare Fund.

40. Another aspect, which needs deliberation, is that the petitioners have been paid salary and arrears of salary in compliance of the interim order dated 21.02.2005 and, the order passed in the contempt petition. Once the writ petition is dismissed, the interim order gets marged in the final order of dismissal of the writ petition. What would be the effect of dismissal of the writ petition on the benefits drawn by the petitioners on the strength of the interim order dated 21.02.2005 is the question needs to be answered. It is well settled that 'act of Court shall prejudice no one', which is based on latin maxim *"actus curiae neminem gravabit"*. This principle is based on justice and good sense and, is guide for *administrative law as held by the*

Supreme Court in ***(2012) 3 SCC 522 (State of Gujarat and others Vs. Essar Oil Limited and another).***

41. This is also encompassed partly within the doctrine of restitution. This 'actus curiae' principle is founded upon justice and good sense and, is a guide for administration of law. This doctrine is basically founded on the idea that when a decree is reversed, law imposes an obligation on the party who received an unjust benefit of the erroneous decree to restitute the other party for what the other party has lost during the period, the erroneous decree was in operation. Therefore, the Court, while granting restitution, is required to restore the parties as far as possible to their same position as they were in at the time when the Court by its erroneous action displaced them. Pragraphas 60, 61, 62, 63, 64, 65 and 66 of the said judgment, which are relevant, are extracted hereunder:-

60. Subsequently, in Binayak Swain v. Ramesh Chandra Panigrahi [AIR 1966 SC 948] this Court relied on the principles in Lal Bhagwant Singh [AIR 1953 SC 136] and explained the concept of restitution as follows: (Binayak Swain case [AIR 1966 SC 948] , AIR p. 950, para 4)

"4. ... The principle of the doctrine of restitution is that on the reversal of a decree, the law imposes an obligation on the party to the suit who received the benefit of the erroneous decree to make restitution to the other party for what he has lost."

61. The concept of restitution is virtually a common law principle and it is a remedy against unjust enrichment or unjust benefit. The core of the concept lies in the conscience of the court which prevents a party from retaining money or some benefit derived from another which it has received by way of an erroneous decree of court. Such remedy in English Law is generally different from a remedy in contract or in tort and falls within a third category of common law remedy which is called quasi-contract or restitution.

62. If we analyse the concept of restitution one thing emerges clearly that the obligation to restitute lies on the person or the authority that has received unjust enrichment or unjust benefit (see Halsbury's Laws of England, 4th Edn., Vol. 9, p. 434).

63. If we look at Restatement of the Law of Restitution by American Law Institute (1937 American Law Institute Publishers, St Paul) we get that a person is enriched if he has received a benefit and similarly a person is unjustly enriched if the retention of the benefit would be unjust. Now the question is what constitutes a benefit. A person confers benefit upon another if he gives to the other possession of or some other interest in money, land, chattels, or performs services beneficial to or at the request of the other, satisfies a debt or a duty of the other or in a way adds to the other's security or advantage. He confers a benefit not only where he adds to the property of another but also where he saves the other from expense or loss. Thus the word "benefit" therefore denotes any form of advantage (p. 12 of the Restatement of the Law of Restitution by American Law Institute).

64. Ordinarily in cases of restitution if there is a benefit to one, there is a corresponding loss to other and in such cases, the benefiting party is also under a duty to give to the losing party, the amount by which he has been enriched.

65. We find that a person who has conferred a benefit upon another in compliance with a judgment or whose

property has been taken thereunder, is entitled to restitution if the judgment is reversed or set aside, unless restitution would be inequitable (p. 302 of the Restatement of the Law of Restitution by American Law Institute).

66. Equity demands that if one party has not been unjustly enriched, no order of recovery can be made against that party. Other situation would be when a party acquires benefits lawfully, which are not conferred by the party claiming restitution, court cannot order restitution."

42. The Supreme Court in the case of (2010) 1 SCC 417 **(Amarjeet Singh and others Vs. Devi Ratan and others)** has held that no litigant can derive any benefit from mere pendency of case in a Court of Law, as the interim order always gets merged in the final order to be passed in the case and, if the writ petition is ultimately dismissed, the interim order stands nullified automatically. A party cannot be allowed to take any benefit of its own wrong by getting an interim order and, thereafter blame the Court. In paragraphs 17, 18, 19, 20, 21, 22, 23 and 24 of the said judgment, while taking note of the earlier judgments on this point, has held as under:-

"17. No litigant can derive any benefit from mere pendency of case in a court of law, as the interim order always merges in the final order to be passed in the case and if the writ petition is ultimately dismissed, the interim order stands nullified automatically. A party cannot be allowed to take any benefit of its own wrongs by getting an interim order and thereafter blame the court. The fact that the writ is found, ultimately, devoid of any merit, shows that a frivolous writ petition had been filed. The maxim actus curiae neminem gravabit, which means that the act of the court shall prejudice no one, becomes applicable in such a case. In such a fact situation the court is under an obligation to undo the wrong done to a party by the act of the court. Thus, any undeserved or unfair advantage gained by a party invoking the jurisdiction of the court must be neutralised, as the institution of litigation cannot be permitted to confer any advantage on a suitor from delayed action by the act of the court. (Vide Shiv Shankar v. U.P. SRTC [1995 Supp (2) SCC 726 : 1995 SCC (L&S) 1018 : (1995) 30 ATC 317] , GTC Industries Ltd. v. Union of India [(1998) 3 SCC 376 : AIR 1998 SC 1566] and Jaipur Municipal Corpn. v. C.L. Mishra [(2005) 8 SCC 423] .)

18. In Ram Krishna Verma v. State of U.P. [(1992) 2 SCC 620 : AIR 1992 SC 1888] this Court examined the similar issue while placing reliance upon its earlier judgment in Grindlays Bank Ltd. v. ITO [(1980) 2 SCC 191 : 1980 SCC (Tax) 230 : AIR 1980 SC 656] and held that no person can suffer from the act of the court and in case an interim order has been passed and the petitioner takes advantage thereof and ultimately the petition is found to be without any merit and is dismissed, the interest of justice requires that any undeserved or unfair advantage gained by a party invoking the jurisdiction of the court must be neutralised.

19. In Mahadeo Savlaram Shelke v. Pune Municipal Corpn. [(1995) 3 SCC 33] this Court observed that while granting the interim relief, the court in exercise of its discretionary power should also adopt the procedure of calling upon the plaintiff to file a bond to the satisfaction of the court that in the event of his failing in the suit to obtain the relief asked for in the plaint, he would adequately compensate the defendant for the loss ensued due to the order of injunction granted in favour of the

plaintiff. Even otherwise the court while exercising its equity jurisdiction in granting injunction is also competent to grant adequate compensation to mitigate the damages caused to the defendant by grant of injunction. The pecuniary award of damages is consequential to the adjudication of the dispute and the result therein is incidental to the determination of the case by the court. The court can do so in exercise of its inherent jurisdiction in doing ex debito justitiae mitigating the damage suffered by the defendant by the act of the court in granting injunction restraining the defendant from proceeding with the action complained of in the suit. Such a procedure is necessary as a check on abuse of the process of the court and adequately compensate the damages or injury suffered by the defendant by act of the court at the behest of the plaintiff.

20. In South Eastern Coalfields Ltd. v. State of M.P. [(2003) 8 SCC 648 : AIR 2003 SC 4482] this Court examined this issue in detail and held that no one shall suffer by an act of the court. The factor attracting applicability of restitution is not the act of the court being wrongful or a mistake or error committed by the court; the test is whether on account of an act of the party persuading the court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage it would not have otherwise earned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the court and the act of such party. There is nothing wrong in the parties demanding being placed in the same position in which they would have been had the court not intervened by its interim order when at the end of the proceedings the court pronounces its judicial verdict which does not match with and countenance its own interim verdict. The injury, if any, caused by the act of the court shall be undone and the gain which the party would have earned unless it was interdicted by the order of the court would be restored to or conferred on the party by suitably commanding the party liable to do so. Any opinion to the contrary would lead to unjust if not disastrous consequences.

21. The Court further held: (South Eastern Coalfields case [(2003) 8 SCC 648 : AIR 2003 SC 4482] , SCC pp. 664-65, para 28)

"28. ... Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to approach the courts, persuading the court to pass interlocutory orders favourable to them by making out a prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced. We are, therefore, of the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated...."

22. Similarly, in Karnataka Rare Earth v. Deptt. of Mines & Geology [(2004) 2 SCC 783] a similar view has been reiterated by this Court observing that the party which succeeds ultimately is to be placed in the same position in which it would have been if the court would not have passed an interim order.

23. In A.R. Sircar (Dr.) v. State of U.P. [1993 Supp (2) SCC 734 : 1993 SCC (L&S) 896 : (1993) 24 ATC 832] a dispute arose regarding the seniority of direct recruits

and promotees on the post of Professor of Medicine in a medical college. The appellant therein faced the selection process for direct appointment along with the respondents who had been working on the said post on ad hoc basis. The appellant was duly selected, however, the private respondents could not succeed. The respondents filed the writ petition before the High Court and precluded the appointment of the appellant pursuant to his selection, by obtaining an interim order and on the other hand they got their ad hoc promotion to the post regularised under the Rules. The appellant could succeed in obtaining the appointment only after dismissal of the writ petition against him after several years of his selection. This Court held that in addition to the relief under the statutory provisions the appellant was entitled in equity to get the seniority over the respondents as they succeeded in precluding his appointment to the post by obtaining an interim order in a case having no merits whatsoever.

24. In Arya Nagar Inter College v. Sree Kumar Tiwary [(1997) 4 SCC 388 : 1997 SCC (L&S) 967 : AIR 1997 SC 3071] the services of the respondent therein were terminated, however, he continued to be in service on the basis of an interim order passed by the High Court in the writ petition filed by him. During the pendency of the writ petition, the rules for regularisation of ad hoc appointees were amended and in pursuance thereof his services also stood regularised. Ultimately, the writ petition filed by the respondent was dismissed. This Court held that his continuity in service and regularisation had to be understood as it was subject to the result of the writ petition. As the writ petition was dismissed the order regularising his services, passed during the pendency of the writ petition, became inoperative."

43. Thus, it is also well settled that the doctrine of restitution is also applicable to interim orders and a litigant would not be allowed to gain by swallowing the benefits yielding out of the interim order. If the petition is dismissed, the injury, if any, caused by the act of the Court is required to be undone and, the gain, which the party would have earned as a result of interim order of the Court would be restored to or conferred on the other party, otherwise it would lead to unjust consequences.

44. In the present case, since the petitioners had drawn the salary on the strength of the interim order dated 21.02.2005 although same was not extended after the writ petition was dismissed for non-prosecution on 25.01.2006, the petitioners are required to refund the salary drawn by them illegally and, therefore, the petitioners are directed to refund the amount of salary with interest @ 6% per annum within a period of two months from today.

45. The BSA is directed to communicate the amount to be recovered from each of the petitioners for making payment by them in compliance of this order. In case of failure to refund the amount by the petitioners, as directed above, the District Magistrate, Ambedkarnagar shall initiate proceedings for recovery as arrears of land revenue.

(2022)03ILR A24
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.02.2022

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Appeal U/S 37 of Arbitration and Conciliation Act 1996 No. 1 of 2022

L.I.C. ...Appellant
Versus
U.P. Metro Rail Corp. Ltd. ...Respondent

Counsel for the Appellant:
Sanjeev Singh

Counsel for the Respondent:
Kumar Ayush, Pritish Kumar

Civil Law- The Arbitration and Conciliation Act, 1996- Section 9- Grant of interim stay- the learned Additional District Judge has far exceeded its jurisdiction and given findings on the merits of the case. He ought to have given only prima facie consideration to the question whether there was any prior correspondence between the parties before granting of such license to a third party- He could have only seen the lease agreement for this purpose and not for the purpose of determining whether the *"activity"* which was being permitted by the Respondent Corporation on the demised land came within the ambit of the Metro Act of 2002.

At the stage of considering an application u/s 9 of the Act, 1996, the Additional District Judge has only the jurisdiction to see as to whether a prima facie case is made out or not and not beyond that, as a detailed finding on the merits of the case is likely to prejudice the case of the applicant/ petitioner during the arbitration proceedings. (Para 12)

Appeal allowed. (E-3)

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.)

1. Heard Sri Sanjeev Singh, learned counsel for the appellant and Sri Pritish Kumar, Advocate assisted by Sri Kumar Ayush, Advocate appearing for the respondent.

2. This appeal has been filed under Section 37 (1) (b) of the Arbitration and Conciliation Act 1996 against the judgement and order dated 10.08.2021 passed by the Additional District Judge, Court No. 17, Lucknow in Arbitration Case No. 02 of 2020 re: Life Insurance Corporation of India Versus U. P. Metro Rail Corporation of India filed by the appellant under Section 9 of the Arbitration and Conciliation Act (hereinafter the Act of 1996).

3. It has been submitted by Sri Sanjay Singh, Advocate that a lease agreement had been entered into between the appellant and the respondent, Corporation on 30.11.2018 for 348 square meters of land in front of its building Jeevan Bhawan-I, Plot No. 43, Hazrat Ganj, Lucknow, which was earlier being used by the petitioner, Corporation for parking of vehicles by its employees. The lease was for a period of 90 years for the purpose of laying the metro rail line in the city of Lucknow at a premium of Rs. 82,000/- per square meter, and as per the terms of the lease agreement more specifically Clause 9 and 11 thereof, the lessee was in no case to assign, relinquish, sublet, transfer or part with possession of the demised premises for any activity without prior written permission of the lessor, except activity as per the provisions of the Metro Railways (Operation and Maintenance) Act, 2002 as amended from time to time (hereinafter referred to Act of 2002), or any other direction/guidelines/ statutory regulations issued by the Government or any Court of Law in this regard.

4. In Clause 11 of the said lease agreement the demise premises could not be assigned, relinquished, mortgaged, sublet, transferred either as a whole or in part, for any activity without written consent of the lessor except the activities as per the Act of 2002 or any other directions/guidelines/statutory regulations issued by the Government or any court of law in this regard.

5. However, the Uttar Pradesh Metro Rail Corporation (hereinafter referred to as U.P.M.R.C.L. entered into a license agreement with M/s Mr. Brown (a bakery) for commercial purposes for some gain. This fact came into the knowledge of the officers of the appellant on 25.10.2019, and on 07.11.2019, the then Manager (Estate) of the appellant wrote a letter to the respondent Corporation to explain about the activities done on the lease property for opening of an outlet of Mr. Brown. In reply to the said notice/letter the U.P.M.R.C.L. admitted that it had entered into a license agreement with Mr. Brown to open its outlet. On 23.11.2019, the appellant found that on the demised property construction was going on in full swing and the respondent had opened a door towards the parking of the petitioner and constructed a platform by encroaching upon the land of the petitioner. On 01.01.2020, the petitioner, Corporation again wrote to the respondent asking them to stop all construction activity but the respondent failed to comply. There being a Clause in the Lease Agreement for referring of the dispute to the Arbitrator under the Arbitration and Conciliation Act, 1996, the appellant repeatedly requested the respondent for reference of the dispute to arbitration. The respondent refused to act on the same. Later on, it was learned by the appellant that the agreement for opening of outlet of M/s Mr. Brown had fallen through, and one M/s Hazelnut Factory, also a Bakery, had been licensed the demised property. After invoking the arbitration clause the appellant approached the court of Additional District Judge under Section 9 of the Act of 1996for grant of interim stay of all construction activity on the demised property by the licensee/third party till finalization of arbitration proceedings.

6. The Respondent, Corporation filed its written statement saying that act of the Respondent was within the ambit of the terms of the lease agreement as it had only granted license to M/s Mr. Brown for opening its outlet within the area under the possession of U.P.M.R.C.L. It is a space within the building of Metro Station and such license does not create any interest or right in favour of third party over the lease property, and in no way compromised the interest of the LIC. The action of the U.P.M.R.C.L. was within the ambit of Section 6 of the Act of 2002.

7. The appellant filled a replication refuting such claim of the Respondent and saying that the demised property was not on the land occupied by the metro railway line as it was leased to the respondent for a specific purpose under the terms and conditions of the lease agreement, which had been violated. After exchange of pleadings the Additional District Judge, who was assigned Arbitration Case No. 02 of 2020 as refused to grant interim injunction for protection of the rights of the parties. The Addl. District Judge in his order impugned in this petition has in detail gone into language of Section 5 and Section 6 of the Act of 2002 and into various clauses/terms and conditions of the leasedeed and has incorporated the clauses of the lease agreement and also the clauses of the Act of 2002 far exceeding its jurisdiction and holding that *"any activity"* that has been carried out by the U.P.M.R.C.L. by licensing the property in question to a third party would come within its ambit of activities permissible under the Act of 2002. He has interpreted the phrase *"any activity"* to say that it cannot be given a restricted sense of laying the Metro Railway lines only. It would also include developing the metro railway land for the

commercial use and to execute lease or grant any license in respect of property *"held"* by U.P.M.R.C.L. Having defined what is *"land'* and having defined and discussed in detail *"any activity"*, the Additional District Judge has given findings in paragraph 21 and 22, which will go against the appellant when the dispute is referred to the Arbitrator.

8. Learned counsel for the appellant has also pointed out the observations made in paragraph 23 of the order impugned wherein the Additional District Judge has ignored paragraph 4 and 5 of the very same order, where a reference was made to various correspondence exchanged between the parties for appointment of Arbitrator.

9. It has been submitted by Sri Sanjeev Singh, Advocate for the appellant that in the order impugned dated 10.08.2021, learned Additional District Judge has far exceeded its jurisdiction and has also recorded findings which are perverse to the material on record, which would seriously prejudice its case before the Arbitrator, when such an Arbitrator is appointed under Section 11(6) of the Act of 1996 by this Court. It has been pointed out that after filing the Section 9 application, the appellant has also filed an application under Section 11 (6) of the Act of 1996 before this Court.

10. Sri Pritish Kumar, Advocate alongwith Sri Kumar Ayush, Advocate has referred to the lease agreement entered into between the Appellant Corporation and the Respondent Corporation and has also referred to the provisions of the Act of 2002 and Sections 5 and 6 thereof to argue that the Additional District Judge has rightly considered, the said Sections and the clauses of the lease agreement to find out whether the prima facie case has been made out by the Appellant for it to exercise its jurisdiction under Section 9 of the Act of 1996.

11. According to Sri Pritish Kumar, Advocate, learned Additional District Judge could not have given any interim injunction without considering a prima facie case and for considering a prima facie case having been made out by the applicant it was necessary to refer to various clauses/phrases of the lease agreement, between the LIC and the U.P.M.R.C.L. and the license agreement between the U.P.M.R.C.L. and the licensee/third party i.e. M/s Hazelnut Factory Limited.

12. This Court having heard the learned counsel for the parties finds on a careful perusal of the order impugned that indeed the learned Additional District Judge has far exceeded its jurisdiction and given findings on the merits of the case. He ought to have given only prima facie consideration to the question whether there was any prior correspondence between the parties before granting of such license to a third party. He could have only seen the lease agreement for this purpose and not for the purpose of determining whether the *"activity"* which was being permitted by the Respondent Corporation on the demised land came within the ambit of the Metro Act of 2002. There were letters on record had also been referred to in paragraph 4, 5 and 6 of the impugned order, which clearly indicated the attempt made by the Life Insurance Corporation for invocation of the Arbitration Clause and the steadfast refusal of U.P.M.R.C.L. for appointment of Arbitrator saying that there was no dispute, although It did admit that it had entered

into the license agreement and it had handed over the part of the demised property to the licensee.

13. Accordingly, the appeal is **allowed**, the impugned order dated 10.08.2021 is ***set aside*** and the matter is ***remanded*** to the Additional District Judge, Lucknow to consider afresh the application of the petitioner under Section 9 of the Arbitration and Conciliation Act, 1996 within a period of three weeks from the date of a copy of this order produced before him.

14. In the meantime, status quo as it exists on today shall be maintained by the parties.

(2022)03ILR A28
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.03.2022

BEFORE

THE HON'BLE ROHIT RANJAN AGARWAL, J.

Arbitration and Conciliation Application U/S 11(4) No. 5 of 2022

IFFCO Ltd., Phulpur Unit, Allahabad ...Applicant

Versus

M/S Manish Engineering Enterprises, Prayagraj ...Opposite Party

Counsel for the Applicant:
Ms. Sushmita Mukherjee, Sri Sanjay Grover, Sri Manish Goyal

Counsel for the Opposite Party:
Sri Dharmendra Shukla, Sri Anil Tiwari

A. Civil Law-Arbitration and Conciliation Act, 1996. - Section 29-A -- An application filed for extending the mandate of substitute sole Arbitrator on the expiry of time limit for publication of arbitral award.- Whether maintainable before High Court of principal Civil Court defined u/S 2(1)(e) of the Act?

Once the appointment of Arbitrator or Arbitral Tribunal has been made by the High Court or the Supreme Court exercising powers u/Ss (4)(5) and (6) of Section 11 then the power to substitute the arbitrator or arbitral tribunal only vest with the said appointing authority i.e. High Court or Supreme Court as the case may be.(Para 35)

B. Section 42 of the Act will get attracted only when the courts are dealing matters other than that of appointment or removal of arbitrators.

Application allowed. (E-12)

List of Cases cited:-

1. Amit Kumar Gupta Vs Deepak Prasad 2021 SCC Online Cal 2174

2. DDA Vs M/s Tarachand Sumit Construction Company OMP(Misc.) (Comm) No. 236 of 19(Delhi High Court)

3. Nilesh Ramanbhai Patel Vs Bhanubhai Ramanbhai Patel 2019(2) GLR 1537

4. Cabra Instalaciones Y. Services S.A. Vs Maharashtra St. Electricity Distribution Co. Ltd. 2019 SCC Online Bom 1437

5. M/s Lots Shipping Comp. Ltd.Vs Cochin Port Trust Board of Trustees 2020 AIR Kerala 169

6. Garhwal Mandal Vikas Nigam Ltd.Vs Krishna Travel Agency (2008)6 SCC 741

7. Nimet Resources Inc. & anr. Vs Essar Steels Ltd. (2009)17 SCC 313

8. Bharat Coking Coal Ltd. Vs Annapurna Construction (2008)6 SCC 732

9. St. of Mah. Vs Atlanta Ltd. (2014)11 SCC 619

10. St. of W.B. & ors. Vs Associated Contractors (2015)1 SCC 32

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

1. Heard Sri Manish Goyal, learned Senior Advocate, assisted by Ms. Sushmita Mukherjee, learned counsel for the applicant and Sri Anil Tiwari, learned Senior Advocate assisted by Sri Dharmendra Shukla, Advocate for the opposite party.

2. This is an application under Section 29A of Arbitration and Conciliation Act, 1996 *(hereinafter referred to as "the Act")* for extending the mandate of Substitute Sole Arbitrator on the expiry of time limit for publication of the award.

3. Brief history of the case is necessary for better appreciation, which is as under:

4. The respondent had entered into a contract with the applicant on 05.11.1998 for executing work of Rs.10,68,596/-. The work was to be completed by 05.03.1999. As the respondent failed to complete the work within the time fixed, he was required to submit final bill, which according to applicant, he failed to do so. On 20.10.2004, respondent invoked the arbitration clause. He filed an application under Section 11 of the Act on 18.12.2005, which was numbered as C.M.A.A. No.20 of 2005. On 03.11.2014, the application was allowed and one Mr. Justice Sheetla Prasad Srivastava, a former Judge of this Court, was appointed as Sole Arbitrator. He entered into the reference on 02.12.2014, but due to his ill health, he recused on 18.03.2015.

5. Thereafter, the Court appointed Mr Justice Prakash Krishna, a former Judge on 22.11.2017, who unfortunately passed away. Thereafter this Court on 28.05.2018 appointed one Mr. Justice S.P. Mehrotra, a retired Judge of this Court, as Sole Arbitrator, who entered into the reference on 07.10.2018. On 10.11.2018, respondent filed his Statement of Claims, while applicant filed his Statement of Defence on 22.12.2018. On 12.01.2019, time was granted for filing of rejoinder affidavit. The period of one year for publishing award, as contemplated under Section 29A of the Act, commenced on 01.03.2019 and ended on 28.02.2020. The parties agreed and submitted joint memorandum as per Section 29-A (3) of the Act on 14.09.2019 extending the period for another six months which was accepted by the Arbitral Tribunal. An application for amending Statement of Claims and the rejoinder was made by the respondent on 27.07.2019.

6. An application for summoning the records filed by the respondent was disposed of on 05.01.2020, which was partly allowed to some extent. On 01.02.2020 respondent moved an application making allegation against the Sole Arbitrator and praying for his recusal. Vide order dated 29.02.2020, the Sole Arbitrator recorded that he did not wish to continue as Arbitrator and withdrew himself.

7. In between, the respondents had approached this Court through Arbitration and Conciliation Application No.36 of 2016 filed under Section 11 (4) of the Act for appointment of Arbitrator. The said application was dismissed on 26.11.2018, leaving it open to the respondents to adopt procedure under Section 11 of the Act to the extent it may be available. On 12.03.2020 applicant appointed one Justice P.K.S. Baghel, former Judge of this Court as Substitute Arbitrator. He entered the reference on 15.03.2020.

8. As the lockdown was imposed throughout the country, the Substitute Arbitrator started hearing on 18.06.2021. An application was moved by the respondent for recalling the order dated 05.01.2020 passed by the predecessor of the Sole Arbitrator and for re-hearing of the application for summoning of records. On 11.10.2021, the recall application was rejected on the ground that Substitute Arbitrator did not have the power to recall the order passed by his predecessor. On 29.10.2021, respondent filed a recusal application against the Substitute Sole Arbitrator. The said application was rejected on 29.10.2021. On the same day, application for amendment of Statement of Claims and rejoinder was allowed. Physical amendment was carried out by the respondent on 06.12.2021. The respondent, on the next date i.e. 13.12.2021 moved an application informing the Arbitral Tribunal that the term of the Tribunal had expired on 01.10.2021. According to the applicant, out of the period of six months available to the Substitute Arbitrator, a major part was spent on the application for recall. It is further averred that the Statement of Claims and Statement of Defence have already been filed by the parties and hearing can be expedited in case the time period is extended.

9. Sri Manish Goyal, learned Senior Advocate appearing for the applicant submitted that initially the Arbitrator was appointed by this Court exercising power under Section 11(4) of the Act. It was due to certain unfortunate reasons that thrice the arbitral panel was changed and now, as the pleadings have already completed by the parties and only final arguments are to be done, and, in view of the mandate of Section 29A(5) and (6) of the Act, if the term of the Substituted Arbitrator is extended, the arbitral proceedings can be concluded.

10. According to him, the word "Court' as occurring in sub-section (5) and (6) of Section 29-A is the High Court and not the principal Civil Court of original jurisdiction in a district, as defined under Section 2(1)(e) of the Act. In the context of Section 29A of the Act, which has prescribed the substantive provision for the completion of arbitral award and the time limit to do so, the meaning of word "Court' as used therein, has to be understood. According to him, under sub-section (6) of Section 29-A the Court has been empowered to substitute the arbitrator(s) in re-constituting the Arbitral Tribunal, if so required. While the power of appointment of Arbitral Tribunal has been prescribed in Section 11 of the Act.

11. In the present case, as the High Court had exercised jurisdiction under Section 11 of the Act in the appointment of the Arbitrator, thus the extension of time limit prescribed for completing the arbitration, as provided under Section 29A of the Act also vest with the High Court and not with the principal Civil Court.

12. He has relied upon the decision of Calcutta High Court in case of **Amit Kumar Gupta vs. Dipak Prasad 2021 SCC Online Cal 2174**. Relevant paras 17 and 18 of the judgment are extracted hereas under:

*"**17.** The meaning of the word "court" as ascribed in Section 2(1)(e) of the Act of 1996 is subject to the requirement of the context. In the context of Section 29A of the Act of 1996 which has prescribed a substantive provision for completion of the arbitral award and the time limit to do so,*

the meaning of the word "court" as used therein has to be understood. Under sub-section (6) of Section 29A of the Act of 1996, the Court has been empowered to substitute the arbitrator or the arbitrators in reconstituting the arbitral tribunal if so required. The power of appointment of an arbitral tribunal has been prescribed in Section 11 of the Act of 1996. Section 11 of the Act of 1996 has prescribed two appointing authorities given the nature of the arbitration. In the case of an international commercial arbitration, the authority to appoint an arbitrator, has been prescribed under Section 11 of the Act of 1996 to be the Supreme Court. In the case of a domestic arbitration, Section 11 of the Act of 1996 has prescribed that the appointing authority shall be the High Court.

18. *In my view, the word "court" used in Section 29A of the Act of 1996 partakes the character of the appointing authority as has been prescribed in Section 11 of the Act of 1996 as, the Court exercising jurisdiction under Section 29A of the Act of 1996 may be required to substitute the arbitrator in a given case. Such right of substituting can be exercised by a Court which has the power to appoint. The power to appoint has been prescribed in Section 11. Therefore, the power to substitute should be read in the context of the power of appointment under Section 11."*

13. Reliance has also been placed upon decision of Delhi High Court in **O.M.P. (Misc.) (Comm) No. 236 of 2019 (DDA vs. M/s Tara Chand Sumit Construction Co.)** decided on 12.5.2020. Relevant paras 28, 29 and 30 of the judgment are extracted hereasunder :

"28. Power to extend the mandate of an Arbitrator under Section 29A(4), beyond the period of 12 months and further extended period of six months only lies with the Court. This power can be exercised either before the period has expired or even after the period is over. Neither the Arbitrator can grant this extension and nor can the parties by their mutual consent extend the period beyond 18 months. Till this point, interpreting the term 'Court' to mean the Principal Civil Court as defined in Section 2(1)(e) would, to my mind, pose no difficulty. The complexity, however, arises by virtue of the power of the Court to substitute the Arbitrator while extending the mandate and this complication is of a higher degree if the earlier Arbitrator has been appointed by the High Court or the Supreme Court. Coupled with this, one cannot lose sight of the fact that the Legislature in its wisdom has conferred the powers of appointment of an Arbitrator only on the High Court or the Supreme Court, depending on the nature of arbitration and as and when the power is invoked by either of the parties. There may be many cases in which while extending the mandate of the Arbitrators, the Court may be of the view that for some valid reasons the Arbitrators are required to be substituted, in which case the Court may exercise the power and appoint a substituted Arbitrator and extend the mandate.

29. In case a petition under Section 29A of the Act is filed before the Principal Civil Court for extension of mandate and the occasion for substitution arises, then the Principal Civil Court will be called upon to exercise the power of substituting the Arbitrator. In a given case, the Arbitrator being substituted could be an Arbitrator who had been appointed by the Supreme Court or the High Court. This would lead to a situation where the conflict would arise between the power of superior

Courts to appoint Arbitrators under Section 11 of the Act and those of the Civil Court to substitute those Arbitrators under Section 29A of the Act. This would be clearly in the teeth of provisions of Section 11 of the Act, which confers the power of appointment of Arbitrators only on the High Court or the Supreme Court, as the case may be. The only way, therefore, this conflict can be resolved or reconciled, in my opinion, will be by interpreting the term 'Court' in the context of Section 29A of the Act, to be a Court which has the power to appoint an Arbitrator under Section 11 of the Act. Accepting the contention of the respondent would lead to an inconceivable and impermissible situation where, particularly in case of Court appointed Arbitrators, where the Civil Courts would substitute and appoint Arbitrators, while extending the mandate under Section 29A of the Act.

30. Similarly, in case of International Commercial Arbitration, if one was to follow the definition of the term Court under Section 2(1)(e) and apply the same in a strict sense, then it would be the High Court exercising Original or Appellate jurisdiction which would have the power to extend the mandate and substitute the Arbitrator. In such a situation, the High Court would be substituting an Arbitrator appointed by the Supreme Court which would perhaps lead to the High Court over stepping its jurisdiction as the power to appoint the Arbitrator is exclusively in the domain of the Supreme Court. Thus, in the opinion of this Court, an application under Section 29A of the Act seeking extension of the mandate of the Arbitrator would lie only before the Court which has the power to appoint Arbitrator under Section 11 of the Act and not with the Civil Courts. The interpretation given by learned counsel for the respondent that for purposes of Section 29A, Court would mean the Principal Civil Court in case of domestic arbitration, would nullify the powers of the Superior Courts under Section 11 of the Act."

14. He then placed before the Court the decision rendered by Gujrat High Court in the case of **Nilesh Ramanbhai Patel vs. Bhanubhai Ramanbhai Patel 2019 (2) GLR 1537** wherein the Court had taken the similar view. Relevant paras 14, 15 and 16 of the judgment are extracted hereas under :

"14. As is well-known, the arbitration proceedings by appointment of an arbitrator can be triggered in number of ways. It could be an agreed arbitrator appointed by the parties outside the Court, it could be a case of reference to the arbitration by Civil Court in terms of agreement between the parties, it may even be the case of appointment of an arbitrator by the High Court or the Supreme Court in terms of sub-secs. (4), (5) and (6) of Sec. 11 of the Act. The provisions of Sec. 29A and in particular sub-sec. (1) thereof would apply to arbitral proceedings of all kinds, without any distinction. Thus, the mandate of an arbitrator irrespective of the nature of his appointment and the manner in which the Arbitral Tribunal is constituted, would come to an end within twelve months from the date of Tribunal enters upon the reference, unless such period is extended by consent of the parties in term of sub-sec. (3) of Sec. 29A which could be for a period not exceeding six months. Sub-section (4) of Sec. 29A, as noted, specifically provides that, if the award is not made within such period, as mentioned in sub-sec. (1) or within the extended period, if so done, under sub-sec. (3) the mandate of the arbitrator shall terminate. This is however with the caveat that unless such period either before or after the expiry has been

extended by the Court. In terms of sub-sec. (6) while doing so, it would be open for the Court to substitute one or all the arbitrators who would carry on the proceedings from the stage they had reached previously.

15. This provision thus make a few things clear. Firstly, the power to extend the mandate of an arbitrator under sub-sec. (4) of Sec. 29A beyond the period of twelve months or such further period it may have been extended in terms of sub-sec. (3) of Sec. 29A rests with the Court. Neither the arbitrator nor parties even by joint consent can extend such period. The Court on the other hand has vast powers for extension of the period even after such period is over. While doing so, the Court could also choose to substitute one or all of the arbitrators and this is where the definition of term 'Court' contained in Sec. 2(1)(e) does not fit. It is inconceivable that the Legislature would vest the power in the Principal Civil Judge to substitute an arbitrator who may have been appointed by the High Court or Supreme Court. Even otherwise, it would be wholly impermissible since the powers for appointment of an arbitrator when the situation so arises, vest in the High Court or the Supreme Court as the case may be in terms of sub-secs. (4), (5) and (6) of Sec. 11 of the Act. If therefore, there is a case for extension of the term of an arbitrator who has been appointed by the High Court or Supreme Court and if the contention of Shri Mehta that such an application would lie only before the Principal Civil Court is upheld, powers under sub-sec. (6) of Sec. 29A would be non-operatable. In such a situation, sub-sec. (6) of Sec. 29A would be rendered otiose. The powers under sub-sec. (6) of Sec. 29A are of considerable significance. The powers for extending the mandate of an arbitrator are coupled with the power to substitute an arbitrator. These powers of substitution of an arbitrator are thus concomitant to the principal powers for granting an extension. If for valid reasons the Court finds that it is a fit case for extending the mandate of the arbitrator but that by itself may not be sufficient to bring about an early end to the arbitral proceedings, the Court may also consider substituting the existing arbitrator. It would be wholly incumbent to hold that under sub-sec. (6) of Sec. 29A the Legislature has vested powers in the Civil Court to make appointment of arbitrators by substituting an arbitrator or the whole panel of arbitrators appointed by the High Court under Sec. 11 of the Act. If we, therefore, accept this contention of Shri Mehta, it would lead to irreconcilable conflict between the power of the superior Courts to appoint arbitrators under Sec. 11 of the Act and those of the Civil Court to substitute such arbitrators under Sec. 29A(6). This conflict can be avoided only by understanding the term "Court" for the purpose of Sec. 29A as the Court which appointed the arbitrator in case of Court constituted Arbitral Tribunal.

16. Very similar situation would arise in case of an international commercial arbitration, where the power to make an appointment of an arbitrator in terms of Sec. 11 vests exclusively with the Supreme Court. In terms of Sec. 2(1)(e), the Court in such a case would be the High Court either exercising original jurisdiction or appellate jurisdiction. Even in such a case, if the High Court were to exercise power of substitution of an arbitrator, it would be transgressing its jurisdiction since the power to appoint an arbitrator in an international commercial arbitrator rests exclusively with the Supreme Court."

15. According to Sri Goyal, the question whether the meaning of word

"Court' would be High Court while exercising powers under Section 29A was also dealt with by the Bombay High Court in the case of **Cabra Instalaciones Y. Servicios. S.A. vs. Maharashtra State Electricity Distribution Company Limited 2019 SCC OnLine Bom 1437.** Relevant paras 7 and 8 of the judgment are extracted hereas under :

"7. On a plain reading of Section 29A alongwith its sub-sections, it can be seen that for seeking extension of the mandate of an arbitral tribunal, these are substantive powers which are conferred on the Court and more particularly in view of the clear provisions of sub-section (6) which provides that while extending the period referred to in sub-section (4), it would be open to the Court to substitute one or all the arbitrators, which is in fact a power to make appointment of a new/substitute arbitrator or any member of the arbitral tribunal. Thus certainly when the arbitration in question is an international commercial arbitration as defined under Section 2(1)(f) of the Act, the High Court exercising power under Section 29A, cannot make an appointment of a substitute arbitral tribunal or any member of the arbitral tribunal as prescribed under sub-section (6) of Section 29-A, as it would be the exclusive power and jurisdiction of the Supreme Court considering the provisions of Section 11(5) read with Section 11(9) as also Sections 14 and 15 of the Act. It also cannot be overlooked that in a given case there is likelihood of an opposition to an extension application and the opposing party may pray for appointment of a substitute arbitral tribunal, requiring the Court to exercise powers under sub-section (6) of Section 29-A. In such a situation while appointing a substitute arbitral tribunal, when the arbitration is an international commercial arbitration, Section 11(9) would certainly come into play, which confers exclusive jurisdiction on the Supreme Court to appoint an arbitral tribunal.

8. Thus, as in the present case once the arbitral tribunal was appointed by the Supreme Court exercising powers under Section 11(5) read with Section 11(9) of the Act, in my opinion, this Court lacks jurisdiction to pass any orders under Section 29-A of the Act, considering the statutory scheme of Section 29-A. It would only be the jurisdiction of the Supreme Court to pass orders on such application under Section 29-A of the Act when the arbitration is an international commercial arbitration. The insistence on the part of the petitioner that considering the provisions of sub-section (4), the High Court would be the appropriate Court to extend the mandate of the arbitral tribunal under Section 29-A, would not be a correct reading of Section 29A as the provision is required to be read in its entirety and in conjunction with Section 11(9) of the Act."

16. He placed before the Court judgment of Division Bench of Kerala High Court rendered in **M/s Lots Shipping Company Limited vs. Cochin Port Trust Board of Trustees 2020 AIR (Kerala) 169.** Relevant paras 9 and 11 of the judgment are extracted hereas under :

"9. Question to be decided is whether the term "court" contained in Section 29A(4) requires a contextual interpretation apart from the meaning contained in Section 2(1)(e)(i) of the Act. A contextual interpretation is clearly permissible in view of the rider contained in sub-section (1) of Section (2), "unless the context otherwise requires". As argued by the counsel on either side and as submitted

by the learned Amicus Curiae, a contextual interpretation is required since the power conferred on the court under Section 29A, especially under sub-sections (4) and (5), are more akin to the powers conferred on the Supreme Court and the High Court, as the case may be, under Sections 11(6), 14 & 15 of the Act, for appointment, termination of mandate and substitution of the arbitrator. It is pointed out that, the amendments introduced in the year 2015, with effect from 23.10.2015, has recognized the judgment of the Constitutional Bench of the apex court in SBP & Company v. Patel Engineering Company Ltd. (2005) 8 SCC 618 and conferred the power of appointment on the Supreme Court or the High Court. The amendment has not in any manner enhanced the power of the principal civil court, which continues only with respect to matters provided under Sections 9 and 34 of the Act. It is significant to note that the orders passed by the principal civil court of original jurisdiction under Sections 9 and 34 are made appealable under Section 37 of the Act. So also, order if any passed refusing to refer the parties to arbitration under Section 8 of the Act, was also made appealable under Section 37(1)(a) of the Act. Section 29A was introduced to make it clear that, if the arbitration proceedings is not concluded within 18 months, even if the parties have consented for an extension, it cannot be continued unless a judicial sanction is obtained. The power to grant extension by the court is introduced under an integrated scheme which also allows the court to reduce the fees of the arbitrator or to impose cost on the parties and/or to substitute the arbitrator(s). The power of extension is to be exercised on satisfying "sufficient cause' being made out. In all respect, such power conferred under Section 29A for permitting extension with respect to the proceedings of arbitration, is clearly akin to the powers conferred under Sections 14 & 15 of the Act. The absence of any provision for an appeal with respect to the exercise of such power under Section 29A, in the nature as mentioned above, would indicate that the power under Section 29A is not to be exercised by the principal civil court of original jurisdiction. Otherwise, it will create anomalous situation of identical powers being exercised in a contrary manner, prejudicial to the hierarchy of the courts. In a case where appointment of an arbitrator is made under Section 11(6) of the Act by the High Court or the Supreme Court, as the case may be, it would be incongruous for the principal civil court of original jurisdiction to substitute such an arbitrator or to refuse extension of the time limit as provided under Section 29A, or to make a reduction in the fees of the Arbitrator. Therefore a purposive interpretation becomes more inevitable.

11. Taking note of the principle enunciated herein above and on the basis of the detailed analysis, we are inclined to hold that the term "court" used in Section 29(4) has to be given an contextual and purposive interpretation, which is to be in variance with the meaning conferred to the said term under sub-section Section 2(1)(e)(i) of the Act. The term "court" contained in Section 29(4) has to be interpreted as the "Supreme Court' in the case of international commercial arbitrations and as the "High Court' in the case of domestic arbitrations. Hence it is held that, either of the party will be at liberty to file an arbitration petition before the High Court under Section 29A(5) of the Act, seeking extension of time for continuance of the arbitration proceedings in exercise of the power conferred under Section 29A(4) of the Act, in the case of any

domestic arbitration. The reference is answered accordingly."

17. He has also placed before the Court Arbitration and Conciliation (Amendment) Act, 2015. In the Statement of Objects and Reasons it has been provided that as India has been ranked at 178 out of 189 nations in the world in contract enforcement, thus to facilitate quick enforcement of contract, the amendments were introduced in the year 2015.

18. Opposing the application, Sri Anil Tiwari, learned Senior Advocate appearing for the respondent raised a preliminary issue relating to maintainability of the application under Section 29A(5) of the Act before this Court. According to him, the word "Court" occurring in the different sections of the Act means the Court as defined under section 2(1)(e) of the Act, which means the principal Civil Court of original jurisdiction in a district. According to him, after the amendment was made in the Act in the year 2015, Section 14 mandated that once the mandate of an Arbitrator stood terminated, he was to be substituted by another Arbitrator to be appointed by the Court. Thus, the word "Court' used either in Section 14, 15 or 29A(5) and (6) is the "Court' as defined under Section 2(1)(e) of the Act and not this Court. He has placed reliance upon the decision of Apex Court in the case of **Garhwal Mandal Vikas Nigam Ltd. vs. Krishna Travel Agency (2008) 6 SCC 741.** Relevant paras 8 and 9 of the judgment are extracted hereas under:

"8. Apart from these four cases, which have been brought to our notice, the position of law is very clear that in case the argument of learned counsel is accepted, that would mean that in every case where this Court passes an order, be it on appeal from the order passed by the High Court under Section 11(6) of the Arbitration and Conciliation Act, 1996, this Court will become a Principal Civil Court of Original Jurisdiction. If the argument is further taken to its logical conclusion that would mean that the parties will have to approach this Court by making an application under Section 34 i.e. for setting aside the award. The expression "court" used in Section 34 of the Act will also have to be understood ignoring the definition of "court" in the Act.

9. There is another facet of the problem. The party will be deprived of the right to file an appeal under Section 37(1)(b) of the Arbitration and Conciliation Act. This means that a valuable right of appeal will be lost. Therefore, in the scheme of things, the submission of the learned counsel cannot be accepted. Taking this argument to a further logical conclusion, when the appointment is made by the High Court under Section 11(6) of the Arbitration and Conciliation Act, then in that case, in every appointment made by the High Court in exercise of its power under Section 11(6), the High Court will become the Principal Civil Court of Original Jurisdiction, as defined in Section 2(1)(e) of the 1996 Act. That is certainly not the intention of the legislature. ***Once an arbitrator is appointed then the appropriate forum for filing the award and for challenging the same, will be the Principal Civil Court of Original Jurisdiction. Thus, the parties will have the right to move under Section 34 of the 1996 Act and to appeal under Section 37 of the 1996 Act.*** *Therefore, in the scheme of things, if appointment is made by the High Court or by this Court, the Principal Civil*

Court of Original Jurisdiction remains the same as contemplated under Section 2(1)(e) of the 1996 Act."

19. He then placed before the Court the judgment of Apex Court in the case of **Nimet Resources Inc. and another vs. Essar Steels Ltd. (2009) 17 SCC 313**. Relevant paras 11 and 13 of the judgment are extracted hereas under :

"11. As a "court" has been defined in the 1996 Act itself, an application under Section 14(2) would be maintainable only before the Principal Civil Court which may include a High Court having jurisdiction but not this Court.

13. The definition of "court" indisputably would be subject to the context in which it is used. It may also include the appellate courts. Once the legislature has defined a term in the interpretation clause, it is not necessary for it to use the same expression in other provisions of the Act. It is well settled that meaning assigned to a term as defined in the interpretation clause unless the context otherwise requires should be given the same meaning."

20. He then relied upon decision of Apex Court in the case of **Bharat Coking Coal Limited vs. Annapurna Construction (2008) 6 SCC 732.**

21. Reliance has also been placed upon decision of Apex Court in the case of **State of Maharashtra vs. Atlanta Limited (2014) 11 SCC 619**. Relevant paras 24, 24.1, 24.2 and 24.3 of the judgment are extracted hereas under :

*"**24.** We shall first endeavour to address the submissions advanced at the hands of the learned counsel for the appellants, with reference to Section 15 of the Code of Civil Procedure. In terms of the mandate of Section 15 of the Code of Civil Procedure, the initiation of action within the jurisdiction of Greater Mumbai had to be "in the court of lowest grade competent to try it". We are, however, satisfied, that within the area of jurisdiction of the Principal District Judge, Greater Mumbai, only the High Court of Bombay was exclusively the competent court (under its "ordinary original civil jurisdiction") to adjudicate upon the matter. The above conclusion is imperative from the definition of the term "court" in Section 2(1)(e) of the Arbitration Act:*

***24.1.** Firstly, the very inclusion of the High Court "in exercise of its ordinary original civil jurisdiction", within the definition of the term "court", will be rendered nugatory, if the above conclusion was not to be accepted. Because, the "Principal Civil Court of Original Jurisdiction in a district", namely, the District Judge concerned, being a court lower in grade than the High Court, the District Judge concerned would always exclude the High Court from adjudicating upon the matter. The submission advanced by the learned counsel for the appellant cannot therefore be accepted, also to ensure the inclusion of "the High Court in exercise of its ordinary original civil jurisdiction" is given its due meaning. Accordingly, the principle enshrined in Section 15 of the Code of Civil Procedure cannot be invoked whilst interpreting Section 2(1)(e) of the Arbitration Act.*

***24.2.** Secondly, the provisions of the Arbitration Act, leave no room for any doubt, that it is the superior-most court exercising original civil jurisdiction, which had been chosen to adjudicate disputes arising out of arbitration agreements, arbitral proceedings and arbitral awards.*

Undoubtedly, a "Principal Civil Court of Original Jurisdiction in a district", is the superior-most court exercising original civil jurisdiction in the district over which its jurisdiction extends. It is clear that Section 2(1)(e) of the Arbitration Act having vested jurisdiction in the "Principal Civil Court of Original Jurisdiction in a district", did not rest the choice of jurisdiction on courts subordinate to that of the District Judge. Likewise, "the High Court in exercise of its ordinary original jurisdiction", is the superior-most court exercising original civil jurisdiction, within the ambit of its original civil jurisdiction. On the same analogy and for the same reasons, the choice of jurisdiction will clearly fall in the realm of the High Court, wherever a High Court exercises "ordinary original civil jurisdiction".

24.3. *Under the Arbitration Act, therefore, the legislature has clearly expressed a legislative intent different from the one expressed in Section 15 of the Code of Civil Procedure. The respondent had chosen to initiate proceedings within the area of Greater Mumbai, it could have done so only before the High Court of Bombay. There was no other court within the jurisdiction of Greater Mumbai, where the respondents could have raised their challenge. Consequently, we have no hesitation in concluding that the respondent by initiating proceedings under Section 34 of the Arbitration Act, before the Original Side of the High Court of Bombay, had not violated the mandate of Section 2(1)(e) of the Arbitration Act. Thus viewed, we find the submission advanced at the hands of the learned counsel for the appellants, by placing reliance on Section 15 of the Code of Civil Procedure, wholly irrelevant."*

22. As far as question of jurisdiction under Section 42 of the Act is concerned, reliance has been placed upon decision in the case of **State of West Bengal and others vs. Associated Contractors (2015) 1 SCC 32.** Paras 11, 13 and 25 of the judgment are extracted hereas under :

"11. It will be noticed that Section 42 is in almost the same terms as its predecessor section except that the words "in any reference" are substituted with the wider expression "with respect to an arbitration agreement". It will also be noticed that the expression "has been made in a court competent to entertain it", is no longer there in Section 42. These two changes are of some significance as will be pointed out later. Section 42 starts with a non obstante clause which does away with anything which may be inconsistent with the section either in Part I of the Arbitration Act, 1996 or in any other law for the time being in force. The expression "with respect to an arbitration agreement" widens the scope of Section 42 to include all matters which directly or indirectly pertain to an arbitration agreement. Applications made to courts which are before, during or after arbitral proceedings made under Part I of the Act are all covered by Section 42. But an essential ingredient of the section is that an application under Part I must be made in a court.

....

13. It will be noticed that whereas the earlier definition contained in the 1940 Act spoke of any civil court, the definition in the 1996 Act fixes "court" to be the Principal Civil Court of Original Jurisdiction in a district or the High Court in exercise of its ordinary original civil jurisdiction. Section 2(1)(e) further goes on to say that a court would not include any civil court of a grade inferior to such Principal Civil Court, or a Small Cause Court.

...

25. Our conclusions therefore on Section 2(1)(e) and Section 42 of the Arbitration Act, 1996 are as follows:

(a) Section 2(1)(e) contains an exhaustive definition marking out only the Principal Civil Court of Original Jurisdiction in a district or a High Court having original civil jurisdiction in the State, and no other court as "court" for the purpose of Part I of the Arbitration Act, 1996.

(b) The expression "with respect to an arbitration agreement" makes it clear that Section 42 will apply to all applications made whether before or during arbitral proceedings or after an award is pronounced under Part I of the 1996 Act.

(c) However, Section 42 only applies to applications made under Part I if they are made to a court as defined. Since applications made under Section 8 are made to judicial authorities and since applications under Section 11 are made to the Chief Justice or his designate, the judicial authority and the Chief Justice or his designate not being court as defined, such applications would be outside Section 42.

(d) Section 9 applications being applications made to a court and Section 34 applications to set aside arbitral awards are applications which are within Section 42.

(e) In no circumstances can the Supreme Court be "court" for the purposes of Section 2(1)(e), and whether the Supreme Court does or does not retain seisin after appointing an arbitrator, applications will follow the first application made before either a High Court having original jurisdiction in the State or a Principal Civil Court having original jurisdiction in the district, as the case may be.

(f) Section 42 will apply to applications made after the arbitral proceedings have come to an end provided they are made under Part I.

(g) If a first application is made to a court which is neither a Principal Court of Original Jurisdiction in a district or a High Court exercising original jurisdiction in a State, such application not being to a court as defined would be outside Section 42. Also, an application made to a court without subject-matter jurisdiction would be outside Section 42.

The reference is answered accordingly."

23. Lastly, a decision of coordinate Bench of this Court in the case of **M/s Lucknow Agencies and Another vs. U.P. Avas Vikas Parishad and others 2019 ADJ Online 0169.**

24. Learned counsel did not make any other submission and does not dispute the fact that initial appointment of Arbitrator was by this Court exercising power under Section 11(4) of the Act.

25. I have heard the rival submissions and perused the material on record. With the consent of counsels for the parties, the matter is being decided at the admission stage itself.

26. The present application has been filed for extending the time for arbitral award which has been objected by the respondent on the ground of maintainability. The sole question, which arises for consideration is :-

"whether the application moved under Section 29A of the Act for extending the time for arbitral award is maintainable before this Court or the principal Civil Court as defined under Section 2(1)(e) of the Act."

27. Section 29A of the Act for the first time was inserted by Act No.3 of 2016 w.e.f. 23.10.2015 in the Arbitration and Conciliation Act 1996. Again, by Act 33 of 2019, the section 29-A was amended.

28. Before proceeding to decide the issue in hand, a cursory glance of provision of Section 2(1)(e), 11(4), (5), (6) and 29-A is necessary for better appreciation of the case, which are extracted hereas under :

"(e) "Court" means--

(i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;

(ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court;"

"11. Appointment of arbitrators.- *...*

(4) *If the appointment procedure in sub-section (3) applies and--*

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment,

the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be.

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made on an application of the party in accordance with the provisions contained in sub-section (4).

(6) Where, under an appointment procedure agreed upon by the parties,--

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment."

"29A.Time limit for arbitral award.*--(1) The award in matters other than international commercial arbitration shall be made by the arbitral tribunal*

within a period of twelve months from the date of completion of pleadings under sub-section (4) of section 23:

Provided that the award in the matter of international commercial arbitration may be made as expeditiously as possible and endeavor may be made to dispose of the matter within a period of twelve months from the date of completion of pleadings under sub-section (4) of section 23.

(2) If the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree.

(3) The parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months.

(4) If the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period:

Provided that while extending the period under this sub-section, if the Court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent. for each month of such delay.

Provided further that where an application under sub-section (5) is pending, the mandate of the arbitrator shall continue till the disposal of the said application:

Provided also that the arbitrator shall be given an opportunity of being heard before the fees is reduced.

(5) The extension of period referred to in sub-section (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court.

(6) While extending the period referred to in sub-section (4), it shall be open to the Court to substitute one or all of the arbitrators and if one or all of the arbitrators are substituted, the arbitral proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record, and the arbitrator(s) appointed under this section shall be deemed to have received the said evidence and material.

(7) In the event of arbitrator(s) being appointed under this section, the arbitral tribunal thus reconstituted shall be deemed to be in continuation of the previously appointed arbitral tribunal.

(8) It shall be open to the Court to impose actual or exemplary costs upon any of the parties under this section.

(9) An application filed under sub-section (5) shall be disposed of by the Court as expeditiously as possible and endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party."

29. From the reading of Section 2(1)(e) it is clear that in case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction or the High Court, which exercises its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration, shall be the court.

30. While, section 11 provides for power of appointment of arbitrators. Sub-

section (2) provides that parties are free to agree on a procedure for appointing the arbitrator or arbitrators. It is where the parties failed to arrive in the appointment of arbitrators that the power has been vested with the High Court with the appointment of arbitrators for domestic arbitration and the Supreme Court in the matters of international commercial arbitration. Sub-sections (4), (5) and (6) read together provide the manner in which these two superior courts step in, in the appointment of arbitrator.

31. Section 29-A is a substantive provision which was inserted w.e.f. 23.10.2015 for speedy disposal of cases relating to arbitration with the least Court intervention. The statement of objects and reasons to the amending Act No.3 of 2016 provided that as India had been ranked as 178 out of 189 nations in the world in contract enforcement, it is high time that urgent steps are taken to facilitate quick enforcement of contracts, easy recovery of monetary claims and award of just compensation for damages suffered and reduce the pendency of cases in courts and hasten the process of dispute resolution through arbitration, so as to encourage investment and economic activity.

32. Sub-section (1) of Section 29A provides for the period within which the arbitration proceedings are to be completed i.e. 12 months. Further sub-section (3) of Section 29A takes care that in case the award is not made as per sub-section (1), by the consent of the parties, the period can be extended for further six months.

33. The Act puts a cap upon extension beyond period of eighteen months and sub-section (4) of Section 29A provides that in case the award is not made within the extended period, it is only the Court on the application of the parties may extend the period. Sub-section (6) of Section 29A is of great relevance as it provides the power to the Court to substitute one or all the arbitrators and the arbitral proceedings shall continue from the stage already reached and on the basis of evidence and material already on record.

34. Thus, the power to substitute the arbitrator as mandated in sub-section (6) of Section 29A vest only with the Court. This provision cannot be read in isolation but with Section 11, which provides for appointment of arbitrator.

35. Once the appointment of arbitrator or arbitral Tribunal has been made by the High Court or the Supreme Court exercising power under sub-sections (4), (5) and (6) of Section 11 then the power to substitute the arbitrator or the Arbitral Tribunal only vest with the said appointing authority i.e. High Court or Supreme Court, as the case may be.

36. The argument raised from the side opposite that the word "Court' occurring in Section 2(1)(e) means the principal Civil Court and not the High Court cannot be accepted, as once the appointment was made by the High Court exercising power under Section 11, the power to substitute an arbitrator cannot vest under sub-section (6) of Section 29A with the principal Civil Court.

37. The Calcutta High Court in **Amit Kumar Gupta (supra)** had in categorical terms held that the power to substitute the arbitrator given in sub-section (6) of Section 29A has to be read with the power of appointment under Section 11. The same view has been reiterated by the Gujarat

High Court in case of **Nilesh Ramanbhai Patel (supra).**

38. The Division Bench of Kerala High Court in case of **M/s Lots Shipping Company Limited (supra)** had clearly held that the power to grant extension by Court is introduced under an integrated scheme which also allows the Court to reduce the fees of the arbitrators or to impose cost on a party and/or to substitute the arbitrators. The power of extension is to be exercised on satisfying the "sufficient cause" being made out. According to the Court, the powers conferred under Section 29A for permitting extension with respect to proceedings of arbitration, is clearly akin to the powers conferred under Section 14 and 15 of the Act.

39. The Court further recorded that the absence of any provision for an appeal with regard to the exercise of powers under Section 29A, would be indicative of the fact that power under Section 29A is not to be exercised by principal Civil Court of original jurisdiction.

40. The anxiety of respondent's counsel as to the Section 42 of the Act read with Section 2(1)(e) has no relevance in the scheme of the Act while dealing with Sections 11 and 29A of the Act, as Section 42 will get attracted only when the Courts are dealing matters other than that of appointment and removal of arbitrators. The section clearly provides that where any application in respect of an arbitration agreement is made to the Court, that Court alone has jurisdiction over the arbitral proceedings and all the subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court.

41. In case of **Garhwal Mandal Vikas Nigam Ltd. (supra)**, the Apex Court while clarifying the position as to the challenge of an award made by an arbitrator appointed by the High Court or Supreme Court under Section 11 shall be made under Section 34 of the Act of 1996 before the principal Civil Court of original jurisdiction as contemplated under Section 2(1)(e) of the Act.

42. Thus the argument from the side opposite as to the award cannot be challenged before the principal Civil Judge made by the arbitrator appointed by this Court has been dealt in extenso by Hon'ble Apex Court in the judgment referred above.

43. Here, we are concerned with the extension of time limit for the arbitral award under Section 29A, wherein an arbitrator has been appointed by the High Court exercising power under Section 11 of the Act. Section 42 will not be attracted and it is only the High Court which has the power to grant extension to the Arbitral Tribunal for making award.

44. Reliance placed on the various decisions by the respondent's counsel relate to the definition of the word "court" under Section 2(1)(e) prior to the amendment of year 2015. In none of the judgment placed before the Court Sections 11 and 29A of the Act has been taken into consideration.

45. As far as decision of coordinate Bench of this Court in case of **M/s Lucknow Agencies and Another (supra)** is concerned, the arbitrator was appointed by the Housing Commissioner and not by the High Court exercising power under Section 11 of the Act. The Court while considering the provisions of Section 29A(4) and (5) held that it was the

principal Civil Court where the application for extension of time for arbitral award was maintainable and not before the High Court. In the said judgment there was no consideration as to sub-section (6) and (7) of Section 29A of the Act. The said decision is distinguishable on the facts of the present case.

46. In the present case this Court exercising power under Section 11 of the Act has appointed the arbitrator way back in the year 2014.

47. Thus, the question framed above stand answered holding that the application for extension of time for arbitral award moved under Section 29A is maintainable before this Court

48. Considering the facts and circumstances of the case, a case under Section 29A(4) and (5) of the Act is made out for extending the mandate of the arbitrator

49. The application stands allowed. The mandate of the arbitrator is extended by a period of four months from today. The period between 01.10.2021 and today is hereby regularized.

(2022)03ILR A44
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.04.2021

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Appeal U/S 37 of Arbitration and Conciliation Act 1996 No. 8 of 2021

Bhartiya Rashtriya Rajmarg Pradhikaran ...Appellant

Versus

Smt. Manju Dixit & Anr. ...Respondents

Counsel for the Appellant:
Sri Pranjal Mehrotra

Counsel for the Respondents:

A. Civil Law-Arbitration and Conciliation Act, 1996.- **Sections 34 & 37 -** Scope of interference of the Court u/S 37 is very limited. Court is not vested with the power to re-appraise the material on record and substitute the view of Arbitrator by it's view. Court does not act as the court of appeal in dealing with the arbitral award and should be slow in interfering with the arbitration award.

B. Court can interfere with the court under Section 34 of the Act if the award is perverse or so irrational that no reasonable man would have arrived at the same or it is bereft of reasons or against the public policy or in violation of the principles of natural justice or he arbitration has not followed the statutory legal provision of law if there is something so shocking in the award which pricks the conscience of the court.

Appeal dismissed. (E-12)

List of Cases cited:-

1. Dyna Technologies Pvt. Ltd. Vs Crompton Greaves Ltd. (2019)10 SCC 1

2. Swan Gold Mining Ltd. Vs Hindustan Copper Ltd. (2015)5 SCC 739

3. M/s Navodaya Mass Entert. Ltd. Vs M/s G.M. Combines (2015)5 SCC 698

4. MMTC Ltd. Vs Vedanta Ltd. (2019)4 SCC 163

5. Oil & Natural Gas Corporation Ltd. Vs Saw Pipes Ltd. (2003)5 SCC 705

6. Digamber & ors. Vs St. of Mah. & ors. (2013)14 SCC 406

7. Attar Singh & anr. Vs U.O.I. & anr. (2009)9 SCC 289

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

1. Heard Sri Pranjal Mehrotra, learned counsel for the appellant.

2. The appellant, Bhartiya Rashtriya Rajmarg Pradhikaran has preferred the present appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Act, 1996') praying for setting aside the order dated 06.08.2020 passed by the District Judge, Shahjahanpur in Arbitration Case No.16 of 2016 under Section 34 of the 'Act, 1996'.

3. The brief facts of the case are that the appellant in the exercise of power under Section 3-A (1) of the National Highway Act, 1956 (hereinafter referred to as) issued notification dated 16.11.2009 with respect to the lands situated in the number of villages for the widening of NH-24 to four-lanes. By the said notification, Gata No.193 area 0.1260 hectare (hereinafter referred to as 'land in question') situated in village Maujampur, Tehsil Sadar, district Shahjahanpur owned by respondent no.1 was also acquired.

4. The declaration under Section 3-D of the 'Act, 1956' in respect of the land in question was issued on 08.10.2010. The competent authority while disposing of the objection of respondent held that since land in question is recorded as agriculture land, therefore, compensation be calculated and paid as per circle rates applicable to agriculture land. Accordingly, it calculated compensation based on circle rates applicable to agriculture land and declared the award on 05.10.2012 under Section 3-G of the Act, 1956.

5. Feeling aggrieved by the award, respondent no.1 preferred application under Section 3-G (5) of the Act, 1956 for referring the matter to the Arbitrator. Accordingly, the application of respondent no.1 was referred to the Sole Arbitrator/Collector, Shahjahanpur for deciding the claim of respondent no.1.

6. The Sole Arbitrator/Collector, Shahjahanpur by order dated 30.06.2016 dismissed the application of respondent no.1 holding that he could not prove that the land in question was outside the purview of U.P. Road Side Land Control Act, 1942, therefore, the competent authority rightly computed the compensation treating the land to be agriculture land. Accordingly, it held that there is no illegality or infirmity in the award passed by the competent authority.

7. Feeling aggrieved by the order of the Sole Arbitrator/Collector, Shahjahanpur in Arbitration Case No.27 of 2012, the respondent no.1 preferred application under Section 34 of the Act, 1996 before the District Judge, Shahjahanpur which was numbered as 16 of 2016. The District Judge, Shahjahanpur by order dated 06.08.2020 rejected the objection of the appellant against the application of the respondent under Section 34 of the Act, 1996. It set aside the award dated 30.06.2016 passed in Arbitration Case No.16 of 2016 and directed for payment of compensation treating the land to be commercial land.

8. The District Judge, Shahjahanpur in allowing the application of respondent no.1 after noticing in detail the scope of Section 34 of the Act, 1996 concluded that the award of the Arbitrator is against the public policy and principles of natural justice. Accordingly, it found no merit in the objection of the appellant and rejected

the same. Thereafter, the District Judge proceeded to consider the issue as to whether respondent no.1 is entitled to compensation on the basis of agriculture land or commercial land. After examining the evidence led by respondent no.1, the District Judge found that the land in question was commercial land, and accordingly, it directed for payment of compensation of the land in question on the basis of the commercial rate applicable on the date of notification under Section 3-A of the Act, 1956.

9. Challenging the order dated 06.08.2020 passed by the District Judge, Shahjahanpur, learned counsel for the appellant has contended that the District Judge in passing the order on the application under Section 34 of the Act, 1996 has acted as an appellate authority and has reappraised the evidence on record which is beyond the scope of Section 34 of the Act, 1996. He submits that Section 34 of the Act, 1996 stipulates certain preconditions which if present would entitle the court to interfere under Section 34 of the Act, 1996. He submits that in the case on hand, the District Judge has travelled beyond jurisdiction in interfering with the award under Section 34 of the Act,1996 as no condition envisaged under said Section empowering the courts to invoke its jurisdiction is present in the present case. Thus, he submits that the order of the District Judge, Shahjahanpur is without jurisdiction and deserves to be set aside.

10. He further submits that it is established from the evidence on record that land in question is recorded as agriculture land on the date of notification under Section 3-A of the Act, 1956, therefore, merely because land in question was being used for commercial purposes, it would not become commercial land. Accordingly, he submits that the District Judge has committed a manifest error of law apparent on the face of the record in treating the land to be commercial land and directing for payment of compensation on the basis of commercial land. Thus, the submission is that the impugned order is per se illegal and not sustainable in law.

11. I have heard learned counsel for the appellant and perused the record.

12. Before adverting to the first argument of learned counsel for the appellant in respect of the scope of Section 34 of the Act, 1996, it would be appropriate to reproduce Section 34 of the Act, 1996:-

"34. ***Application for setting aside arbitral award.*** *--(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).*

(2) An arbitral award may be set aside by the Court only if--

(a) the party making the application furnishes proof that--

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to

arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that--

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

[Explanation 1.--For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,--

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.]

Explanation 2.--For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]

[(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.]

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

[(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.]"

13. At this point, it would be appropriate to refer to few judgments of the Apex Court to appreciate the scope of Section 34 of the Act, 1996.

14. In ***Dyna Technologies Private Limited Vs. Crompton Greaves Limited (2019) 20 SCC 1,*** the Apex Court has held that Section 34 of the Act, 1996 limits challenge to the award only on the grounds stipulated therein. Paragraphs 24 & 25 of the said judgment are being extracted herein below:-

"24. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.

25. Moreover, umpteen number of judgments of this Court have categorically held that the courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act."

15. The Apex Court in the case of ***Swan Gold Mining Limited Vs. Hindustan Copper Limited (2015) 5 SCC 739*** held that the Court shall not ordinarily substitute its interpretation for that of the Arbitrator. Paragraph 12 of the said judgment is being reproduced hereinbelow:-

"12. It is equally well settled that the arbitrator appointed by the parties is the final judge of the facts. The finding of facts recorded by him cannot be interfered with on the ground that the terms of the contract were not correctly interpreted by him.

16. The Apex Court in the case of ***M/s Navodaya Mass Entertainment Limited Vs. M/s. J.M. Combines (2015) 5 SCC 698*** while considering the scope of Section 34 of the Act, 1996 reiterated that the scope of interference of the court is very limited. Court is not vested with the power to reappraise the material on record and substitute the view of Arbitrator by its view. Paragraph 8 of the said judgment is being reproduced hereinbelow:-

"8. In our opinion, the scope of interference of the court is very limited. The court would not be justified in reappraising the material on record and substituting its own view in place of the arbitrator's view. Where there is an error apparent on the face of the record or the arbitrator has not followed the statutory legal position, then and then only it would be justified in interfering with the award published by the arbitrator. Once the arbitrator has applied

his mind to the matter before him, the court cannot reappraise the matter as if it were an appeal and even if two views are possible, the view taken by the arbitrator would prevail."

17. In the case of ***MMTC Limited Vs. Vedanta Limited (2019) 4 SCC 163***, the Apex Court held that court does not sit in appeal over arbitral award while considering the application 34 of the Act, 1996. Paragraph 11 of the said judgment is being reproduced hereinbelow:-

"11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii), i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the "fundamental policy of Indian law" would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury reasonableness. Furthermore, "patent illegality" itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract."

18. The Apex Court in the aforesaid judgments while explaining the scope of Section 34 of the Act, 1996 consistently held that the court does not act as the court of appeal in dealing with the arbitral award and should be slow in interfering with the arbitration award. It is also held in the aforesaid judgments that if two views are possible on an issue and one adopted by the arbitrator is possible then, the court should not substitute its view by the view of the Arbitrator. Thus, it can be elucidated from aforesaid that the existence of any one of the conditions specified under Section 34 of the Act, 1996 is a precondition for interference with the award by the court. In other words, the courts are devoid of the power to interfere with the award if conditions stipulated under Section 34 of the Act,1996 are lacking and not present.

19. The Apex Court, by and large, has approved the interference in the award by the court under Section 34 of the Act, 1996 if the award is perverse or so irrational that no reasonable man would have arrived at the same or it is bereft of reasons or against the public policy or in violation of the principles of natural justice or the Arbitrator has not followed the statutory legal provision of law or if there is something so shocking in the award which pricks the conscience of the Court.

20. The term "public policy" contained in Section 34 (2) (b) (ii) of the Act, 1996 has been defined by the Apex Court in paragraph 31 of the judgment in the case of ***Oil & Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd. (2003) 5 SCC*** 705. Paragraph 31 of the judgment reads as under:-

"31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some

matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in Renusagar case (supra), it is required to be held that the award could be set aside if it is patently illegal. The result would be - award could be set aside if it is contrary to: -

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality, or

(d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void."

21. At this stage, it would also be appropriate to refer to the judgment of ***Dyna Technologies Private Limited (supra)*** wherein the Apex Court in paragraphs 34 & 35 of the judgment has explained the necessity for passing reasoned award as mandated under Section 31 (3) of the Act, 1996. Paragraphs 34 & 35 of the judgment are being reproduced hereinbelow:

"34. The mandate under Section 31(3) of the Arbitration Act is to have reasoning which is intelligible and adequate and, which can in appropriate cases be even implied by the courts from a fair reading of the award and documents referred to thereunder, if the need be. The aforesaid provision does not require an elaborate judgment to be passed by the arbitrators having regard to the speedy resolution of dispute.

35. When we consider the requirement of a reasoned order, three characteristics of a reasoned order can be fathomed. They are: proper, intelligible and adequate. If the reasonings in the order are improper, they reveal a flaw in the decision-making process. If the challenge to an award is based on impropriety or perversity in the reasoning, then it can be challenged strictly on the grounds provided under Section 34 of the Arbitration Act. If the challenge to an award is based on the ground that the same is unintelligible, the same would be equivalent of providing no reasons at all. Coming to the last aspect concerning the challenge on adequacy of reasons, the Court while exercising jurisdiction under Section 34 has to adjudicate the validity of such an award based on the degree of particularity of reasoning required having regard to the nature of issues falling for consideration. The degree of particularity cannot be stated in a precise manner as the same would depend on the complexity of the issue. Even if the Court comes to a conclusion that there were gaps in the reasoning for the conclusions reached by the Tribunal, the Court needs to have regard to the documents submitted by the parties and the contentions raised before the Tribunal so that awards with inadequate reasons are not set aside in casual and cavalier manner. On the other hand, ordinarily unintelligible awards are to be set aside, subject to party autonomy to do away with

the reasoned award. Therefore, the courts are required to be careful while distinguishing between inadequacy of reasons in an award and unintelligible awards."

22. It would also be apposite to reproduce Section 3-G (7) of the Act, 1956 which provides criteria for assessment of compensation of the land acquired. Section 3-G(7) of the Act, 1956 is being reproduced hereinbelow:-

"3-G. Determination of amount payable as compensation.--

(1)...
(2)...
(3)...
(4)...
(5)...
(6)...

(7). The competent authority or the arbitrator while determining the amount under sub-section (1) or sub-section (5), as the case may be, shall take into consideration--

(a) the market value of the land on the date of publication of the notification under section 3A;

(b) the damage, if any, sustained by the person interested at the time of taking possession of the land, by reason of the severing of such land from other land;

(c) the damage, if any, sustained by the person interested at the time of taking possession of the land, by reason of the acquisition injuriously affecting his other immovable property in any manner, or his earnings;

(d) if, in consequences of the acquisition of the land, the person interested is compelled to change his residence or place of business, the reasonable expenses, if any, incidental to such change."

23. On the touchstone of the parameters laid down by the Apex Court explicating when the court can interfere with the award under Section 34 of the Act, 1996 and the criteria provided in Section 3-G(7) of the Act, 1956 which the competent authority or the Arbitrator shall take into consideration in assessing the compensation, the legality of the arbitral award passed by the Collector is being tested, and whether in the facts of the present case, the District Judge was justified in setting aside the award and directing for payment of compensation treating the land to be commercial land.

24. The fact as emanates from the record suggest that respondent no.1 being dissatisfied with the compensation awarded by the competent authority, raised an arbitration dispute under Section 3-G(5) of the Act, 1956. The case of respondent no.1 was that the land in question was commercial land, and therefore, he is entitled to compensation on the basis of rates applicable to commercial land on the date of notification under Section 3-A of the Act, 1956. In respect of the said contention, respondent no.1 has produced shreds of evidence; namely sale deed dated 01.11.1999 in respect of 168 square meter which was the part and parcel of Gata No.193, the evidence showing that M/s Manoj Kumar Dixit was running a transport office in the shop constructed over the land in question, copy of registration certificate of the commercial establishment (वाणिज्यिक अधिष्ठान), copy of khasra in which land in question is recorded as 'Dukan/Abadi'. The other pieces of evidence adduced by respondent no.1, which establishes that the land was Abadi land, was Rashion Card and Voter I.D. Card. Besides above, respondent no.1 also adduced evidence to establish that

there was a petrol pump, Hyundai showroom, tractor agency, Nainital Dhaba, Fauji Dhaba, Shahjahanpur Dhaba, Urea and Pesticides shop in the surrounding area of the land in question on the date of notification which proves that commercial activity is also being carried on in the vicinity of land in question.

25. The aforesaid pieces of evidence were filed by respondent no.1 before the Arbitrator, but the Arbitrator did not consider any of the evidence adduced by respondent no.1 and rejected the claim of respondent no.1 on the ground that respondent no.1 could not produce any evidence that land in question was outside the limits of the U.P. Roadside Land Control Act, 1942. The Arbitrator further recorded a finding that respondent no.1 has not adduced any evidence to prove that construction over land was made after taking necessary approval from the authority.

26. The District Judge while considering the application under Section 34 of the Act, 1996 of respondent no.1 has noticed that there was ample evidence adduced by respondent no.1 which proves that land in question was commercial land and the Arbitrator did not consider any of the evidence led by the respondent no.1 while rejecting his claim. Accordingly, the District Judge concluded that the award is against the public policy and non-speaking, hence, the application under Section 34(2) of the Act, 1996 is maintainable.

27. From the facts detailed above, it is clear that the arbitral award is perverse for want of consideration of any of the evidence adduced by respondent no.1 proving that land in question was commercial on the date of notification under Section 3A.

28. At this point, it is worth pointing that Section 3-G(7) of the Act, 1956 cast a duty upon the Arbitrator to follow the criteria provided in the said Section for determining the compensation. Accordingly, the Arbitrator shall determine the compensation as per the market value of the land on the date of publication of the notification under Section 3-A of the Act, 1956 whereas in the present case, the Arbitrator has failed to assess the compensation as per the market value of the land in question on the date of the notification under Section 3-A of the Act, 1956. Thus, the Arbitrator has failed to follow the criteria provided in Section 3-G (7) of the Act, 1956 for determining the compensation and the arbitral award is in violation of Section 3-G (7) of the Act, 1956.

29. Therefore, in the light of the above discussion, this Court finds that the District Judge, Shahjahapur has not committed any error or illegality in concluding that the present case falls within the ambit of Section 34 of the Act, 1996 and has rightly interfered with the award.

30. Now coming to the next submission of learned counsel for the appellant that since the land in question is recorded as agricultural land in the revenue record, therefore, merely because the land in question is in use for commercial purpose, it would not become commercial land, and, the compensation awarded the competent authority treating the land to be agriculture land is just and proper and does not warrant interference by the Court.

31. It is worth pointing out that it is evident from the record that overwhelming evidence as detailed above was adduced by respondent no.1 to demonstrate that the land in question was commercial land on the date of notification under Section 3A of the Act, 1956. Those pieces of evidence were not rebutted by the appellant. Section 3-G(7)(a) provides that compensation shall be determined on the basis of the market value of the land on the date of notification under Section 3-A of the Act, 1956. So, the criteria for determination of compensation in respect of land acquired is the market value of the land which it could fetch on the date of notification under Section 3-A of the Act, 1956.

32. At this stage, it would be worth noticing few judgments of the Apex Court where Apex Court has explained with reference to the Land Acquisition Act, 1894 as to what criteria should be adopted by the courts in fixing the 'market value' of land. Paragraphs 16.3 and 16.4 of the judgment of the Apex Court in the case of ***Digamber and Others Vs. State of Maharashtra and Others (2013) 14 SCC 406*** are being reproduced hereinbelow:-

"16.3 Also paras 16 and 17 from Sabhia Mohammed Yusuf Abdul Hamid Mulla v. Land Acquisition Officer, (2012) 7 SCC 595 are quoted hereunder:

"16. We have considered the respective arguments and carefully perused the record. It is settled law that while fixing the market value of the acquired land, the Land Acquisition Collector is required to keep in mind the following factors:

(i) Existing geographical situation of the land.

(ii) Existing use of the land.

(iii) Already available advantages, like proximity to National or State Highway or road and/or developed area.

(iv) Market value of other land situated in the same locality/village/area or adjacent or very near the acquired land.

17. In Viluben Jhalejar Contractor v. State of Gujarat (2005) 4 SCC 789 this Court laid down the following principles for the determination of market value of the acquired land: (paras 17-19)

"17. Section 23 of the Act specifies the matters required to be considered in determining the compensation; the principal among which is the determination of the market value of the land on the date of the publication of the notification under sub-section (1) of Section 4.

18. One of the principles for determination of the amount of compensation for acquisition of land would be the willingness of an informed buyer to offer the price therefor. It is beyond any cavil that the price of the land which a willing and informed buyer would offer would be different in the cases where the owner is in possession and enjoyment of the property and in the cases where he is not.

19. Market value is ordinarily the price the property may fetch in the open market if sold by a willing seller unaffected by the special needs of a particular purchase. Where definite material is not forthcoming either in the shape of sales of similar lands in the neighbourhood at or about the date of notification under Section 4(1) or otherwise, other sale instances as well as other evidences have to be considered.

16.4. Further, it would be worthwhile to refer to the portion which is extracted from Atma Singh Vs. State of Haryana (2008) 2 SCC 568 which paragraph is referred to at para 18 in Sabhia Mohammed Yusuf Abdul Hamid

Mulla v. Land Acquisition Officer, (2012) 7 SCC 595 which reads thus:

"5. For ascertaining the market value of the land, the potentiality of the acquired land should also be taken into consideration. Potentiality means capacity or possibility for changing or developing into state of actuality. It is well settled that market value of a property has to be determined having due regard to its existing condition with all its existing advantages and its potential possibility when led out in its most advantageous manner. The question whether a land has potential value or not, is primarily one of fact depending upon its condition, situation, uses to which it is put or is reasonably capable of being put and proximity to residential, commercial or industrial areas or institutions. The existing amenities like water, electricity, possibility of their further extension, whether nearabout town is developing or has prospect of development have to be taken into consideration."

33. In the case of ***Attar Singh and Another Vs. Union of India and Another (2009) 9 SCC 289,*** the Apex Court explained in paragraphs 7 to 9 of the judgment the norms to be applied for the determination of the market value of the land. Paragraphs 7 to 9 of the said judgment are being reproduced hereinbelow:-

"7. It is now a well-settled principle of law that determination of the market value of the land acquired indisputably would depend upon a large number of factors including the nature and quality thereof. The norms which are required to be applied for determination of the market value of the agricultural land and homestead land are different. In given cases location of land and in particular, closeness thereof from any road or highway would play an important role for determination of the market value wherefor belting system may in appropriate cases may be resorted to. The position of the land, particularly in rainy season, existence of any building, etc. also plays an important role. A host of other factors including development in and around the acquired land and/or the potentiality of development will also have a bearing on determination of the fair market value of the land.

8. Determination of the market value of the land may also depend upon the facts and circumstances of each case, amongst them would be the amount of consideration mentioned in a deed of sale executed in respect of similarly situated land nearabout the date of issuance of notification in terms of Section 4(1) of the Act; in the absence of any such exemplars, the market value can be determined on yield basis or in case of an orchard on the basis of number of fruit-bearing trees.

9. It is also well settled that for the purpose of determination of price of acquired land, the courts would be well advised to consider the positive and negative factors, as has been laid down by this Court in Viluben Jhalejar Contractor v. State of Gujarat 2005 (4) SCC 789:

"Positive factors

Negative factors

(i) smallness of size

(i) largeness of area

(ii) proximity to a road

(ii) situation in the interior at adistance from the road

(iii) frontage on a road

(iii) narrow strip of land with very small

frontage compared
to depth
(iv) nearness to developed area
(iv) lower level requiring the

depressed portion to be filled up
(v) regular shape (v) remoteness from developed
locality
(vi) level vis-a-vis land under
(vi) some special
disadvantageous acquisition
factors which would deter a
purchaser
(vii) special value for an owner
of an adjoining property to whom it may
have some very special advantage."

34. The Apex Court has consistently held in the above judgments that the best method to assess the market value of land would be the amount that a willing purchaser would pay to the owner of the land. In the absence of any direct evidence, the other method as elucidated by the Apex Court in the judgements referred above may be taken recourse to.

35. The District Judge in concluding that the land in question was commercial land has considered unrebutted pieces of evidence adduced by respondent no.1 which established that the land in question is commercial. It further held that simply because the land is recorded as agricultural land in the revenue record, that does not mean that the claimant would be entitled to compensation on the rates applicable to agricultural land. Applying the principle laid down by the Apex Court that the best method to determine the market value of the land is the amount which a willing purchaser would pay to the owner of the land, this court finds that the view taken by the District Judge that the respondent no. 1 is entitled to compensation as per commercial rate of the land is correct and in conformity with the criteria provided for determination of compensation under Section 3G(7) of the Act, 1956 for the reason that in the present case, the land in question is commercial land, therefore, it is obvious that the willing purchaser would offer the price of commercial land to purchase the land in question which means that the market value of the land in question is the price of commercial land in the area where land is situated.

36. Thus, it can be concluded that the competent authority or the arbitrator in determining the compensation is only to consider the market value of the land on the date of notification under Section 3A of Act, 1956 and the nature of land recorded in the revenue record is not relevant for determining the compensation. Therefore, the court finds that the District Judge has rightly issued direction to pay compensation of the land treating it be commercial land. Consequently, the contention of the counsel for the appellant that the District Judge has acted illegally and beyond its jurisdiction in directing the appellant to pay compensation on the commercial rate is devoid of substance and rejected.

37. Now another question that arises for consideration is whether the District Judge was justified in directing payment of compensation treating the land to be commercial land instead of remanding the matter back to the Arbitrator or leave it open to the parties to approach the Arbitrator again.

38. In this respect, it is useful to notice that Section 3-A to 3-F of the Act,

1956 provides a mechanism for acquisition of land where the Central Government is satisfied that for public purposes any land is required for building, maintenance, management or operation of a national highway or part thereof, it can acquire the land by following the procedure provided under Section 3-A to 3-F of the Act, 1956 and take possession of the land. Section 3-G (7) of the Act, 1956 provides for a mechanism for the determination of compensation. Section 3-G (5) of the Act, 1956 provides that if the party is dissatisfied with the amount of compensation, it can approach the Arbitrator. Thus, under the scheme of the Act, 1956, land is acquired compulsorily if the conditions envisaged in Section 3(A) of the Act, 1956 exists. After the acquisition of the land, competent authority shall determine the compensation and pass an award. If the landowner is not satisfied with the award, the only remedy available to the landowner is to seek arbitration under Section 3-G (5) of the Act, 1956 before an Arbitrator appointed by the Central Government.

39. The legislature has provided criteria under Section 3-G (7) of the Act, 1956 for determining the compensation with an object that the landowner shall be compensated adequately for the loss suffered by him on account of compulsory acquisition of his land. Section 3-G (7) of the Act, 1956 is a benevolent provision for the benefit of the landowner; and if the claimant is not satisfied with the compensation, the remedy to raise arbitration dispute by the landowner is contemplated under the Act with a purpose to grant quick relief to the landowner to save the landowner from being dragged into long drawn routine litigation. It is also to bear in mind that the Arbitration Proceedings under the Act,1956 does not arise of commercial contract where the parties have agreed to go in arbitration in case of any dispute arising out of the contract rather a mechanism of Arbitration conceived under the Act,1956 is to provide speedy remedy to landowners. Thus, it is obvious that the legislature while inducting the provision of arbitration under Section 3-G(5) of the Act, 1956 must have been conscious of the fact that the Arbitrator appointed by the Central Government would act fairly and independently and follow the criteria given in Section 3-G (7) of the Act,1956 in determining the compensation.

40. Thus, it is manifest that the provision of arbitration in the Act,1956 has been inserted with a purpose to provide a quick remedy to landowners, therefore in such circumstances, it cannot be said that the court is denuded of the power to modify the award for the ends of justice to provide relief to the landowner so that he may not suffer indefinitely to get just compensation as per law else any other conclusion would thwart the object of providing the remedy of Arbitration in the Act,1956. At this point, it would again be useful to refer to paragraph 37 of the judgment of Apex Court in the case of ***Dyna Technologies Private Limited (supra)*** wherein the Apex Court did not find it proper in the interest of justice to remand the matter to the Tribunal as the case has taken 25 years for its adjudication. Paragraph 37 of the said judgment is being reproduced hereinbelow:-

"37. In case of absence of reasoning the utility has been provided under of Section 34(4) of the Arbitration Act to cure such defects. When there is complete perversity in the reasoning then

only it can be challenged under the provisions of Section 34 of the Arbitration Act. The power vested under Section 34 (4) of the Arbitration Act to cure defects can be utilised in cases where the arbitral award does not provide any reasoning or if the award has some gap in the reasoning or otherwise and that can be cured so as to avoid a challenge based on the aforesaid curable defects under Section 34 of the Arbitration Act. However, in this case such remand to the Tribunal would not be beneficial as this case has taken more than 25 years for its adjudication. It is in this state of affairs that we lament that the purpose of arbitration as an effective and expeditious forum itself stands effaced."

41. On perusal of judgments in respect of quantum of compensation mentioned in the memo of appeal on which reliance has been placed by the appellant, I find that none of them is applicable in the facts of the present case since those judgments have been referred under the Indian Stamp Act whereas the present case is under the Act, 1996 wherein Section 3-G (7) stipulates the criteria which the Arbitrator shall consider in determining the compensation.

42. Accordingly, this Court for the reasons given above finds that the District Judge has rightly modified the award and directed for payment of compensation treating the land to be commercial land.

43. Thus, for the reasons given above, the appeal lacks merit and is accordingly, ***dismissed.*** There shall be no order as to costs.

(2022)03ILR A57
APPELLATE JURISDICTION
CRIMINAL SIDE

DATED: LUCKNOW 21.03.2022

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Criminal Misc. Anticipatory Bail Application U/S 438 CR.P.C. No. 307 of 2022

Anirudh Kamal Shukla ...Applicant
Versus
U.O.I. ...Opposite Party

Counsel for the Applicant:
Purnendu Chakravarty, Anuuj Taandon

Counsel for the Opposite Party:
A.S.G.I., Shiv P. Shukla

A. Criminal Law - Code of Criminal Procedure,1973 - Section 438 - Indian Prevention of Money Laundering Act, 2002 - Section 3/4-seeking for bail-proceeds of crime-scheduled offence-alleged money scam- money laundering has been committed by the accused-applicant with other co-accused and he has continously projected the same as being untainted-twin conditions of section 45(1) of the PMLA Act is mandatory in nature and must be complied before granting bail to the accused-Being a special enactment it has overriding effect on general law-prima facie, the parameters of Section 45(1) PMLA is not satisfied-Hence, for money-launderers "jail is the rule and bail is an exception".(Para 1 to 30)

B. In the instant case, accused-applicant entered into a criminal conspiracy with some unknown persons and got sanctioned 08 housing loans on the basis of false and fictitious documents. the said loan account turned NPA in the name of non-existent borrowers causing a loss to the tune of Rs. 1.17 crores approximately to the Bank of India in lieu of wrongful gain.(Para 6)

C. Section 45 of PMLA Act imposes two conditions for grant of bail:

(i) That the prosecutor must be given an opportunity to oppose the application for bail, and

(ii) That the court must be satisfied that there are reasonable grounds for believing that the accused person is not guilty of such offence and that he is not likely to commit any offence while on bail.(Para 20 to 23)

D. Economic offences constitute a class apart and need to be visited with different approach in the matter of bail. the economic offences having deep-rooted conspiracies and involving huge loss of public funds need to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country.(Para 24 to 26)

The application is dismissed. (E-6)

List of Cases cited:

1. Nikesh Tarachand Shah Vs U.O.I. & anr.(2018) 11 SCC 1

2. Ramji Singh Vs C.B.I. Anti Corruption Branch Lko.(Crl.Misc. Anticipatory Bail No. 12682 of 2021)

3. Prakash Jay Prakash Vs U.O.I. (ED) ABLAPL No. 15091 of 2019

4. Siddharth Vs St. of U.P. & anr.,CRLA No. 838 of 2021 (arising out of SLP Crl. No. 5442 of 2021)

5. Asst. Dir. Vs Dr. V.C. Mohan, SLP Crl. No. 8441 of 2021

6. Pankaj Grover Vs U.O.I. (Crl. Misc. Anticipatory Bail No. 7661 of 2021)

7. St. of M.P. Vs Ram Krishna Balothia & anr.(1995) 3 SCC 221

8. St. of V. Vijay Sai Reddy Vs ED, Cr. Petition Nos. 1073 & 1074 of 2021

9. Jai Prakash Singh Vs St. of Bih. & anr.(2012) 4 SCC 379

10. Gautam Kundu Vs ED (2015) 16 SCC 1

11. UOI Vs Varinder Singh (2017) SCC Online SC 1314

12. Y.S. Jagan Mohan Reddy Vs C.B.I. (2013) 7 SCC 439

13. St. of Guj. Vs Mohanlal Jitamalji Porwal (1987) 2 SCC 364

14. P. Chidambaram Vs ED (2019) 9 SCC 24

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

1. Heard Sri Anuj Tandon, learned counsel for the applicant, Sri Shiv P. Shukla, learned counsel for the Enforcement Directorate and perused the material placed on record.

2. The present anticipatory bail application has been filed on behalf of the applicant in Complaint Case No.15 of 2019, E.C.I.R. No. ECIR/15/PMLA/LZO/2010, under Section 3/4 of Prevention of Money Laundering Act, 2002 at Police Station- Directorate Enforcement, District Lucknow with a prayer to enlarge him on anticipatory bail.

3. The applicant is stated to have moved an anticipatory bail application before the Special Judge, PMLA Lucknow, which was rejected by it vide order dated 07.01.2022

Facts in Brief

4. The Enforcement Directorate lodged an ECIR on 26.08.2010 in pursuance of the schedule offence bearing F.I.R. No. RC-8A/2007 dated 31.03.2007. After issuance of provisional attachment order No.01 of 2016 dated 28.03.2016, a complaint under Sections 44 and 45 of

P.M.L.A., 2002 has been filed against the applicant and other co-accused persons for an offence under Sections 3/4 of P.M.L.A., 2002.

5. In pursuance of F.I.R. No. RC-8A/2007, under Sections 120B, 420, 467, 468 and 471 IPC and Section 13(2) r/w 13(1)(d) of Prevention of Corruption Act, several charge-sheets have been filed against different co-accused persons including the one against the applicant and his brother Ashwani Kumar Shukla along with one other co-accused person.

6. As per the F.I.R. lodged by the C.B.I./A.C.B., Lucknow in 2007 during the period of 14.11.2005 to 7.11.2016, V.K. Srivastava, Senior Manager, R.K. Mishra, Senior Manager, Naresh Chandra Bhardwaj, Senior Manager, Dinesh Kumar, Clerk of Bank of India and Vikram Dixit entered into a criminal conspiracy with some unknown persons and got sanctioned 08 housing loans on the basis of false and fictitious documents such as I.T.R., PAN, Sale Deeds, Voter I.D. etc. The said loan accounts turned NPA in the name of non existent borrowers causing a loss to the tune of Rs.1.17 crores approximately to the Bank of India in lieu of wrongful gain. During investigation, proceeds of crime to the tune of Rs.19,49,000/- in the form of movable/immovable property was attached and was confirmed by Adjudicating Authority vide order dated 16.09.2016. The applicant- Anirudh Kamal Shukla is stated to have entered into a criminal conspiracy with R.K. Mishra, Senior Branch Manger Credit and Vinny Sodhi @ Vikram Dixit and applied for sanction of an overdraft limit of Rs.24.60 lakhs for the business purpose against the mortgage of property of Ram Nath Sharma and applied jointly along with the name of his brother Ashwani Kamal Shukla by submitting fake ITRs, PAN Card, NEC, Valuation Report in respect of property mortgaged, mutation certificate, will and sale deed. The investigation revealed that Rs.25,000/- was transferred to the current account of the applicant on 06.11.2006, which was utilized in business and the same is stated to have been admitted by the applicant.

Rival Contentions

7. Learned counsel for the applicant has stated that he has no previous criminal history except the present complaint cases and the predicate offence filed against him. There is no possibility of the applicant fleeing from justice or directly or indirectly inducing, threat or promise to any person. The present ECIR has been registered purely on the basis of predicate offence bearing F.I.R. No.RC-81/2007 dated 31.03.2007. The charge-sheet has been filed against the applicant and the other co-accused persons in the case filed by C.B.I. and the applicant is already on bail in it vide order dated 28.10.2010 passed by this Court in Bail No.8010 of 2010.

8. Learned counsel for the applicant has further stated that the predicate offence relates to OD mortgaged loan account opened in the name of his brother Ashwani Kumar Shukla with the Bank of India, Harsh Nagar, Kanpur. The property mortgage is found to be fake. The loan is alleged to have been applied by Ashwani Kumar Shukla along with the applicant. The only allegation against the applicant is that a sum of Rs.25,000/- was transferred from OD mortgaged loan account to the current account of co-borrower Ashwani Kumar Shukla which was utilized in the business. It has further been stated that the entire proceeds of crime originating from

the schedule offence was transcribed in the provisional attachment order and the present applicant was not named as defendant in the original complaint. The brother of the applicant is only named in that complaint as defendant no.7 for the limited role that a sum of Rs.25,000/- was transferred from OD mortgaged loan account to the current account and subsequently the said amount was deposited with ED in the form of FDR. Learned counsel for the applicant has further submitted that no proceeds of crime has been deciphered and derived in respect of the applicant. There is no provisional attachment issued in respect of the applicant. There is no evidence with regard to possession, acquisition or use and projecting or claiming any proceeds of crime as tainted property *qua* applicant. The applicant himself is stated to have got an FIR lodged against Vikram Dixit on 20.10.2007 at Case Crime No.338 of 2007, under Sections 406, 420, 504 and 506 IPC, Police Station Kakadev Kanpur, wherein charge-sheet has been filed. The applicant is unaware of the entire transactions as he is a resident of Thane, Maharashtra.

9. Learned counsel for the applicant has placed much reliance on the case law settled by the Supreme Court in case of ***Nikesh Tarachand Shah vs. Union of India & Anr.1,*** wherein the Supreme Court has declared twin conditions for grant of bail under Section 45(1) of P.M.L.A. as unconstitutional. Learned counsel for the applicant has further stated that there is no chance of the applicant tempering with evidence and he may be admitted to anticipatory bail. The applicant has not been arrested by the Enforcement Directorate since filing of complaint during last eight years and the applicant is co-operating with the department since then. There is no likelihood of the offence being repeated by the applicant.

10. Learned counsel for the applicant has also placed much reliance on the judgment of this Court passed in the case of ***Ramji Singh vs. Central Bureau of Investigation Anti Corruption Branch Lko.2*** dated 02.03.2022 and on the judgment of Orissa High Court in case of ***Jyoti Prakash Jay Prakash vs. Union of India (E.D.)***3and also on the judgment of Supreme Court passed in the case of ***Siddharth vs. State of Uttar Pradesh & Anr.4.***

11. Per contra, Sri Shiv P. Shukla, learned counsel for the Enforcement Directorate has vehemently opposed the anticipatory bail application stating that the OD mortgaged loan account was opened in the name of Ashwani Kumar Shukla along with applicant with Bank of India, Harsh Nagar Branch on the basis of forged property documents made available by co-accused person Vikram Dixit through Ram Nath Sharma (Guarantor). This property situated at 122/212, Lajpat Nagar, Kanpur was not clear in title and the same was not in physical possession of Ram Nath Sharma as a Legal Suit No.1815 of 1996 is already pending in the court between Ram Nath Sharma and his sister in respect of ownership.

12. The brother of the applicant is stated to have admitted that Rs.25,000/- was tainted money. The said amount of Rs.25,000/- was paid vide cheque no.215054 dated 06.11.2006 to M/S D.K. Agricultural and Engineering. The Enforcement Directorate has examined and recorded the statement of the applicant and

all co-accused persons under Section 50 of P.M.L.A., 2002 wherein the applicant is stated to have confessed his crime.

13. Learned counsel for the Enforcement Directorate has further stated that the provisional attachment order dated 28.03.2016 finds the reference of the aforesaid transaction of Rs.25,000/- at serial no.7. He has further submitted that the applicant along with his brother had entered into a criminal conspiracy with R.K. Mishra, Senior Branch Manager Credit and Vinny Sodhi @ Vikram Dixit for sanction of an overdraft limit of Rs.2.50 lakhs for business purpose against the mortgaged of property of Ram Nath Sharma by submitted fake documents. Learned counsel for the E.D. has stated that the charge-sheet in the present case had already been filed on 27.11.2018 and the cognizance has been taken on 11.04.2019. Summons and non bailable warrants have already been issued against the co-accused persons. There is no reason for entertaining an anticipatory bail of the applicant at this stage. The accused himself should surrender before the Special Court and apply for regular bail.

14. Sri Shiv P. Shukla, learned counsel for the Enforcement Directorate has placed much reliance on the judgment of Supreme Court in case of ***Assistant Director vs. Dr. V.C. Mohan5,*** wherein it has been held that the rigors of Section 45 of the PMLA would be applicable to the petitioners who file applications for grant of anticipatory bail in the case of offences under the PMLA. The relevant excerpt from the judgment is reproduced below for ready reference:-

".....The observations made herein have been misunderstood by the respondent. It is one thing to say that Section 45 of the PMLA Act to offences under the ordinary law would not get attracted but once the prayer for anticipatory bail is made in connection with offence under the PMLA Act, the underlying principles and rigors of Section 45 of the PMLA Act must get triggered - although the application is under section 438 of Code of Criminal Procedure."

15. It has also been held by this Court in the case of ***Pankaj Grover vs. Union of India6*** as follows:-

"42..... In socio-economic offences proceed of crimes are larger and further, offenders are economically sound, therefore, in releasing them on bail/anticipatory bail probability of abscondance not within country but beyond country is more probable. Usually socio-economic offenders abscond to some other country and after that it becomes difficult to bring them back and complete the criminal proceeding against them. Further, their monetary sound condition particularly proceed of crime obtained not by honest working but by deceiving others causes more prone situation for influencing witnesses and other evidences. Furthermore, status and position of offender provides opportunity to influence investigation and prosecution."

16. Learned counsel for the Enforcement Directorate has further stated that the anticipatory bail application of the co-accused- Naresh Chandra Bhardwaj has already been dismissed vide order dated 24.12.2021 passed in Criminal Misc. Anticipatory Bail Application U/S 438 Cr.P.C. No.11679 of 2021. Learned counsel for the Enforcement Directorate has further stated that the right of anticipatory bail is

not part of Article 21 of the Constitution of India as has been held in case ***of State of M.P. vs. Ram Krishna Balothia and Another7.***

17. It is further submitted that provision of PML Act makes it clear though the commission of scheduled offence is a essential pre-requiste for initiating proceeding under PML Act, the offence of money laundering is independent of the scheduled offence. In support of his contention he relied upon Judgment of Hon'ble Telangana High Court in case of ***State of V. Vijay Sai Reddy vs Enforcement Directorate8,*** wherein it was held that trial for the offence of money laundering is independent trial and it is governed by its own provisions and it need not get interfered by the trial of scheduled offences.

18. It is further submitted that PML Act is Special Act to deal with economic offences. Offence under PML Act is made as cognizable and non-bailable and granting anticipatory bail may hamper the societal and national interest. In support of his contention learned counsel relied upon Judgment of Supreme Court in the case of ***Jai Prakash Singh v. State of Bihar & Anr.9,*** wherein it is held that "parameters for grant of anticipatory bail in a serious offence are required to be satisfied and further while granting such relief, the Court must record the reasons therefor. Anticipatory bail can be granted only in exceptional circumstances where the Court is prima facie of the view that the applicant has falsely been enroped in the crime and would not misuse his liberty."

19. It is further submitted that the offence of money laundering has been committed by the accused-applicant with other co-accused and he has continuously projected the same as being untainted. Section 3 specifically provided that directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime and projecting it as untainted property shall be guilty of offence of money-laundering." The offence of money laundering would be counted from the day on which the proceeds of crime had been projected as being untainted.

20. In order to examine the contentions it would be useful to advert to section 45 of PML Act, 2002. The same read thus:-

"45. Offences to be cognizable and non-bailable*.--(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule shall be released on bail or on his own bond unless--*

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

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

Provided that a person, who, is under the age of sixteen years, or is a woman or is sick or infirm, may be released on bail, if the Special Court so directs:

Provided further that the Special Court shall not take cognizance of any offence punishable under Section 4 except upon a complaint in writing made by--

(i) the Director; or

(ii) any officer of the Central Government or a State Government authorised in writing in this behalf by the Central Government by a general or a special order made in this behalf by that Government.

(1-A) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), or any other provision of this Act, no police officer shall investigate into an offence under this Act unless specifically authorised, by the Central Government by a general or special order, and, subject to such conditions as may be prescribed.

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

21. Section 45 specially provides two conditions which is mandatory in nature and must be complied before granting bail to accused of offence.

22. The same is reiterated is case of ***Gautam Kundu vs Directorate of Enforcement10***, the Supreme Court held as under:-

29. Section 45 of PML Act starts with a non obstante clause which indicates that the provisions laid down in Section 45 of PML Act will have overriding effect on the general provisions of the Code of Criminal Procedure in case of conflict between them. Section 45 of PML Act imposes the following two conditions for grant of bail to any person accused of an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule of PML Act:

(i) That the prosecutor must be given an opportunity to oppose the application for bail; and

(ii) That the court must be satisfied that there are reasonable grounds for believing that the accused person is not guilty of such offence and that he is not likely to commit any offence while on bail.

30. The conditions specified under Section 45 of PML Act are mandatory and needs to be complied with, which is further strengthened by the provisions of Section 65 and also Section 71 of PML Act. Section 65 requires that the provisions of CrPC shall apply insofar as they are not inconsistent with the provisions of this Act and Section 71 provides that the provisions of PML Act shall have overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. PML Act has an overriding effect and the provisions of CrPC would apply only if they are not inconsistent with the provisions of this Act. Therefore, the conditions enumerated in Section 45 of PML Act will have to be complied with even in respect of an application for bail made under Section 439 CrPC. That coupled with the provisions of Section 24 provides that unless the contrary is proved, the authority or the Court shall presume that proceeds of crime are involved in money laundering and the burden to prove that the proceeds of crime are not involved, lies on the appellant."

23. In case of ***Union of India v. Varinder Singh11,*** Supreme court observed that Sec 45 of PML Act imposes conditions for grant of bail. Bail cannot be granted without complying with requirements of section 45 of PML Act.

Conclusion

24. In case of ***Y.S jagan Mohan Reddy v. CBI12,*** the Supreme Court observed as under:-

"34. Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offences having deep-rooted conspiracies and involving huge loss of public funds need to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country."

25. In ***State of Gujrat v. Mohanlal Jitamalji Porwal13,*** the Hon'ble Supreme Court observed:

"[...] the entire community is aggrieved if the economic offenders who ruin the economy of the State are not brought to book. A murder may be committed in the heat of moment upon passions being aroused. An economic offence is committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequence to the community. A disregard for the interest of the community can be manifested only at the cost of forfeiting the trust and faith of the community in the system to administer justice in an even-handed manner without fear of criticism from the quarters which view white collar crimes with a permissive eye unmindful of the damage done to the national economy and national; interest [...]"

26. In case of ***P. Chidambaram v. Directorate of Enforcement14***, the Supreme Court observed as under:-

"67. Ordinarily, arrest is a part of procedure of the investigation to secure not only the presence of the accused but several other purposes. Power under Section 438 Cr.P.C. is an extraordinary power and the same has to be exercised sparingly. The privilege of the pre-arrest bail should be granted only in exceptional cases. The judicial discretion conferred upon the court has to be properly exercised after application of mind as to the nature and gravity of the accusation; possibility of applicant fleeing justice and other factors to decide whether it is a fit case for grant of anticipatory bail. Grant of anticipatory bail to some extent interferes in the sphere of investigation of an offence and hence, the court must be circumspect while exercising such power for grant of anticipatory bail. Anticipatory bail is not to be granted as a matter of rule and it has to be granted only when the court is convinced that exceptional circumstances exist to resort to that extraordinary remedy. "

27. The PML Act, 2002 deals with the offence of money laundering and Parliament enacted this law to deal and curb the activities of money laundering. Being a special enactment it has overriding effect on general law. Section 71 of PML Act specially provides that provisions of PML Act shall have overriding effect on any other law time being in force. From aforesaid view it is very clear that provisions of Code of Criminal Procedure will not be applicable until there is no specific provision given in PML Act, 2002.

28. Money Laundering being an offence is economic threat to national interest and it is committed by the white collar offenders who are deeply rooted in society and cannot be traced out easily. These kind of offences are committed with proper conspiracy, deliberate design with the motive of personal gain regardless of

the consequences to the society and economy of Country. Hence, for money-launderers "jail is the rule and bail is an exception".

29. The arguments tendered by the counsel for the applicant can be agitated at the stage of regular bail but not under Section 438 Cr.P.C.

30. On prima facie reading of the material placed on record and considering the parameters of Section 45(1) PMLA as well as the gravity of the alleged offences, it cannot be held that the applicant was not guilty of the alleged offences or that he was not likely to commit any such offence while on bail and accordingly the anticipatory bail application is **dismissed.**

31. However, it is made clear that the observations made hereinabove are exclusively for deciding the instant anticipatory bail application and shall not affect the trial or deciding the regular bail application.

(2022)03ILR A65
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 11.03.2022

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Criminal Misc. Bail Application No. 9660 of 2021

Om Prakash Verma ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Karunakar Srivastava

Counsel for the Opposite Party:
G.A.

A. Criminal Law - Code of Criminal Procedure,1973 - Section 439 - The Narcotics Drugs And Psychotropic Substances Act,1985-Section 8/20-bail-recovery of 1 quintal 3 kg290 grams ganja from 19 packets-Representative samples not drawn from all the 19 packets-there is non-compliance of procedure given in clause 2.4 of the Standing order No. 1 of 1989 which has statutory force and therefore, accused may not be held guilty after trial-Bail allowed with conditions. (Para 1 to 14)

B. The guidelines such as those present in the Standing Order can not be blatantly flouted and substantial compliance therewith must be insisted upon for so that sanctity of physical evidence in such cases remains intact. In this case, the conduct of the prosecution of not drawing individual sample from each packet recovered will be considered to be violation of Standing Order aforesaid. (Para 5 to 11)

The application is allowed. (E-6)

List of Cases cited:

1. St. of Raj. Vs Tara Singh (2011) 11 SCC 559

2. Aman Fidel Chris Vs Narcotics Control Bureau, CRLA No. 1027 of 2015 & Crl. M.B. 511 of 2019 & Crl. M.A. 1660 of 2020

3. Noor Aga Vs St. of Punj.(2008) 3 JIC 640 SC

4. St. of Ker. & ors. Vs Kurian Abraham (P) Ltd. & anr. (2008) 3 SCC 582

5. U.O.I. Vs Azadi Bachao Andolan (2004) 10 SCC 1

6. U.O.I. Vs Shiv Shankar Keshari (2007) 7 SCC 798

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

1. Heard Sri Sri Karunakar Srivastava, learned counsel for the

applicant, learned AGA for the State and perused the material placed on record.

2. Applicant seeks bail in Case Crime No. 0205 of 2021, under Sections 8/20 of The Narcotic Drugs And Psychotropic Substances Act, 1985, Police Station- Utraula, District Balrampur, during the pendency of trial.

3. As per prosecution story, 1 quintal 3 Kg 290 grams of ganja and 38 packets of cigarette rolling paper from a unnumbered Tata Tiago car along with one CMP, .303 bore, one live cartridge of .303 bore are said to have been recovered from the possession of two co-accused persons, namely, the applicant and Ram Prakash Verma. Rs.340 cash was recovered from the possession of the applicant and Rs.25,000/- cash was recovered from the possession of co-accused Ram Prakash Verma and two accused persons are stated to have run away from the scene of recovery after seeing the raiding party.

4. Learned counsel for the applicant has argued that in all the said contraband was recovered from 19 packets and one polythene amounting to total of 1 quintal 3 Kg and 290 grams and only one sample has been taken from the said contraband. This is a clear violation of Clause 2.4 of the Standing Order No.1 of 1989.

5. Learned counsel for the applicant has further argued that the said sample has been sent for testing after a delay of twenty days, which is also clear violation of the said Standing Order, as it is provided in it that the contraband should be sent for chemical analysis within a period of 72 hours. The said delay has categorically prejudiced the accused and there is every possibility of interpolation and adulteration in the said sample.

5. Learned counsel for the applicant has placed reliance on the case law settled by the Apex Court in case of ***State of Rajasthan vs. Tara Singh1***, in which it has been held as under:-

(2) At the very outset, it must be understood that the provisions of Section 50 would no longer be applicable to a search such as the one made in the present case as the opium had been carried on the head in a gunny bag. A Bench of this Court in State of Himachal Pradesh v. Pawan Kumar, after examining the discrepant views rendered in various judgments of this Court has found that Section 50 of the Act would not apply to any search or seizure where the article was not being carried on the person of the accused. Admittedly, in the present case, the opium was being carried on the head in a bag. Mr. Abhishek Gupta, the learned Counsel for the appellant-State, therefore, appears to be right when he contends that the observations of the High Court that the provisions of Section 50 of the Act would not be applicable was no longer correct in view of the judgment in Pawan Kumar's case. We find, however, that the second aspect on which the High Court has opined calls for no interference. As per the prosecution story the samples had been removed from the Malkhana on the 26th of February, 1998, and should have been received in the laboratory the very next day. The High Court has, accordingly observed that the prosecution had not been able to show as to in whose possession the samples had remained from 26th February, 1998 to 9th March, 1998. The High Court has also disbelieved the evidence of PW-6 and PW-9, the former being the Malkhana incharge and the latter being the Constable, who had taken the samples to the Laboratory to the effect that the

samples had been taken out on the 9th of March, 1998 and not on the 26th February, 1998. The Court has also found that in the absence of any reliable evidence with regard to the authenticity of the letter dated 26th February, 1998 it had to be found that the samples had remained in some unknown custody from the 26th February, 1998 to 9th March, 1998. We must emphasise that in a prosecution relating to the Act the question as to how and where the samples had been stored or as to when they had dispatched or received in the laboratory is a matter of great importance on account of the huge penalty involved in these matters. The High Court was, therefore, in our view, fully justified in holding that the sanctity of the samples had been compromised which cast a doubt on the prosecution story. We, accordingly, feel that the judgment of the High Court on the second aspect calls for no interference. The appeal is, accordingly, dismissed. The respondent is on bail. His bail bonds stand discharged."

6. Learned counsel for the applicant has submitted that the general procedure for sampling provided in Standing Order No. 01 of 1989 dated 13.06.1989 has not been complied by the opposite party. He has relied upon clause 2.1 to 2.8 of the aforesaid standing order quoted herein below :-

"2.1 All drugs shall be classified, carefully, weighed and sampled on the spot of seizure.

2.2 All the packages/containers shall be numbered and kept in lots for sampling. Samples from the narcotic drugs and psychotropic substances seized, shall be drawn on the spot of recovery, in duplicate, in the presence of search witnesses (Panchas) and the persons from whose possession the drug is recovered and a mention to this effect should invariably be made in the panchnama drawn on the spot.

2.3 The quantity to be drawn in each sample for chemical test shall not be less than 5 grams in respect of all narcotic drugs and psychotropic substances save in the cases of opium, ganja and charas (hashish) were a quantity of 24 grams in each case is required for chemical test. The same quantities shall be taken for the duplicate sample also. The seized drugs in the packages/containers shall be well mixed to make it homogeneous and representative before the sample (in duplicate) is drawn.

2.4 In the case of seizure of a single package/container, one sample in duplicate shall be drawn. Normally, it is advisable to draw one sample (in duplicate) from each package/container in case of seizure of more than one package/container.

2.5 However, when the packages/containers seized together are of identical size and weight, bearing identical markings and the contents of each package given identical results on colour test by the drug identification kit, conclusively indicating that the packages are identical in all respects the packages/container may be carefully bunched in lots of 10 package/containers except in the case of ganja and hashish (charas), where it may be bunched in lots of, 40 such packages/containers. For each such lot of packages/containers, one sample (in duplicate) may be drawn.

2.6 Where after making such lots, in the case of hashish and ganja, less than 20 packages/containers remain, and in the case of other drugs, less than 5 packages/containers remain, no bunching would be necessary and no samples need be drawn.

2.7 If such remainder is 5 or more in the case of other drugs and substances and 20 or more in the case of ganja and hashish, one more sample (in duplicate) may be drawn for such remainder package/container.

2.8 While drawing one sample (in duplicate) from a particular lot, it must be ensured that representative sample the in equal quantity is taken from each package/container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot."

7. Learned counsel has submitted that the above clauses of the standing order aforesaid clearly show that the police was required to draw a sample from each packet allegedly recovered with the help of field testing kit. The mixing of the material from all the packets and then drawing of representative sample is not provided in the Standing Order, as if, such a course is adopted the sample would seize to be representative sample of the corresponding packet. In the present case 19 packets and one polythene bag were recovered from the possession of the two accused persons and the procedure given in clause 2.4 of the Standing Order No. 1 of 1989 was strictly required to be followed since there were only 20 packets in all from which the sample was to be drawn. At this point of time, it cannot be ascertained whether all the 19 packets and one polythene bag (total 20 in all) contained the alleged contraband of ganja or not.

8. Learned counsel for the applicant has also relied upon the judgment of Delhi High Court in the case of ***Aman Fidel Chris v. Narcotics Control Bureau, Crl. Appeal No.1027 of 2015 & Crl. M.B. 511 of 2019 and Crl. M.A. 1660 of 2020***, in support of his contentions. In this case the conduct of the prosecution of not drawing individual sample from each packet recovered was considered to be violation of Standing Order aforesaid.

9. Learned counsel for the applicant has argued that the applicant is absolutely innocent and has been falsely implicated in the present case with a view to cause unnecessary harassment and to victimize him. The applicant is languishing in jail since 22.06.2021. In case, the applicant is released on bail, he will not misuse the liberty of bail.

10. Learned A.G.A. has vehemently opposed the bail application on the ground that the recovery of the contraband article is of commercial quantity.

11. The Apex Court in case of ***Noor Aga v. State of Punjab2,*** has held in paragraphs 123, 124 and 125 that the standing order in dispute and other guidelines issued by the authority having legal sanction are required to be complied by the arresting authorities. For ready reference the aforesaid paragraphs are quoted hereinbelow:-

"(123) Guidelines issued should not only be substantially complied, but also in a case involving penal proceedings, vis-a-vis a departmental proceeding, rigours of such guidelines may be insisted upon. Another important factor which must be borne in mind is as to whether such directions have been issued in terms of the provisions of the statute or not. When directions are issued by an authority having the legal sanction granted therefore, it becomes obligatory on the part of the sub ordinate authorities to comply therewith.

(124) Recently, this Court in State of Kerala & Ors. v. Kurian Abraham (P)

Ltd. & Anr.3, following the earlier decision of this Court in Union of India v. Azadi Bachao Andolan4, held that statutory instructions are mandatory in nature.

(125) Logical corollary of these discussions is that the guidelines such as those present in the Standing Order can not be blatantly flouted and substantial compliance therewith must be insisted upon for so that sanctity of physical evidence in such cases remains intact. Clearly, there has been no substantial compliance of these guidelines by the investigating authority which leads to drawing of an adverse interference against them to the effect that had such evidence been produced, the same would have gone against the prosecution."

12. The Apex Court in the Case of ***Union of India vs. Shiv Shankar Keshari5,*** has held that the court while considering the application for bail with reference to Section 37 of the Act is not called upon to record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about the existence of such grounds. But the court has not to consider the matter as if it is pronouncing a judgment of acquittal and recording a finding of not guilty.

13. Considering the facts of the case and keeping in mind, the ratio of the Apex Court's judgment in the case of ***Union of India vs. Shiv Shankar Keshari (supra)*** larger mandate of Article 21 of the constitution of India, the nature of accusations, the nature of evidence in support thereof, the severity of punishment which conviction will entail, the character of the accused-applicant, 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 interest of the public/ State and other circumstances, but without expressing any opinion on the merits, I am of the view that it is a fit case for grant of bail.

14. Let the applicant- **Om Prakash Verma**, who is involved in the aforementioned case crime be released on bail on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned subject to following conditions. Further, before issuing the release order, the sureties be verified.

(i) The applicant shall file an undertaking to the effect that he shall not seek any adjournment on the date 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 IPC.

(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., may be issued and if 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 IPC.

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

15. In case of breach of any of the above conditions, it shall be a ground for cancellation of bail.

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

(2022)03ILR A70
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.12.2021

BEFORE

THE HON'BLE SAMIT GOPAL, J.

Criminal Misc. Anticipatory Bail Application U/S 438 CR.P.C. No. 18604 of 2021

Hemant Kumar @ Hemant Kumar Saraswat ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Surya Bhan Singh, Sri Brijesh Kumar Verma, Sri Swapnesh Singh, Sri Akshay Gupta, Sri Shiv Nath Singh (Sr. Advocate)

Counsel for the Opposite Parties:
G.A.

A. Criminal Law - Code of Criminal Procedure,1973 - Section 438 - Indian Penal Code,1860 - Section 420, 467, 468 & 471 - application-rejection-termination of applicant being beneficiary of a forged B.Ed marksheet who was appointed as Assistant Teacher and continued to work for about 10 years-privilege of the pre-arrest bail should be granted only in exceptional cases-arrest is a part of the investigation intended to secure several purposes-cusodial interrrogation may be necessary to reach the roots of the crime-bail order granted to other persons are not binding on the court-Moreso, one deserving candidate has lost his seat for lifetime by the act of the applicant-Whether to grant or not is a matter of discretion-Hence, applicant cannot be granted bail keeping in mind gravity and nature of offence.(Para 1 to 23)

B. Ordinarily, arrest is a part of the process of investigation intended to secure several purposes. the accused may have to be questioned in detail regarding various facets of motive, preparation, commission and aftermath of the crime.It may be necessary to curtail his freedom in order to enable the investigation to proceed without hindrance and to protect witnesses and persons connected with the victim of crime, to prevent his disappearance, to maintain law and order in the locality. For these or other reasons, arrest may become an inevitable part of the process of investigation.The legality of the proposed arrest cannot be gone into in an application under Section 438 of the Code. The role of the investigator is well defined and the jurisdictional scope of interference by the court in the process of investigation is limited.The court ordinarily will not interfere with the investigation of a crime or with the arrest of the accused in a cognizable offence.(Para 11 to 18)

The application is rejected. (E-6)

List of Cases cited:

1. Siddharam Satlingappa Mhetre Vs St. of Mah.(2011) 1 SCC 694

2. Niranjan Hemchandra Sashittal Vs St. of Mah. (2013) 4 SCC 642

3. Asian Resurfacing of Road Agency Pvt. Ltd.Vs CBI (2018) 16 SCC 299

4. Jai Prakash Singh Vs St. of Bih. (2012) 4 SCC 379

5. Sushila Aggarwal Vs St.(NCT of Delhi) (2020) 5 SCC 1

6. P. Chidambaram Vs ED (2019) 9 SCC 24

7. Supreme Bhiwandi Wada Manor Infrastructure (P) Ltd. Vs St. of Mah. (2021) 8 SCC 753

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

1. Heard Sri Shiv Nath Singh, learned Senior Advocate assisted by Sri Swapnesh Singh, Advocate holding brief of Sri Surya Bhan Singh, learned counsel for the applicant and Sri Vinod Kant, Senior Advocate, learned Additional Advocate General, assisted by Sri Sanjay Kumar Singh, learned Additional Government Advocate for the State of U.P. and perused the records.

2. This second anticipatory bail application under Section 438 of Code of Criminal Procedure, 1973 has been filed by the applicant Hemant Kumar @ Hemant Kumar Saraswat, seeking anticipatory bail, in the event of arrest in Case Crime No. 0067 of 2021, under Sections 420, 467, 468, 471 IPC, Police Station Manth, District Mathura.

3. The first anticipatory bail application being Crl. Misc. Anticipatory Bail Application No. 11802 of 2021 (Hemanth Kumar Vs. State of U.P. and 2 others) was rejected by Hon'ble Vivek Agarwal, J. vide order dated 15.06.2021. The said order is quoted herein-below:

"None for the applicant though the link was sent to the learned counsel for the applicant. Sri Vinod Kant, learned Additional Advocate General for the State.

This application seeking anticipatory bail has been filed by the applicant being aggrieved of registration of a criminal case registering Case Crime No. 0067 of 2021 at Police Station- Manth, District- Mathura, under Sections 420, 467, 468, 471 IPC. Allegation on the applicant is that he is a beneficiary of a forged marksheet, which he had allegedly obtained from Agra University, showing him to have qualified the B.Ed Examination in the academic session 2004-05, whereas according to the applicant neither his marksheet is forged nor there is any manipulation.

Learned counsel for applicant submits that on the strength of this marksheet, he was appointed as 'Assistant Teacher' in a primary school where he had joined his services on 29.12.2010 and he continued to work for about 10 years when his service was terminated. It is submitted that applicant is innocent and under similar facts and circumstances in Criminal Misc. Anticipatory Bail Application U/S 438 Cr.P.C. No. 8248 of 2021 (Lokendra Pal Singh and 17 Others) benefit of anticipatory bail has been extended.

Learned A.A.G., in his turn, submits that interim protection was afforded in case of Lokendra Pal Singh because learned A.G.A. in that case had not produced instructions and therefore, matter was thought to be considered on a later date and interim protection was granted till 27.04.2021. Sri Vinod Kant submits that his instructions are complete. There is a racket

going on in the State of Uttar Pradesh where beneficiaries are obtaining forged marksheets in connivance with the middleman and the main conspirators, who are having thorough knowledge of the system, operationalized in various universities.

It is submitted that authorities are deliberately trying to protect the concerned officials of the university, who in collusion with certain other persons, manipulated with the marksheet and cheated innocent persons like applicant.

Applicant has directly come to this Court because F.I.R. was lodged on 20.04.2021. Therefore, applicant has been able to make out an extraordinary circumstances in the light of the judgment of Five Judges Bench of this Court in case of Ankit Bharti Vs. State of U.P. and another; 2020 (3) ADJ 165 (F.B.)., by directly approaching this Court.

After hearing learned counsel for the parties and going through the record, it is evident that applicant is a beneficiary of a forged marksheet. It is a matter of investigation as to whether applicant had actually appeared in the examination conducted by the university and had obtained a genuine marksheet or whether he is a party to the offence or is a victim of the offence, committed by certain other influential accused persons, which may include officials of the university. In view of such facts, it is necessary that applicant surrender before the Court and cooperate with the Investigating Officer, inasmuch as, the chain of beneficiary, middleman and mastermind is long and unless and until, they are all subjected to investigation for which sometimes custodial investigation may also be necessary to reach the roots of the crime, which is paralyzing the fabric of the society and also attacking on the roots of the education system, may not be exposed.

In view of such facts, there being no parity vis-a-vis case of Lokendra Pal Singh and Others, in the present case, I am of the opinion that for the present, applicant has failed to make out a case for grant of anticipatory bail, thus, application fails and is dismissed."

4. The present anticipatory bail application has been filed with the following prayer:-

"It is therefore most respectfully prayed that this Hon'ble Court may graciously be pleased to allow this Anticipatory Bail Application and enlarge the applicant on bail in Case Crime No. 0067 of 2021, under Sections 420, 467, 468 and 471 IPC at Police Station Manth, District Mathura, otherwise the applicant shall suffer irreparable loss and injury."

5. Learned counsel for the applicant argued that the applicant was appointed as Assistant Teacher in Junior Basic School during the period 2008-2011 after obtaining his B.Ed. Degree during the Session 2004-05 from Dr. B.R. Ambedkar University, Agra. He joined his services on 29.12.2010 and continued to work their for about ten years after which his services have been terminated. It was alleged that the B.Ed. mark-sheet and degree which was one of the required qualifications for the appointment was found to be forged and as such the present First Information Report has been lodged.

6. Learned counsel for the applicant has further argued that the controversy with regards to the B.Ed. mark-sheet and degree of Agra University for the year 2004-05 was the subject matter of a writ petition

which was converted into a Public Interest Litigation No. 2906 of 2013 (Sunil Kumar Vs. Dr. Bhimrao Ambedkar University and another) in which the matter was directed to be investigated by a Special Investigating Team which submitted its report on 14.08.2017 alleging therein that there were around 3500 mark-sheets/degree from which about 1000 mark-sheets/degree had been tampered. It is argued that the termination of the applicant vide order dated 18.12.2019 was challenged before this Court in Writ A No. 20784 of 2019 (Hemant Kumar Saraswat Vs. State of U.P. and 4 others). Since large number of candidates were affected whose services were terminated they had also preferred writ petitions before this Court which were all clubbed together and Writ A No. 190 of 2020 (Smt. Neelam Chauhan Vs. State of U.P. and others) was made a leading writ petition which was dismissed vide judgment and order dated 29.04.2020 by this Court. The order of dismissal was challenged in a Special Appeal (Defective) No. 634 of 2020 (Kali Charan and 10 others Vs. State of U.P. and 4 others) before a Division Bench of this Court in which vide order dated 21.09.2020, the effect and operation of the judgment and order dated 29.04.2020 was stayed, and thereafter, the appellants were permitted to continue in their services. The said special appeal was renumbered as Special Appeal No. 488 of 2020 and was decided vide judgment and order dated 26.02.2021 in a bunch of cases in which Special Appeal No. 326 of 2020 (Smt. Kiran Lata Singh Vs. State of U.P. and others) was the leading case. Against the said judgment and order, a Special Leave to Appeal (C) No. 7157-7160 of 2021 (Rajesh Kumar Chaturvedi etc. Vs. State of U.P. and others) was filed before the Apex Court in which vide order dated 01.07.2021, the order passed by the Division Bench in the Special Appeal and also the order passed in the writ petition was stayed and it was directed that the respondents shall pay the current salary to the appellants. Due to non compliance of the said order, a contempt petition was filed.

7. Learned counsel for the applicant argued that the applicant is one of the appellants before the Apex Court and he is the petitioner No.103 in the array of petitioners therein. The contempt petition was ordered to be closed vide order dated 01.10.2021, in view of the statement made in the matter on behalf of the State that they are ready and willing to pay the current salary to the petitioners from the date of passing of the order.

8. Learned counsel has argued that in identical matters, other teachers have been granted anticipatory bail/interim anticipatory bail by co-ordinate Benches of this Court. The order of the Apex Court has been considered in some of the matters and anticipatory bail has been granted to them. Learned counsel has placed before this Court annexure 7 to the affidavit in support of the anticipatory bail application and has placed the orders of other persons who have been granted anticipatory bail/interim anticipatory bail. It is argued that as such the applicant is also entitled to be released on anticipatory bail as the same is a new and fresh ground now.

9. Per contra, learned Additional Advocate General ably assisted by learned Additional Government Advocate appearing for the State of U.P. have argued that the first anticipatory bail application of the applicant was rejected by a detailed order on merits. It is argued that even the ground of parity with some of the persons

being Lokendra Pal Singh and 17 others was considered by the said court. It is argued that the applicant is not cooperating in the investigation at all. He has been called upon to provide the documents but he has till date not provided any document which would let the investigation proceed. It is argued that left with no other option the Investigating Officer has moved various applications before the concerned trial court for issuance of non bailable warrant against the applicant but no order has been passed till date by the said court.

10. It is argued that due to non cooperation of the applicant, the investigation in the matter is pending. The applicant is even not responding to the call of the Investigating Officer to provide the documents to him which would let the investigation proceed and conclude. It is argued that even in parcha No.11 dated 08.06.2021, the Investigating Officer has made a note about persuasion of his application for issuing non bailable warrant against the applicant.

11. The Section 438 of the Code of Criminal Procedure, 1973 as introduced in the State of Uttar Pradesh on 06.06.2019 reads as follows:--

"438. (1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely:--

(i) the nature and gravity of the accusation;

(ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii) the possibility of the applicant to flee from justice; and

(iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested, either reject the application forthwith or issue an interim order for the grant of anticipatory bail:

Provided that where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant, the applicant on the basis of the accusation apprehended in such application.

(2) Where the High Court or, as the case may be, the Court of Session, considers it expedient to issue an interim order to grant anticipatory bail under sub-section (1), the Court shall indicate therein the date, on which the application for grant of anticipatory bail shall be finally heard for passing an order thereon, as the Court may deem fit, and if the Court passes any order granting anticipatory bail, such order shall include inter alia the following conditions, namely:--

(i) that the applicant shall make himself available for interrogation by a police officer as and when required;

(ii) that the applicant shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

(iii) that the applicant shall not leave India without the previous permission of the Court; and

(iv) such other conditions as may be imposed under sub - section (3) of

section 437, as if the bail were granted under that section.

Explanation : The final order made on an application for direction under sub - section (1); shall not be construed as an interlocutory order for the purpose of this Code.

(3) Where the Court grants an interim order under sub - section (l), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.

(4) On the date indicated in the interim order under sub - section (2), the Court shall hear the Public Prosecutor and the applicant and after due consideration of their contentions, it may either confirm, modify or cancel the interim order.

(5) The High Court or the Court of Session, as the case may be, shall finally dispose of an application for grant of anticipatory bail under sub-section (l), within thirty days of the date of such application.

(6) Provisions of this section shall not be applicable,--

(a) to the offences arising out of, --

(i) the Unlawful Activities (Prevention) Act, 1967;

(ii) the Narcotic Drugs and Psychotropic Substances Act, 1985;

(iii) the Official Secrets Act, 1923;

(iv) the Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986.

(b) in the offences, in which death sentence can be awarded.

(7) If an application under this section has been made by any person to the High Court, no application by the same person shall be entertained by the Court of Session."

12. In the case of ***Siddharam Satlingappa Mhetre v. State of Maharashtra :*** **(2011) 1 SCC 694**, the Apex Court, after considering its earlier judgments, laid down certain factors and parameters to be considered while considering application for an anticipatory bail. In para 112 it has been held as under:

"112. The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:

(i). The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

(ii). The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii). The possibility of the applicant to flee from justice;

(iv). The possibility of the accused's likelihood to repeat similar or the other offences;

(v). Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her;

(vi). Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people;

(vii). The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of sections 34 and 149 of the Penal Code,

1860 the court should consider with even greater care and caution because overimplication in the cases is a matter of common knowledge and concern;

(viii). While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(ix). The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

(x). Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail."

13. In ***Niranjan Hemchandra Sashittal v. State of Maharashtra : (2013) 4 SCC 642,*** the Apex Court observed in para 26 as follows:

"26: That corruption is not to be judged by degree, for corruption mothers disorder, destroys societal will to progress, accelerates undeserved ambitions, kills the conscience, jettisons the glory of the institutions, paralyses the economic health of a country, corrodes the sense of civility and mars the marrows of governance. It is worth noting that immoral acquisition of wealth destroys the energy of the people believing in honesty, and history records with agony how they have suffered. The only redeeming fact is that collective sensibility respects such suffering as it is in consonance with constitutional morality."

The observation was on intolerance to any kind of corruption bereft of its degree.

14. In ***Asian Resurfacing of Road Agency Private Limited v. Central Bureau of Investigation : (2018) 16 SCC 299,*** the Apex Court observed that the cancer of corruption has, as we all know, eaten into the vital organs of the State. Cancer is a dreaded disease which, if not nipped in the bud in time, causes death.

15. In the case of ***Jai Prakash Singh v. State of Bihar, (2012) 4 SCC 379,*** (though the judgement was partly overruled in the case of ***Sushila Aggarwal Vs. State (NCT of Delhi : (2020) 5 SCC 1*** but on a different count) the Apex Court has held that anticipatory bail being an extra-ordinary privilege should be granted only in exceptional cases. The judicial discretion conferred upon the Court has to be properly exercised after proper application of mind to decide whether it is a fit case for grant of anticipatory bail. It is further held that "parameters for grant of anticipatory bail in a serious offence are required to be satisfied and further while granting such relief, the Court must record the reasons therefor. Anticipatory bail can be granted only in exceptional circumstances where the Court is prima facie of the view that the applicant has falsely been enroped in the crime and would not misuse his liberty."

16. In the case of ***P. Chidambaram v. Directorate of Enforcement :*** **(2019) 9 SCC 24,** the Apex Court has held that the power under Section 438 Cr.P.C. is an extraordinary power and the same was to

be exercised sparingly. It is also held that privilege of the pre-arrest bail should be granted only in exceptional cases.

17. The importance and relevance of custodial interrogation of the accused in a case and also that the Courts should be slow in grant of bail / prearrest bail has been elaborated by the Apex Court in P. Chidambaram's case (supra) which is as follows:

"74. Ordinarily, arrest is a part of the process of the investigation intended to secure several purposes. There may be circumstances in which the accused may provide information leading to discovery of material facts and relevant information. Grant of anticipatory bail may hamper the investigation. Pre-arrest bail is to strike a balance between the individual's right to personal freedom and the right of the investigating agency to interrogate the accused as to the material so far collected and to collect more information which may lead to recovery of relevant information. In State v. Anil Sharma [State v. Anil Sharma, (1997) 7 SCC 187 : 1997 SCC (Cri) 1039] , the Supreme Court held as under : (SCC p. 189, para 6)

"6. We find force in the submission of CBI that custodial interrogation is qualitatively more elicitation-oriented than questioning a suspect who is well-ensconced with a favourable order under Section 438 of the Code. In a case like this, effective interrogation of a suspected person is of tremendous advantage in disinterring many useful informations and also materials which would have been concealed. Success in such interrogation would elude if the suspected person knows that he is well protected and insulated by a pre-arrest bail order during the time he is interrogated. Very often interrogation in such a condition would reduce to a mere ritual. The argument that the custodial interrogation is fraught with the danger of the person being subjected to third-degree methods need not be countenanced, for, such an argument can be advanced by all accused in all criminal cases. The Court has to presume that responsible police officers would conduct themselves in a responsible manner and that those entrusted with the task of disinterring offences would not conduct themselves as offenders."

75. Observing that the arrest is a part of the investigation intended to secure several purposes, in Adri Dharan Das v. State of W.B. [Adri Dharan Das v. State of W.B., (2005) 4 SCC 303 : 2005 SCC (Cri) 933] , it was held as under : (SCC p. 313, para 19)

"19. Ordinarily, arrest is a part of the process of investigation intended to secure several purposes. The accused may have to be questioned in detail regarding various facets of motive, preparation, commission and aftermath of the crime and the connection of other persons, if any, in the crime. There may be circumstances in which the accused may provide information leading to discovery of material facts. It may be necessary to curtail his freedom in order to enable the investigation to proceed without hindrance and to protect witnesses and persons connected with the victim of the crime, to prevent his disappearance, to maintain law and order in the locality. For these or other reasons, arrest may become an inevitable part of the process of investigation. The legality of the proposed arrest cannot be gone into in an application under Section 438 of the Code. The role of the investigator is well defined and the jurisdictional scope of interference by the court in the process of investigation is limited. The court ordinarily will not

interfere with the investigation of a crime or with the arrest of the accused in a cognizable offence. An interim order restraining arrest, if passed while dealing with an application under Section 438 of the Code will amount to interference in the investigation, which cannot, at any rate, be done under Section 438 of the Code."

76. In Siddharam Satlingappa Mhetre v. State of Maharashtra : (2011) 1 SCC 694, the Supreme Court laid down the factors and parameters to be considered while dealing with anticipatory bail. It was held that the nature and the gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made and that the court must evaluate the available material against the accused very carefully. It was also held that the court should also consider whether the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.

77. After referring to Siddharam Satlingappa Mhetre judgment and observing that anticipatory bail can be granted only in exceptional circumstances, in Jai Prakash Singh v. State of Bihar, the Supreme Court held as under : (SCC p.386, para 19)

"19. Parameters for grant of anticipatory bail in a serious offence are required to be satisfied and further while granting such relief, the court must record the reasons therefor. Anticipatory bail can be granted only in exceptional circumstances where the court is prima facie of the view that the applicant has falsely been enroped in the crime and would not misuse his liberty. (See D.K. Ganesh Babu v. P.T. Manokaran : (2007) 4 SCC 434, State of Maharashtra v. Modh. Sajid Husain Mohd. S. Husain : (2008) 1 SCC 213 and Union of India v. Padam Narain Aggarwal : (2008) 13 SCC 305.)

18. In the latest case of ***Supreme Bhiwandi Wada Manor Infrastructure (P) Ltd. v. State of Maharashtra :*** **(2021) 8 SCC 753,** the Apex Court while considering the powers of High Court in grant of anticipatory bail has observed as follows:-

"25. The High Court, in granting anticipatory bail under Section 438 CrPC in the first two appeals and following that order in disposing of the challenge to the order of the Sessions Judge in the companion appeals, has evidently lost sight of the nature and gravity of the alleged offence. This Court in Sushila Aggarwal v. State (NCT of Delhi) [Sushila Aggarwal v.State (NCT of Delhi), (2020) 5 SCC 1 : (2020) 2 SCC (Cri) 721] has enunciated the considerations that must govern the grant of anticipatory bail in the following terms : (SCC p. 110, para 92)

"92.3.... While considering an application (for grant of anticipatory bail) the court has to consider the nature of the offence, the role of the person, the likelihood of his influencing the course of investigation, or tampering with evidence (including intimidating witnesses), likelihood of fleeing justice (such as leaving the country), etc. ...

92.4. Courts ought to be generally guided by considerations such as the nature and gravity of the offences, the role attributed to the applicant, and the facts of the case, while considering whether to grant anticipatory bail, or refuse it. Whether to grant or not is a matter of discretion; equally whether and if so, what kind of special conditions are to be imposed (or not imposed) are dependent on facts of

the case, and subject to the discretion of the court."

19. Anticipatory bail being an extra-ordinary remedy, should be resorted to only in a special case. The case prima facie indicates involvement of the applicant in the offence-in-question as he was the beneficiary by making use of the forged mark-sheet/degree. The applicant has not established any special circumstance. No reason is found to falsely implicate the present applicant.

20. It is settled principle of law that departmental and criminal proceedings are distinct and have different standards of proof. The two proceedings, criminal and departmental, are entirely different. They operate in different fields and have different objectives. The issue drawing attention of the Apex Court is with regards to the termination of the applicant. The present First Information Report is with regards to the filing of the forged document being the B.Ed. mark-sheet/degree on the basis of which employment was sought and was given. The matter of termination and lodging of the First Information Report / the investigation / trial if any, are altogether two different proceedings and are not in any manner linked with each other.

21. By the act of the applicant of seeking appointment on the basis of a forged mark-sheet/degree, one deserving candidate has lost his seat and chance of appointment and it may be a life long loss for many reasons like crossing the bracket of prescribed age and many other factors.

22. After having heard learned counsels for the parties and perusing the records, it is evident that the first anticipatory bail application of the applicant was rejected on 15.06.2021 on merits. In so far as, the orders of the other persons are concerned who have been granted anticipatory bail/interim anticipatory bail, the same are not binding on this Court. While rejecting the first anticipatory bail application, the Court was of the opinion that during investigation even at times custodial interrogation may be necessary to reach the roots of the crime, the same cannot be overlooked. Therefore, looking into the gravity of the offence, nature of offence and the legal position enumerated above, this Court is of the view that the anticipatory bail application has no merit and is liable to be rejected.

23. Accordingly, the anticipatory bail application is ***rejected.***

(2022)03ILR A79
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.03.2022

BEFORE

THE HON'BLE SAMIT GOPAL, J.

Criminal Misc. Anticipatory Bail Application U/S 438 CR.P.C. No. 19059 of 2021

M/s V.K. Traders ...Applicant
Versus
U.O.I. & Ors. ...Opposite Parties

Counsel for the Applicant:
Sri Atiqur Rahman Siddiqui, Ms. Vishakha Pande, Sri Rakes Pande

Counsel for the Opposite Parties:
Sri Krishna Agarawal, Sri Dileep Chandra Mathur, Sri Suresh Kumar Maurya

A. Criminal Law - Code of Criminal Procedure,1973 - Section 438 - Central Goods and Service Tax Act, 2017-Section 132(1)(a)(b)(c)(d)(i)-application-seeking

grant of bail-availment and utilisation of ineligible Input Tax Credit (ITC) on the basis of fake invoices issued in the name of M/s V. K. Traders of which applicant no. 2 was the sole proprietor-the disputed amount is an inadmissible Input Tax Credit of Rs. 1,80,86,343/- which is much less than 5 crore remain bailable as per Section 132(1)(a)(b)(c)(d)(i) of the Act, 2017 -the terms of imprisonment and the amount of fine is dependent on the amount involved in the offence-granting for bail does not arise for an offence which is bailable and a direction for the same can be issued only in respect of non-bailable and cognizable offence-Thus, the applicant's bail deserves to be rejected. (Para 1 to 20)

The application is rejected. (E-6)

List of Cases cited:

1. Onkar Nath Agrawal Vs St. (1976) SCC Online All 11: 1976 Cr.L.J. 1142(All.)

2. Joginder @ Jindi Vs St. of Har. (2008) 10 SCC 138

3. R.K. Krishna Kumar Vs St. of Assam (1998) 1 SCC 474

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

1. This anticipatory bail application under Section 438 of the Code of Criminal Procedure, 1973 ("Cr.P.C.") has been filed by the applicants M/s V.K. Traders/ applicant No. 1 and Vipin Kumar/ applicant No. 2 (added as an applicant in pursuance of order dated 25.11.2021 of the court) before this Court directly without approaching the Sessions Judge with the following prayer:

"It is, therefore most respectfully prayed that this Hon'ble Court may graciously be pleased to allow this application and grant anticipatory bail to the applicant under Section 132(1)(a)(b)(c)(d)(i) of the Central Goods and Service Tax Act, otherwise applicant shall suffer irreparable loss and injury.

And/or pass such other further order which this Hon'ble Court may deem fit and proper in the circumstances of the case."

2. Heard Sri Rakesh Pande, learned Senior Advocate assisted by Ms. Vishakha Pande, learned counsel for the applicants, Sri Dileep Chandra Mathur, learned counsel for the opposite party no. 3/ Directorate General, Goods and Services Tax Intelligence, Meerut Zonal Unit, Meerut through its Senior Intelligence Officer, Sri Suresh Kumar Maurya, Advocate holding brief of Sri Krishna Agarawal, learned counsel for the opposite party nos. 2/ Chief Commissioner, CGST, Meerut Zone, Meerut and 4/ Assisstant Commissioner, CGST, Meerut and perused the material on record.

3. No one appears on behalf of the opposite Party No.1/ Union of India.

4. Sri S.B. Maurya, learned State counsel is also present.

5. Learned counsel for the applicants states that he does not intend to file any rejoinder affidavit to the counter affidavit filed on behalf the opposite party no. 3 for which he was granted time on 12.2.2022.

The Court thus proceeds to hear the matter.

6. At the very outset, learned counsel for the applicants has stated that the dispute in the present matter relates to an amount of Rs.1,80,86,343/- which is stated to be

prima facie availed by M/s V.K. Traders the applicant no. 1 as an inadmissible Input Tax Credit (ITC). It is argued that the applicant no. 1 is the proprietorship firm of which the applicant no. 2 is the sole proprietor. It is argued that since in para- 28 of the counter affidavit it has specifically been mentioned that all the offences in which tax evasion is less than Rs. 5 crore remain bailable and only most grave offences involving tax evasion above Rs. 5 crore have been made non-bailable and cognizable offences and, as such, the amount in the present dispute is much less than Rs. 5 crore, and, hence the offences are bailable. It is argued that as such the applicant is entitled to be granted anticipatory bail.

7. Per contra, learned counsel appearing for the opposite party no. 3 opposed the prayer for anticipatory bail and argued that the present anticipatory bail application under Section 438 Cr.P.C. is not maintainable inasmuch as the amount involved, which has been availed by M/s V.K. Traders the applicant no. 1 and is an inadmissible Input Tax Credit is Rs.1,80,86,343/- which is much less than the amount which would make the offence non - bailable and cognizable.

8. This Court without going into the merits of the case proceeds to examine the following question which arises before it for its adjudication :

"Whether an application under Section 438 Cr.P.C. would lie and is maintainable for an offence which has been declared by the concerned statute as a bailable offence ? "

9. Section 438 of the Code of Criminal Procedure, 1973 as introduced in the State of Uttar Pradesh on 06.06.2019 reads as follows :-

"438. Direction for grant of bail to person apprehending arrest. -

(1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely:--

(i) the nature and gravity of the accusation;

(ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii) the possibility of the applicant to flee from justice; and

(iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested;

either reject the application forthwith or issue an interim order for the grant of anticipatory bail:

Provided that where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant, the applicant on the basis of the accusation apprehended in such application.

(2) Where the High Court or, as the case may be, the Court of Session, considers it expedient to issue an interim order to grant anticipatory bail under sub-section (1), the Court shall indicate therein the date, on which the application for grant of anticipatory bail shall be finally heard for passing an order thereon, as the Court

may deem fit, and if the Court passes any order granting anticipatory bail, such order shall include inter alia the following conditions, namely:--

(i) that the applicant shall make himself available for interrogation by a police officer as and when required;

(ii) that the applicant shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

(iii) that the applicant shall not leave India without the previous permission of the Court; and

(iv) such other conditions as may be imposed under sub - section (3) of section 437, as if the bail were granted under that section.

Explanation: The final order made on an application for direction under sub - section (1); shall not be construed as an interlocutory order for the purpose of this Code.

(3) Where the Court grants an interim order under sub - section (l), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.

(4) On the date indicated in the interim order under sub - section (2), the Court shall hear the Public Prosecutor and the applicant and after due consideration of their contentions, it may either confirm, modify or cancel the interim order.

(5) The High Court or the Court of Session, as the case may be, shall finally dispose of an application for grant of anticipatory bail under sub-section (l), within thirty days of the date of such application.

(6) Provisions of this section shall not be applicable,--

(a) to the offences arising out of, --

(i) the Unlawful Activities (Prevention) Act, 1967;

(ii) the Narcotic Drugs and Psychotropic Substances Act, 1985;

(iii) the Official Secret Act, 1923;

(iv) the Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986.

(b) in the offences, in which death sentence can be awarded.

(7) If an application under this section has been made by any person to the High Court, no application by the same person shall be entertained by the Court of Session."

10. The provision of anticipatory bail as per its scheme can be invoked by a person who has a "reason to believe that he may be arrested" for committing a "non - bailable offence".

11. For entertaining an application under Section 438 Cr.P.C., there are two requirements as contemplated in its Clause (1), which are as follows:

(i) There must be an accusation of the petitioner having committed a non-bailable offence. Obviously, this accusation must be an existing one or in any case stemming from the facts already in existence.

(ii) There must be reasonable apprehension or belief in the mind of the petitioner that he would be arrested on the basis of such an accusation.

The simultaneous existence of both these conditions is a sine qua non for

invoking courts jurisdiction. When the said two requirements are fulfilled, the High Court or the Court of Sessions could entertain an application for anticipatory bail and then consider it on its own merit.

12. In the case **Onkar Nath Agrawal v. State : 1976 SCC OnLine All 11 : 1976 Cr. L.J. 1142 (All.)** it was held that the power under section 438 Cr.P.C. is not to be exercised in vacuum but only on the satisfaction of the conditions spelled out in the section itself. The court further held in following terms:

5. It is obvious that the provision comprises of two parts. The first part envisages of the conditions under which a person is entitled to make an application for anticipatory bail in the court of Sessions or in the High Court. There are only two conditions which must exist before he can move such an application. In the first place there must exist a ground to believe that he may be arrested and secondly there must be an accusation of his having committed a non-bailable offence. The language is plain and unambiguous....."

13. In the case of **Joginder @ Jindi vs. State of Haryana : (2008) 10 SCC 138** the Apex Court has also held that Section 438 Cr.P.C. relates to non - bailable offences and a petition under Section 438 Cr.P.C. in relation to bailable offences is misconceived.

14. In the case of **R. K. Krishna Kumar Vs. State of Assam : (1998) 1 SCC 474** it has been held by the Apex Court that anticipatory bail cannot be granted in offences which are bailable.

15. It is thus concluded that the conditions prerequisite for the court's exercise of its discretion under Section 438 Cr.P.C. is that the person seeking such relief must have a reasonable apprehension of his arrest on an accusation of having committed a non-bailable offence.

16. The question thus gets answered by the above mentioned discussion that an application under Section 438 Cr.P.C. is only maintainable by a person who has apprehension of his arrest on accusation of having committed a non - bailable offence.

17. Section 132 of The Central Goods and Services Tax Act, 2017 (hereinafter referred as the 'Act') is as follows:

"Section 132 : Punishment for certain offences

(1) Whoever commits,or causes to commit and retain the benefits arising out of, any of the following offences, namely:-

(a) supplies any goods or services or both without issue of any invoice, in violation of the provisions of this Act or the rules made thereunder, with the intention to evade tax;

(b) issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act, or the rules made thereunder leading to wrongful availment or utilisation of input tax credit or refund of tax;

(c) avails input tax credit using the invoice or bill referred to in clause (b) or fraudulently avails input tax credit without any invoice or bill;

(d) collects any amount as tax but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;

(e) evades tax, or fraudulently obtains refund and where such offence is not covered under clauses (a) to (d);

(f) falsifies or substitutes financial records or produces fake accounts or documents or furnishes any false information with an intention to evade payment of tax due under this Act;

(g) obstructs or prevents any officer in the discharge of his duties under this Act;

(h) acquires possession of, or in any way concerns himself in transporting,removing, depositing, keeping, concealing, supplying, or purchasing or in any other manner deals with, any goods which he knows or has reasons to believe are liable to confiscation under this Act or the rules made thereunder;

(i) receives or is in any way concerned with the supply of, or in any other manner deals with any supply of services which he knows or has reasons to believe are in contravention of any provisions of this Act or the rules made thereunder;

(j) tampers with or destroys any material evidence or documents;

(k) fails to supply any information which he is required to supply under this Act or the rules made thereunder or (unless with a reasonable belief, the burden of proving which shall be upon him, that the information supplied by him is true) supplies false information; or

(l) attempts to commit, or abets the commission of any of the offences mentioned in clauses (a) to (k) of this section,

shall be punishable -

(i) in cases where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds five hundred lakh rupees, with imprisonment for a term which may extend to five years and with fine;

(ii) in cases where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds two hundred lakh rupees but does not exceed five hundred lakh rupees, with imprisonment for a term which may extend to three years and with fine;

(iii) in the case of any other offence where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds one hundred lakh rupees but does not exceed two hundred lakh rupees, with imprisonment for a term which may extend to one year and with fine;

(iv) in cases where he commits or abets the commission of an offence specified in clause (f) or clause (g) or clause (j), he shall be punishable with imprisonment for a term which may extend to six months or with fine or with both.

(2) Where any person convicted of an offence under this section is again convicted of an offence under this section, then, he shall be punishable for the second and for every subsequent offence with imprisonment for a term which may extend to five years and with fine.

(3) The imprisonment referred to in clauses (i), (ii) and (iii) of sub-section (1) and sub-section (2) shall, in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the Court, be for a term not less than six months.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), all offences under this Act, except the offences referred to in sub-section (5) shall be non-cognizable and bailable.

(5) The offences specified in clause (a) or clause (b) or clause (c) or clause (d) of sub-section (1) and punishable under clause (i) of that sub-section shall be cognizable and non-bailable.

(6) A person shall not be prosecuted for any offence under this section except with the previous sanction of the Commissioner."

18. Section 132 of the Act lists 12 offences that are punishable with imprisonment and/or a fine. The terms of imprisonment and the amount of fine, is dependent on the amount involved in the offence, or in some cases, the act committed by the offender. The provision further categorises certain offences as cognizable and non-bailable, if the amount involved exceeds Rs. 500 lakhs, as stated in clause-5 of the Section. These offences relate to person who supply goods or services without issuing invoices, or issue invoices without supplying goods or services and thus wrongfully avail Input Tax Credit, or to persons who collect tax but fails to pay it to the Government beyond a period of three months from the date on which payment becomes due. All other offences listed under the Act have been categorized as non-cognizable and bailable, as per clause-4 of the Section.

19. In the present case, it is a common ground between the applicants and the opposite party No. 3 that the offences are bailable. Even para-28 of the counter affidavit to the said effect stands unrebutted.

20. Resultantly, the question thus being answered by holding that granting of anticipatory bail does not arise for an offence which is bailable and a direction for the same can be issued only in respect of non-bailable and cognizable offences, the present anticipatory bail application deserves rejection and, accordingly, it is rejected.

21. Interim order dated 2.3.2022 is hereby vacated.

(2022)03ILR A85
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.01.2022

BEFORE

THE HON'BLE RAHUL CHATURVEDI, J.

Criminal Misc. Bail Application No. 46047 of 2021
&
Criminal Misc. Bail Application No. 44992 of 2021

Najim Hussain ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Ved Prakash Mishra, Sri Jai Shanker Malviya

Counsel for the Opposite Party:
A.G.A., Sri Janardan Prasad Tripathi

A. Criminal Law - Code of Criminal Procedure,1973 - Section 439 - Indian Penal Code, 1860 - Section 306-seeking for bail-delay in FIR-husband committed suicide on account of extra marital relationship of his wife with other person-as per doctor opinion, deceased died on account of asphyxia as a result of hanging-husband committed suicide under the score that he was under the constant threat and quarrelling terms with his wife-he seems too sensitive and possessive about his wife, he has many other avenues and alternatives to get rid off her instead of taking his own life-Extra-marital relationship per se, would not come within the ambit of Section 498-A-suspicion in the mind of husband cannot be regarded as mental cruelty-Extra marital realtionship alone is neither cruelty nor abetment of suicide in the absence of proper proof for provocation-

Mental cruelty varies from person to person, depending upon the intensity and the degree of endurance-extra-marital affair may not in all circumstances invite conviction under Section 306 IPC-bail granted.

The application is allowed. (E-6)

List of Cases cited:

1. Pinakin Mahipatray Rawal Vs St. of Guj.(2014) AIR SC 331,(2013) 10 SCC 48

2. K.V. Prakash Babu Vs St. of Karn.(2017) Cr.L.J.

3. Ghusabhai Raisangbhai Chourasia & ors. Vs St. of Guj. (2015) AIR SC 2670, (2015) 11 SCC 753

(Delivered by Hon'ble Rahul Chaturvedi, J.)

(1) There are two connected criminal misc. bail applications moved by the applicants Najim Hussain and Smt. Areeba and both are being named accused of case crime no. 463 of 2021, under Section 306 IPC, P.S. Katghar, District Moradabad and for the sake of brevity both the bail applications are being heard and decided by a common order.

(2) Both the applicants are facing prosecution in case crime no. 463 of 2021, under Section 306 IPC and are in jail since 09.09.2021, seeking enlargement on bail in exercise of power under Section 439 Cr.P.C.

(3) Heard Sir Jai Shanker Malviya, learned counsel for the applicant, Sir Janardan Prasad Tripathi, Ms. Sweety Srivastava, learned counsel for the complainant and learned AGA for the State and perused the material brought on record.

(4) The delayed FIR was registered by Sri Danish on 30.08.2019 for the incident said to have been taken place on 20.08.2021, there is not plausible justification coming forward to explain this delay. From the record, it is clear that the informant himself is not an eye witness to the incident and whatever the story narrated by him in the FIR is on the basis of some hearsay of others. The FIR was registered against the applicants Najim Hussain and Areeba with the allegation that on 22.08.2021 around 11.30 p.m. in the night, the wife of the deceased Jakir @ Choota (informant's brother) has given an information to the house of brother-in-law (Behnoi) of the informant that his younger brother Jakir @ Choota has sustained sudden cardiac arrest, on which the informant rushed to the Jakir's place where he saw that the dead body of Jakir was lying on the bed, which was carrying ligature mark around his neck. It is further submitted that the applicant-Nazim often used to visit his brother's place and has developed an intimate relationship with Jakir's wife Smt. Areeba. On this account, Jakir @ Chhota and his wife Smt. Areeba-applicant were often in a quarreling terms and was a severe cause of mental concern of his brother-Jakir @ Chhota. It is further mentioned that the deceased's wife Smt. Areeba-applicant without divorcing his husband- Jakir @ Chhota, got married with applicant- Najim. The informant has got firm belief that on account of this extra marital relationship of his wife Smt. Areeba, Jakir @ Chhota has committed suicide.

(5) The case was registered under Section 306 IPC. Provides to the abettor to commit suicide. Learned counsel for the applicant has drawn the attention of the

Court to the provisions of Section 107 IPC, which reads thus:-

"107. Abetment of a thing.--A person abets the doing of a thing, who--

(Secondly) --Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

(Thirdly) -- Intentionally aids, by any act or illegal omission, the doing of that thing. Explanation 1.--A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing. Explanation 2.--Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitate the commission thereof, is said to aid the doing of that act."

(6) It is further contended by the learned counsel for the applicant that the Investigating Officer during investigation has collected the number of statements of witnesses and every body has given sketchy and perfunctory allegation of extra marital relationship between the applicant-Najim Hussain and applicant- Smt. Areeba, who is legally wedded wife of deceased Jakir @ Chhota. This was the basic root cause of taking extreme step by the deceased by hanging himself.

(7) It has been contended by the learned counsel for the applicant that Danish, who was present at the time of inquest on 23.08.2021, did not expressed a whisper about alleged illicit relationship. The post mortem report too reveals that there is mark of singular ligature ad-measuring 22 x 3 cm around the neck with a gap of 5 cm on the back side of the neck obliquely place on the right side of the neck. A typical injury of hanging and the doctor too has opined that deceased died on account of asphyxia as a result of hanging.

(8) While drawing the attention of the Court to the number of witnesses, namely, Danish, informant who is not an eye witness, Kaleem, Rahees Ahmad, Mohd. Wajid and Pappu @ Sarif Ahmad, all the witnesses in unequivocally terms have stated that since Areeba was nurturing an illicit relationship with the applicant-Najim and this was sole root cause of taking the extreme step by committing suicide. On this line, there is tangent remark was pasted that the deceased used to share his feelings during his life time with the witnesses that both of them used to curse the deceased and instigate him to commit suicide.

(9) Learned counsel for the applicant has relied upon number of judgements of Hon'ble Apex Court as to whether the extra marital relation though come within the realm of "cruelty' but would not fall within the four corners of Section 107 IPC.

(10) It has been contended by the learned counsel that the term extra marital affair is termed which has not been defined in the IPC nor it is possible to give steal jacketed definition of the term as the situation may changes from case to case. The marital relationship means a legally protected marital interest of one spouse to another, which includes marital obligation to another like companionship, living under the same roof, sexual relation and the exclusive enjoyment between them, to have children, their upbringing, services in the

home, support, affection, love, liking and so on. Referring to three judgements of Hon'ble Apex Court in the case of **(i) Pinakin Mahipatray Rawal Vs. State of Gujrat** reported in **AIR 2014 (SC)331, (2013)10 SCC 48**, in the case of (ii) **K.V.Prakash Babu Vs. State of Karnataka reported in 2017, Crl.L.J.**, in the case of (iii) **Ghusabhai Raisangbhai Chourasia and others Vs. State of Gujrat** reported in **AIR 2015 SC 2670, (2015) 11 SCC 753,** judgement of Hon'ble Madhya Pradesh in the case of Anil Patel Vs. The State of Madhya Pradesh decided on 18.02.2020 in Crl. Appeal no. 514 of 2011 and the judgement of Madras High Court in the case of Manickam Vs. State of Tamilnadu decided on 29.09.2018 in Crl. Appeal No. 32 of 2008. Let us examine the obsrvations made by the Hon'ble Court one by one.

(11) In the case of **Pinakin Mahipatray Rawal (supra)** Hon'ble Apex Court while dealing with such type of cases where either of the parties committed suicide on the basis of suspicion i.e. counter part has developed certain amount of intimate relationship with some third person. The Hon'ble Apex Court has opined that the deceased seem to be too possessive for her husband and always under the emotional stress towards him that she might lose her husband. Too much of possessiveness could also lead to serious emotional stress, over and above the fact that she had one abortion and her daughter died after few days of birth, cumulatively affects that she might lose all the interest in her life and committed suicide. The mere fact that husband has developed some intimacy with another. During subsistence of his marital relationship and way to discharge his marital obligation as such would not amount to "cruelty" but it must be of such a nature as is likely to drive the spouse to commit suicide to fall within the explanation of Section 498A IPC.

It was held that the accused has developed an intimacy with her colleague but has not ill-treated the deceased either physically or mentally and the deceased was living with the accused in the matrimonial home till the date but she committed suicide. In the aforesaid circumstances, the Court has held that the alleged extra marital relationship was not such a nature as to drive the wife to commit suicide or that accused has ever intended or accord in such a manner, which under the normal circumstances, would driving wife to commit suicide.

(12) In paragraph 26 of the judgement of Hon'ble Apex Court in the case of **Pinakin Mahipatray Rawal (supra)** observed as under:-

"Section 26. The action for committing suicide is also on account of mental disturbance caused by mental and physical cruelty. To constitute an offence under Section 306, the prosecution has to establish that a person has committed suicide and the suicide was abetted by the accused. Prosecution has to establish beyond reasonable doubt that the deceased committed suicide and the accused abetted the commission of suicide. But for the alleged extra-marital relationship, which if proved, could be illegal and immoral, nothing has been brought out by the prosecution to show that the accused had provoked, incited or induced the wife to commit suicide."

(13) In the case of **Ghusabhai Raisangbhai Chourasia (supra)**, the

Hon'ble Court has held which read as under:-

"23. the accused husband of deceased had illicit relations with the appellant, who was divorcee. The deceased wife was residing separately on terrace of house and committed suicide by consuming poison. The Court said that the involvement of accused in illicit relationship, even if proven, was not evidence that mental cruelty was of such a degree that it would drive wife to commit suicide. In the aforesaid situation, the explanation of section 498-A ***of IPC is not attracted. The Court also observed that :-***

"It would be difficult to hold that the mental cruelty was of such a degree that it would drive the wife to commit suicide. Mere extra-marital relationship, even if proved, would be illegal and immoral, but it would take a different character if the prosecution brings some evidence on record to show that the accused had conducted in such a manner to drive the wife to commit suicide. In the instant case, the accused may have been involved in an illicit relationship with the appellant divorcee, but in the absence of some other acceptable evidence on record that can establish such high degree of mental cruelty, the Explanation to Section 498A, which includes cruelty to drive a woman to commit suicide, would not be attracted".

The Supreme Court held in Para 20 of the aforesaid case as under:-

"20. Coming to the facts of the present case, it is seen that the factum of divorce has not been believed by the learned trial Judge and the High Court. But the fact remains is that the husband and the wife had started living separately in the same house and the deceased had told her sister that there was severance of status and she would be going to her parental home after the 'Holi' festival. True it is, there is some evidence about the illicit relationship and even if the same is proven, we are of the considered opinion that cruelty, as envisaged under the first limb of Section 498A, IPC would not get attracted."

(14) Lastly in the case of **K.V.Prakash Babu (supra)** in that case marriage between the applicant and deceased was solemnized on 12.10.1997. The appellant has got involved with another woman. It was the case of prosecution that the deceased felt extremely hurt and eventually being unable to withstand the conduct of the husband who was allegedly involved in an extra-marital affair, put an end to her life on 20.08.2004. The Hon'ble Court observed that :-

"16. The concept of mental cruelty depends upon the milieu and the strata from which the persons come from and definitely has an individualistic perception regard being had to one's endurance and sensitivity. It is difficult to generalize but certainly it can be appreciated in a set of established facts. Extra-marital relationship, per se, or as such would not come within the ambit of Section 498-A IPC. It would be an illegal or immoral act, but other ingredients are to be brought home so that it would constitute a criminal offence. There is no denial of the fact that the cruelty need not be physical but a mental torture or abnormal behaviour that amounts to cruelty or harassment in a given case. It will depend upon the facts of the said case. To explicate, solely because the husband is involved in an extra-marital relationship and there is some suspicion in the mind of wife, that cannot be regarded as mental

cruelty which would attract mental cruelty for satisfying the ingredients of Section 306 IPC."

(15) It has come on record that various witnesses that the people talked in the locality with regard to the involvement of the applicant with another lady. It needs to be noted that the deceased being the husband felt betrayed and even to digest the humiliation and have committed suicide.

The Hon'ble Apex Court summarizing the impact of extra-marital relationship and its probable consequences that factual score that has the potentiality to shock a sensitive mind and a sincere heart, for the materials brought on record show how "suspicion" can corrode the rational perception of value of life and cloud the thought of a wife to such an extent, that would persuade her to commit suicide which entail more death, i.e. of the alleged paramour, and she could not cope up with social humiliation extinguish.

In the instant case too even assumed for the sake of argument, the prosecution story to be true on the face value, the husband has committed suicide under the score that he was under constant threat and quarrelling terms with his wife that she has developed an intimate relationship with the applicant-Najim. The deceased seems to be too sensitive and possessive about his wife, he has many other avenues and alternatives to get rid off her instead of taking is own life by hanging.

(16) Sir Janardan Prasad Tripathi, and Ms. Sweety Srivastava, learned counsel for the complainant have vehemently opposed the bail application by making mentioned that the wife of a person means dignity and honour and if someone has tried to p lay with other or dilute interse relation of husband and wife is an unacceptable proposition and frustrated husband if have committed suicide, the accused persons are liable to be punished under Section 306 IPC.

(17) To the mind of the Court, the allegation made therein of developing extra-marital relationship and this is the reason behind committing suicide. In the light of the aforesaid judgements of Hon'ble Apex Court, the applicants deserve to be bailed out.

(18) After hearing rival submissions of the learned counsel for the parties, the charge sheet has been submitted by the police under Section 306 IPC and nothing remains to be investigated and taking the guidelines of the aforesaid judgements of Hon'ble Apex Court with regard to the extra-marital relationship and its probable consequences in which the Hon'ble Apex Court has clearly and explicitly in its judgement exonerated the accused from the charges under Section 306 IPC and admitted on bail.

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

(20) Let the applicants- **Najim Hussain & Smt.Areeba,** be released on bail in the aforesaid case crime number on furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned with the following conditions which are being imposed in the interest of justice:-

(i) THE APPLICANT/APPLICANTS SHALL FILE AN UNDERTAKING TO THE EFFECT THAT HE/SHE/THEY SHALL

NOT SEEK ANY ADJOURNMENT ON THE DATE FIXED FOR EVIDENCE WHEN THE WITNESSES IS/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/APPLICANTS SHALL REMAIN PRESENT BEFORE THE TRIAL COURT ON EACH DATE FIXED, EITHER PERSONALLY OR THROUGH HIS/HER/THEIR COUNSEL. IN CASE OF HER ABSENCE, WITHOUT SUFFICIENT CAUSE, THE TRIAL COURT MAY PROCEED AGAINST HIS/HER/THEIR UNDER SECTION 229-A IPC.

(iii) IN CASE, THE APPLICANT/APPLICANTS MISUSES THE LIBERTY OF BAIL DURING TRIAL AND IN ORDER TO SECURE HER PRESENCE PROCLAMATION UNDER SECTION 82 CR.P.C., MAY BE ISSUED AND IF APPLICANT/APPLICANTS FAILS TO APPEAR BEFORE THE COURT ON THE DATE FIXED IN SUCH PROCLAMATION, THEN, THE TRIAL COURT SHALL INITIATE PROCEEDINGS AGAINST HIS/HER/THEIR, IN ACCORDANCE WITH LAW, UNDER SECTION 174-A IPC.

(iv) THE APPLICANT/APPLICANTS SHALL REMAIN PRESENT, IN PERSON, BEFORE THE TRIAL COURT ON DATES FIXED FOR (1) OPENING OF THE CASE, (2) FRAMING OF CHARGE AND (3) RECORDING OF STATEMENT UNDER SECTION 313 CR.P.C. IF IN THE OPINION OF THE TRIAL COURT ABSENCE OF THE APPLICANT/APPLICANTS IS/ARE 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 HIS/HER/THEIR IN ACCORDANCE WITH LAW.

(v) THE TRIAL COURT MAY MAKE ALL POSSIBLE EFFORTS/ENDEAVOUR AND TRY TO CONCLUDE THE TRIAL WITHIN A PERIOD OF ONE YEAR AFTER THE RELEASE OF THE APPLICANT/APPLICANTS.

(21) In case of breach of any of the above conditions, it shall be a ground for cancellation of bail.

(22) Since the bail application has been decided under extra-ordinary circumstances, thus in the interest of justice following additional conditions are being imposed just to facilitate the applicant/applicants to be released on bail forthwith. Needless to mention that these additional conditions are imposed to cope with emergent condition-:

1. The applicant/applicants shall be enlarged on bail on execution of personal bond without sureties till normal functioning of the courts is/are restored. The accused will furnish sureties to the satisfaction of the court below within a month after normal functioning of the courts are restored.

2. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad.

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

4. 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)03ILR A92
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.01.2022

BEFORE

THE HON'BLE RAHUL CHATURVEDI, J.

Criminal Misc. Bail Application No. 53947 of 2021

Atul Mishra ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Sri Ishan Deo Giri, Sri Sarvesh Pandey

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

A. Criminal Law - Code of Criminal Procedure,1973 - Section 439 - Indian Penal Code, 1860-Section 363, 366, 376 & POCSO Act,2012-Section ¾ - Scheduled Caste & Scheduled Tribe (Prevention of Atrocities) Act, 1989-Sections 3(2)v, 3(2)va-seeking for bail-victim was 14 ½ years old on the date of incident-victim and the applicant got married and remained in company and she gave birth to a baby-No doubt consent of minor girl has got no value in the eyes of law but in the present case, where the girl has given birth to a baby from the applicant and in her statemnt u/s 164 CrPC, she declined to go with her parents, she is living at Balgrih in most inhuman condition with her infant baby, this by itself is pathetic and would amount to adding to her miseries-it is extremely harsh and inhuman to devoid that baby from parental love and affection-In this extraordinary condition, keeping in view of the offence,evidence and complicity of the accused, bail is granted to the accused/applicant.(Para 1 to 21)

B. There are certain grey areas, where the severity of the sentences porvided under the Act, rightly so be diluted keeping in view of the facts of each case. if these rigors of the enactment is pasted hastily or irresponsiblity, it could lead to irreparable damage to the reputation and future of young whose action would have been only innocuous and may lead to spoiling the future life of that innocent lovers or couple who out of sheer innocence have initially developed and thereafter established that relationship, which if seen through the bioscope of these penal provisions of the Act, 2012, would fall within the realm of offence. (Para 12)

The application is allowed. (E-6)

(Delivered by Hon'ble Rahul Chaturvedi, J.)

1. Heard Shri Ishan Deo Giri, learned counsel for the applicant, learned A.G.A. and perused the record of the case.

2. Applicant Atul Mishra is facing prosecution in Case Crime No.0456 of 2019, u/s 363, 366, 376 I.P.C.; Section ¾ of POCSO Act, 2012 and Sections 3(2)v, 3(2)va of the Scheduled Caste & Scheduled Tribe (Prevention of Atrocities) Act, 1989, Police Station-Khaga, District-Fatehpur. He is behind the bars in connection with aforesaid offence since 4.10.2021 and seeking bail during trial, whereas the victim/prosecutrix is languishing at Government Child Welfare Home (Girls), Khuldabad, Prayagraj along with her infant baby in her lap.

3. Pursuant to the earlier orders of this Court, the notices were issued to the concerned respondents. The C.J.M. Fatehpur who vide its intimation dated 22.1.2022 informs the court that the notices were served upon Rajendra Prasad (Respondent No.2) personally, but of no response. Nor learned A.G.A. has filed any counter affidavit so far, on the other hand, the applicant is behind the bars since October, 2021 waiting for justice. Hence with the help and aid of learned A.G.A. the Court is proposing to decide the bail application.

3. Prosecution against the applicant was rolled by the father of the victim Ms "A' by filing F.I.R. on 17.11.2019 u/s 363 I.P.C. with the specific allegation that his daughter is a minor, pursuing her studies in Class-XI, (Date of Birth : 15.6.2005 as per her High School certificate) was enticed away by the applicant from 06.11.2019. This is the gist of the F.I.R.

4. Normally, this Court, on these factual aspect of the issue, is most uncharitable and unmerciful to such type of accused, who used a minor girl to quench their animal instinct and commit rape with her, but paragraphs herein below have compelled the Court to shift its stand for a greater cause and in the interest of larger good.

5. Applicability of statutory provisions in the facts and circumstances of the case is not a mathematical exposition or its theorem. When the law courts apply to these provisions, we should be careful about what would be its end result. If after applying any provisions in a given facts, leading to a disastrous and catastrophic result, it is the duty of the courts of law to mellow down its rigors in order to achieve much more meaningful and swallowable application of that provision in a given facts and circumstances of the case.

6. Now coming back to the facts of the case in hand, after lodging of the F.I.R., the police have recorded statements u/s 161 Cr.P.C. of the informant and his wife. From these statements, it was surfaced that the victim was missing since 6.11.2019, when gone to her school and thereafter her whereabouts were not known. Interestingly, from the same day the applicant too was missing. Thus it was gathered that both of them fled away to some unknown destination. Ms "A' who was student of Class-XI and as per her High School Certificate-2019 her date of birth is 15th June, 2005, and thus on the date of incident she was barely 14 years 4 months of age, provenly a minor girl.

7. Police after lodging the F.I.R. in October, 2019, came to the informant on 2.3.2021, for recording his statement second time (majeed bayan), Annexure-4, in which he candidly declined to co-operate with the police, revealing that he knows the whereabouts of the victim but he has decided not to interfere in her life. He also asked the police officials to drop the case. Accordingly, the police on the same day has filed CLOSURE REPORT No.14/2021 before the court for its acceptance.

8. Since the victim was not traceable for a considerable period, it seems it was a black blot on the functioning of the police; thus, they kept the matter pending. Eventually on 4.10.2021 after getting a tip from the informer, police arrested the victim and her small baby in her lap along with the applicant from east of by-pass.

After the alleged arrest of the victim, her baby and the applicant, the

police, all of a sudden became active and pasted Sections 3(2)5 of the SC/ST Act, as the victim belongs to "PASI' community.

9. After the alleged arrest, the victim was produced for her regular statements u/s 161 and 164 Cr.P.C. (Annexures 7 and 9) recorded on 7.1.2021 and 11.10.2021 respectively. Conjoint reading of both these statements following common feature are surfaced :-

(a) Victim is the student of Class-XI and having date of birth 16.6.2005.

(b) Both, the victim and the applicant, were nurturing inter-se relationship for the last three years.

(c) On 6.11.2019, without informing any one in the family or friends, both of them have decided to fled away. Thus from Khaga to Fatehpur, and thereafter via Lucknow, ultimately they reached to Delhi.

(d) After performing marriage in the Shiva Temple, they started living in a rented accommodation as husband and wife for two years. During this period, out of this relationship the prosecutrix/ victim on 21.5.2021 has given birth to a baby, who is now about 4 months old.

(e) In no uncertain terms, the victim states that on her own volition and accord she joined the company of the applicant; both of them decided to stay at Delhi and maintain the relationship as husband and wife. Even now the victim wants to live with the applicant as his wife and does not wish to go back with her parent.

10. After the aforesaid, since on the date of incident the victim was minor, consequently, all the authorities at the subordinate level, unmindful of the fact that the victim is carrying a baby in her lap, sent her to RAJKIYA BALGRIH (BALIKA) KHULDABAD, PRAYAGRAJ and the applicant is in jail. An order to this effect was passed by Juvenile Justice Board, Fatehpur on 8.10.2021 and since then she is residing at the said "Balgrih' with her baby. On the other hand learned Additional Sessions Judge/ Special Judge (POCSO Act), Fatehpur has rejected the bail application moved on behalf of applicant, having Bail Application No.2346/2021, vide order dated 23.11.2021. Hence the present bail application before this Court.

11. As mentioned above, undisputedly on the date of incident i.e. 06.11.2019, the victim Ms. "A' was a minor girl and her "consent' as contemplated u/s 375/376 I.P.C. has got no value in the eyes of law. This seems to be conservative approach to deal and decide the instant issue and rightly so. But as I have stated in the opening part of the order, that applicability of any statutory penal provision is not a mathematical exposition or theorem. It contains inherent flexibility to cope up an extraordinary situation and to have more meaningful and larger good.

12. There can be no second thought as to the seriousness of the offence under the POCSO Act and the object to achieve. Enactment of POCSO Act was to effectively address the heinous crime of sexual abuse and sexual exploitation of children. The Act was introduced to provide protection of children from the offences of sexual assault and harassment etc. This Act also provides for safeguarding the interest of the child at every stage of judicial process. But this laudable object must have some genuine and inherent exceptions too. It is imperative for the Court of law to draw thin line that demarcates the nature of acts that should

not be made to fall within the scope of this enactment. There are certain gray areas, where the severity of the sentences provided under the Act, rightly so be diluted keeping in view the facts of each case. If these rigors of the enactment is pasted hastily or irresponsibly, it could lead to irreparable damage to the reputation and future of young whose actions would have been only innocuous and may lead to spoiling the future life of that innocent lovers or couple who out of sheer innocence have initially developed and thereafter established that relationship, which if seen through the bioscope of these penal provisions of Act of 2012, would fall within the realm of offence.

13. Growing incidences where teenagers and young adults fall victim of the offences under the POCSO Act, being slapped by the penal provisions of POCSO Act without understanding the far reaching implication of the severity of the enactment, is an issue that brings much concern to the conscience of this Court. A reading of the statement of objects and reasons of POCSO Act would show that, as mentioned, to protect the child from the offences of sexual abuse, sexual assault and harassment, pornography, pursuant to the Article-15 of the Constitution of India, 1950 and the Conservation on the Rights of the children. However, a large array of the cases filed under the POCSO Act seems to be those arising on the basis of the complaints/F.I.Rs. lodged by the families of adolescents and teenagers who are involved in romantic relationship with each other. The scheme of the Act clearly shows that it did not intend to bring within its scope or limits, the cases of the nature where the adolescents or teenagers involved in the dense romantic affair.

14. This Court deems it fit and necessary to take a moment to delve into an important aspect, the awareness of which is crucial in understanding and appreciating with the cases of instant nature. It is crucial to accept the science and psychology of an adolescent and young adulthood at this juncture. This is because social and biological phenomenons are widely recognised as determinates of human development, health and socio-economic attainment across the life course, but our understanding of the underlying pathways and processes remains limited. Therefore, a "bio-social approach" needs to be adopted and appreciated i.e. one that conceptualizes the biological and social requirements of two teenagers, who on account of mutual infatuation are attracted and decide for their future. Their decision could be impulsive, immature but certainly not sinful or tainted as branded in the F.I.R. or complaint of the informant.

15. Reverting back to the facts of the present case, when both the parties (boy as well as girl) who are in their teens and college going, both of them met in the school during NCC parade, developed a natural inclination towards each other, thereafter cutting across the caste barrier between them eventually have decided to marry with each other. No doubt the girl was barely 14½ years on the date of incident. Both of them fled away, got married in a shiv Temple at Delhi and remained in company with each other for almost two years during which the girl has given birth to a baby, who is now 7-8 months old. She was clear in her mind that she does not want to go back with her parent but wants to remain in the company of the applicant, to whom she has accepted her husband. This relationship has given birth to a baby on 21.5.2021.

16. Assessing the totality of the circumstances, the childhood domestic training of the adolescent teenagers should be blamed and targeted, where their parent have miserably failed to inculcate the values of life, the family traditions, their focus towards the life and their priorities. It is the parent to be blamed for their complete inaction and their responsibilities qua their children. Lodging the F.I.R. would not be going to absolve them from their failure as parent. But all said and done, if these teens decided to enter into nuptial knot and now they have baby out of this relationship, certainly rigors of POCSO Act would not come in their way. The girl is not sexually abused or no sexual assault was made upon her, nor she has been sexually harassed by the applicant, as contemplated by the object of POCSO Act.

17. No doubt consent of minor girl has got no value in the eyes of law, but in the present scenario where the girl has given birth to a baby from the applicant and in her 164 statement, she has declined to go with her parent and from last 4-5 months residing at Rajkiya Balgrih (Balika) Khuldabad, Prayagraj in most inhuman condition with her infant baby, this by itself is pathetic and would amount to adding to her miseries.

18. This is extremely gloomy situation, where the applicant is in jail since 4.10.2021 for the alleged sin committed by him while marrying with a girl belonging to scheduled caste and both of them are peacefully residing as husband and wife. It is extremely harsh and inhuman to devoid that baby from the parental love and affection on account of the fact that both of them loved each other and decided to marry, when the girl was minor. Even today the boy (the applicant) is more than ready to keep his wife and baby with him and would take good care of both.

19. Thus, assessing the totality of facts and circumstances, in this extraordinary condition and keeping in view the nature of the offence, evidence on record regarding complicity of the accused and without expressing any opinion on the merits of the case, the Court is of the view that the applicant has made out a case for bail. The bail application is allowed.

20. **The In-Charge of Rajkiya Balgrih (Balika) Khuldabad, Prayagraj is hereby directed to release the victim/prosecutrix Ms. Anju Devi w/o Atul Mishra (the applicant) with her baby forthwith.**

21. Let the applicant ***Atul Mishra***, who is involved in aforementioned case crime be released on bail on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned subject to following conditions. Further, before issuing the release order, the sureties be verified.

(I) IT IS TRUE THAT THE APPLICANT IS BEING BAILED OUT ON THE ASSURANCE GIVEN BY THE LEARNED COUNSEL FOR THE APPLICANT THAT THE APPLICANT IS MORE THAN READY AND WILLING TO KEEP HIS WIFE AND BABY WITH HIM. THE COURT FEELS TO SECURE THE FUTURE OF THE GIRL AND BABY, IT IS DIRECTED THAT AFTER THE RELEASE ON BAIL, THE APPLICANT SHALL PRODUCE A BANK DRAFT OF RS.5,00000/- (5 LACS) IN FAVOUR OF HIS WIFE MS. ANJU DEVI AND HER BABY, WHICH

SHALL BE HANDED OVER TO THE VICTIM BEFORE THE COURT WITHIN A PERIOD OF SIX MONTHS FROM THE DATE OF HIS RELEASE ON BAIL, ELSE THE BAIL ORDER IS LIABLE TO BE CANCELLED BY THE COURT CONCERNED ITSELF WITHOUT REVERTING THE ORDERS TO THE COURT.

(iI) THE APPLICANT SHALL FILE AN UNDERTAKING TO THE EFFECT THAT HE SHALL NOT SEEK ANY ADJOURNMENT ON THE DATE 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 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 IPC.

(iv) 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., MAY BE ISSUED AND IF 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 IPC.

(v) THE APPLICANT SHALL REMAIN PRESENT, IN PERSON, BEFORE THE TRIAL COURT ON DATES FIXED FOR (1) OPENING OF THE CASE, (2) FRAMING OF CHARGE AND (3) RECORDING OF STATEMENT UNDER SECTION 313 CR.P.C. IF IN THE OPINION OF THE TRIAL COURT ABSENCE OF THE APPLICANT IS DELIBERATE OR WITHOUT SUFFICIENT CAUSE, THEN IT SHALL BE OPEN FOR THE TRIAL COURT TO TREAT SUCH DEFAULT AS ABUSE OF LIBERTY OF BAIL AND PROCEED AGAINST HIM IN ACCORDANCE WITH LAW.

(vi) THE TRIAL COURT MAY MAKE ALL POSSIBLE EFFORTS/ENDEAVOUR AND TRY TO CONCLUDE THE TRIAL WITHIN A PERIOD OF ONE YEAR AFTER THE RELEASE OF THE APPLICANT.

In case of breach of any of the above conditions, it shall be a ground for cancellation of bail.

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

23. Since the bail application has been decided under extra-ordinary circumstances, thus in the interest of justice following additional conditions are being imposed just to facilitate the applicant to be released on bail forthwith. Needless to mention that these additional conditions are imposed to cope with emergent condition-:

1. The applicant shall be enlarged on bail on execution of personal bond without sureties till normal functioning of the courts is restored. The accused will furnish sureties to the satisfaction of the court below within a

month after normal functioning of the courts are restored.

2. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad.

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

4. 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.

24. However, it is made clear that any wilful violation of above conditions by the applicant, shall have serious repercussion on his/her bail so granted by this Court and the trial court is at liberty to cancel the bail, after recording the reasons for doing so, in the given case of any of the condition mentioned above.

(2022)03ILR A98
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 07.03.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MRS. SAROJ YADAV, J.

Capital Sentence (Reference) No. 2 of 2017
connected with
Criminal Appeal No. 376 of 2022

State of U.P. ...Appellant
Versus
Rahul Singh @ Govind Singh ...Respondent

Counsel for the Appellant:
Sri Jyotindra Mishra, Senior Advocate and Shri Kapil Misra, Advocate

Counsel for the Respodent:
Shri Vimal Srivastava, Govt. Advocate and Shri Chandra Shekhar Pandey, Additional Govt. Advocate

A. Criminal Law - Code of Criminal Procedure,1973-Section 374(2) - Indian Penal Code,1860 - Sections 302/34, 394, 411, 120-B - challenge to-conviction/death-penalty-murder-no motive-no previous enmity-weak direct evidence-deceased died of asphyxia as a result of ante-mortem stangulation-statement of PW-1 the only eye-witness is not worthy of credence-her statemetns are contradictory what have been written in FIR and what have been stated in the court-the source of light has not been shown in the site plan-in the darkness of night, it is not possible to witness the incident which is being caused in a orchard-PW-1 stated accused looted jewellery and mobile but not mentioned in FIR-Similarly, in her examination -in – chief, she stated that the accused were armed with small guns but nothing is there in the FIR-She stated that some village-people saw the incident, at another place she denies the same-Thus, the story of prosecution is not worthy of credence, to prove the charge levelled against the convict beyond reasonable doubt-Thus the appellant is entitled for acquittal.(Para 1 to 30)

The appeal is allowed. (E-6)

List of Cases cited:

1. Rajeev Singh Vs St. of Bih. & anr. (2015) 16 SCC 369

(Delivered by Hon'ble Mrs. Saroj Yadav, J.)

1. This Capital sentence Reference registered as Capital Sentence No.2 of 2017 was made to this Court under Section 366 of Code of Criminal Procedure, 1973 (in short ***'Cr.P.C.'***) for confirmation of Capital sentence awarded to the convict Rahul

Singh @ Govind Singh in Sessions Trial No.341 of 2011 State Vs. Rahul Singh @ Govind Singh arising out of Crime

No.858 of 2010 under Sections 302/34, 394, 411, 120-B of the Indian Penal Code, 1860 (in short ***'I.P.C.'***), Police Station Dalmau, District Rae Bareli by judgement and order dated 15.6.2017 passed by Shri K.K.Sharma, learned Sessions Judge, Rae Bareli wherein the convict Rahul Singh @ Govind Singh has been punished with death sentence under Section 302 I.P.C. and with a fine of Rs.25,000/-.

2. The convict Rahul Singh @ Govind Singh preferred a Criminal Appeal (Defective) No.1342 of 2017 against the aforesaid judgement and order passed against him. As there was a delay in filing the criminal appeal, the same was condoned by a Co-ordinate Bench of this court vide order dated 10.12.2021. Thereafter, the office has allotted the regular number bearing Criminal Appeal No.376 of 2022.

3. Since the above captioned capital sentence reference and criminal appeal no.376 of 2022 arise out of a common factual matrix and the judgement dated 15.6.2017, therefore we are disposing them by a common judgement.

4. Shorn off unnecessary details, the facts necessary for deciding the above Capital Reference as well as criminal appeal are as under :-

5. A First Information Report (in short ***'F.I.R.'***) was registered on 4.9.2010 at around 5 O'clock in the morning as crime no.858/2010 on the basis of a written report submitted by Ms. Kunti at Police Station Dalmau, District Rae Bareli. It was stated in the written report that on the preceding night, she was sitting with her father Raju and mother Manju Devi, at the door of the house near the pond, Rahul Singh @ Govind Singh Son of Rati Bhan Singh, resident of Purey Bairhana Majrey Valipur came there alongwith his two aides at around 2 O' Clock in the night. Rahul Singh asked for drinking-water from her father and also asked her father to go and call Chotu Neta. Her father went to call Chotu Neta to Village Chandi Ka Purwa. When her father came back, Rahul and his two aides locked her and her mother inside her house and took her father away towards orchard. They again came back and Rahul tied her hands on the back and also tied cloth on the eyes of her mother. They all left her inside the house and took her mother away towards orchard and there they killed her mother and father by throttling their necks. Thereafter, they hanged them on the tree. She somehow escaped from the house and went in village and told about the incident to the villagers. When villagers came there, Rahul alongwith his aides ran away towards north of the pond. When Rahul alongwith his aides, was hanging her mother on the tree, the electric bulb was lightening on the door at the time. She got very much frightened and somehow saved her life. The villagers had seen the accused persons.

6. After investigation, a chargesheet no.108/2010 was submitted against convict Rahul Singh under Section 302, 394, 411 and 120-B I.P.C. Another chargesheet no.134 of 2010 against co accused Ajay @ Bhanu Yadav, Dharmendra @ D.K. and Ram Deen @ Ram Ji Baba was submitted. The concerned Magistrate took cognizance on the chargesheets and committed the case to Sessions Court. The Sessions court

declared Ajay @ Bhanu Yadav a juvenile and separated his file and sent to the Juvenile Justice Board for trial.

7. Two separate sessions trials were registered. The Sessions Trial No.104 of 2011 was registered against accused Dharmendra @ D.K. and Ram Deen @ Ram Ji Baba and another Sessions Trial No.341 of 2011 was registered against convict Rahul Singh. Both the Sessions Trials were tried, heard and decided together by the impugned judgement of the trial court. The charges were framed on 29.9.2011 against accused Rahul Singh @ Govind Singh, Dharmendra @ D.K. and Ram Deen @ Ram Ji Baba in their respective Sessions Trials. All the accused persons denied the charges and claimed to be tried.

8. The prosecution in order to prove its case, examined nine witnesses in toto and also proved the relevant documents Exhibit. Ka-1 to Ka-16. Nine witnesses examined are Km. Kunti P.W.-1, Sri Ram P.W.-2, Shri Shiv baran, P.W.3, Arvind Kumar Srivastava P.W.-4, Raj Bahadur Patel P.W.-5, Lok Nath Verma P.W.-6, Anand Kumar Verma P.W.-7, Kailash Prakash Yadav P.W.-8 and Vansh Rai Bharti P.W.-9.

9. Statement of accused persons were recorded under Section 313 Cr.P.C. wherein the accused persons denied the crime and also the recovery. They have also stated that the case was registered against them due to enmity and witnesses have deposed falsely. They refused to give any evidence in defence. The trial court after hearing the arguments of both the sides came to the conclusion that the prosecution has proved the charges levelled against the accused Rahul Singh @ Govind Singh under Section 302 I.P.C. beyond reasonable doubt but the offence under rest of the Sections i.e. 394, 411, 120-B I.P.C. could not be proved.

10. For convicting Rahul Singh, the learned trial court relied upon the statements of P.W.-1 Ms. Kunti the complainant, as she was the only eye-witness examined in the court. The trial court found this witness creditworthy and opined that the reliability of the witness could not be shaken by the defence. The trial court after hearing the convict Rahul Singh on the point of quantum of sentence came to conclusion that the crime committed by the convict Rahul Singh comes under 'Rarest of the Rare category' and punished him with death sentence under Section 302 I.P.C. coupled with a fine of Rs.25,000/-

11. The trial court sent the impugned judgement and conviction order awarding the capital sentence for confirmation by this Court under Section 366 Cr.P.C.

12. Being aggrieved of the aforesaid judgement and order, the convict Rahul Singh preferred Criminal Appeal No.376 of 2022 (primarily registered as criminal Appeal No.1342 (Defective) of 2017).

13. Heard Shri Jyotindra Mishra learned Senior Advocate assisted by Shri Kapil Mishra, learned counsel for the appellant/ convict and Shri Vimal Srivastava, learned Government Advocate assisted by Shri Chandra Shekhar Pandey, learned A.G.A.

14. Learned counsel for the appellant/convict submitted that the only eye-witness examined in this case is Ms. Kunti and her statement is not worthy of

reliance because she has given a contradictory statement in her examination-in-chief and in cross- examination. Her statement made in the court also differs what she has mentioned in the written-report. The time of incident in the written-report has been mentioned by her at around 2.00 A.M. in the night while in the court she has stated the time around 11.00 P.M. in the night. In her examination-in-chief, she has stated that she knew Rahul Singh prior to the incident because he used to come to her house quite often but in the cross-examination, she has stated that she never saw accused Rahul prior to this incident. It was also submitted by the counsel for the convict that the distance where the bodies were found hanging was about 100 steps (250 feets) as has been shown in the site-plan so it was not possible to see anything in a dark night from such a distance. Though P.W.-1 has stated that electric bulb was lightening at the door of her house but no such source of light has been shown in the site-plan. P.W.-1 has improved her version in the court and has stated that the accused also looted two pairs of payals(anklets), one gold nose-pin and one mobile-set from the house of the informant but nothing has been mentioned in the written-report about such loot. In fact, the convict Rahul Singh was on run from the jail, so police was annoyed with him and implicated him falsely in the crime. There is no evidence against the convict Rahul Singh hence he should be acquitted.

15. Contrary to it, Shri Vimal Srivastava, learned Government Advocate submitted that the prosecution has proved its case against the convict by examining nine witnesses, before the trial court. P.W.-1 Kunti the daughter of both the deceased persons is the eye- witness of the case and she has supported the prosecution story and the learned trial court after evaluating the evidence available on record held guilty and convicted the appellant by awarding him capital sentence. The appellant/ convict is a habitual offender having criminal history of three more cases prior to the present case. He also submitted that the convict committed murder of the parents of the complainant in a ghastly manner without showing any mercy towards them and also without thinking about the informant, the daughter of the deceased persons.He also submitted that the medical evidence corroborates the prosecution version as the doctors who conducted post-mortem on the cadavers of the deceased persons, have found that the death was caused by ante-mortem strangulation. He also submitted that there is no reason to disbelieve the evidence of eye-witness Km. Kunti hence learned trial court has rightly held guilty the convict Rahul Singh under Section 302 I.P.C. and punished him with capital sentence. The appeal of the convict should be dismissed and the reference made by the trial court should be confirmed.

16. Considered the rival submissions and perused the original record. The main principles of Criminal Law Jurisprudence in Indian Judicial System are as under :-

i). Prosecution has to prove its case beyond reasonable doubt.

ii). The accused shall be presumed innocent until proved guilty.

iii). The burden of proof i.e. onus of proving the accused guilty beyond reasonable doubt never shifts.

17. The Hon'ble Supreme Court of India in the case of ***Rajeev Singh Vs. State of Bihar and another : (2015) 16 SCC 369***, has held as under :

"66. It is well-entrenched principle of criminal jurisprudence that a charge can be said to be proved only when there is certain and explicit evidence to warrant legal conviction and that no person can be held guilty on pure moral conviction. Howsoever grave the alleged offence may be, otherwise stirring the conscience of any court, suspicion alone cannot take the place of legal proof. The well-established canon of criminal justice is "fouler the crime higher the proof". In unmistakable terms, it is the mandate of law that the prosecution in order to succeed in a criminal trial, has to prove the charge(s) beyond all reasonable doubt."

71. In his treatise, The Law of Evidence, Professor Ian Dennis while dwelling on the theme of allocation of burden in criminal cases, elaborated on the significance and purport of presumption of innocence and the general rule of the burden of proof. While reiterating the fundamental notion of criminal jurisprudence, that a person is presumed to be innocent until proven guilty and that the burden of proof in a criminal case is on the prosecution to establish the guilt of accused beyond reasonable doubt, the author underlined that the acknowledged justification of such presumption is that the outcome of a wrong conviction is regarded as a significantly worse harm than wrongful acquittal.

72. Viewed from the moral and political perspectives, it has been observed that in liberal states, the rule about the burden of proof has been elevated to the status of fundamental human right encompassing the assurance of liberty, dignity and privacy of the individual and from this standpoint it is essential that the state should justify fully its invasion of the individual's interest by proving that he had committed an offence, thereby abusing the freedom of action accorded to him or her by the liberal state. The significance of such presumption finds insightful expression in the following extract of State Vs. Coetzee [1997] 2 L.R.C.593, South African Constitutional Court in the words of Sachs,J.:

"There is a paradox at the heart of all criminal procedure in that the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important do constitutional protections of the accused become. The starting point of any balancing enquiry where constitutional rights are concerned must be that the public interest in ensuring that innocent people are not convicted and subjected to ignominy and heavy sentences massively outweighs the public interest in ensuring that a particular criminal is brought to book .... Hence the presumption of innocence, which serves not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of the legal system. Reference to the prevalence and severity of a certain crime therefore does not add anything new or special to the balancing exercise. The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put into the scales as part of a justificatory balancing exercise. If this were not so, the ubiquity and ugliness argument could be used in relation to murder, rape, car- jacking, house breaking,drug-smuggling, corruption... the list is unfortunately almost endless, and nothing would be left of the presumption of innocence, save, perhaps, for its relic status as a doughty defender of rights in the most trivial of cases."

The quintessence of the philosophy embedded in the above extract

is that the presumption of innocence serves not only to protect a particular individual on trial but to maintain public confidence in the enduring integrity and security of the legal system.

77. Distraught though one would be, by the calamitous incident, judicial adjudication has to be assuredly guided by the recognised legal dicta and cannot be swayed by emotional or sentimental surges. Justice has to be administered essentially in accordance with law and uninfluenced by individual predilections, notions and prejudices....."

18. Now, we have to examine this matter and appreciate the evidence available on record keeping in mind the aforesaid cardinal principles of criminal jurisprudence.

19. Admittedly, there is no eye-witness of the crime except Km. Kunti P.W.1 the daughter of both the deceased and also the complainant of the case. No doubt it is settled law that the evidence of a relative witness cannot be doubted or discarded only for the reason that he or she is a relative of the deceased, if the evidence is worthy of raising confidence of the court. Km. Kunti has mentioned in the F.I.R. that she alongwith her deceased parents were sitting in front of the door of her house at 2.00 A.M. in the night. The accused Rahul alongwith his two aides came there and asked for drinking-water. Thereafter, he asked her father to go and call Chotu Neta from a nearby village Chandi Ka Purwa. When her father came back, Rahul and his two aides locked her and her mother inside her house and took her father away towards orchard. They again came back and Rahul tied her hands on the back and tied a cloth on the eyes of her mother. They left her in the house and took her mother away towards the orchard and killed her mother and father by throttling their necks and hanged them separately on the tree. She somehow escaped and went in the village and told everything to the village people. When village people came there, Rahul alongwith his aides ran away towards the north of the pond. This witness was examined in the court initially on 20.10.2011. In her examination-in-chief, she has stated that she knew accused Rahul Singh. He used to come at her house quite-often. The incident occurred about one year ahead. She alongwith her mother Manju and father were sleeping outside the house. At that time, Rahul alongwith two other persons came there and asked for drinking-water. She gave him water in a 'lota' (a small vessel in round shape) but her father asked her to bring the water in a bucket. Then she brought water in a bucket and also some sugar. Her father handed over the water and sugar to them. They went away. After some time, Rahul came back to return the bucket and asked her father to go and call Chotu Yadav. Chotu Yadav is a resident of village Chandi Ka Purwa and is a leader. Her father was not ready to go, then Rahul asked him "you go nothing will happen to you". Thereafter her father went to call Chotu to his village. When his father went, Rahul asked his aides to tie her and her mother's hands and locked them inside a room in the house. She and her mother could not raise cry due to fear. When her father came back, Chotu Yadav was not with him. Thereafter, Rahul took her father away tying her hands, towards the orchard. At that time one lamp (chimni) was lightening there. About half an hour later, Rahul and his aides came back and they picked up two pairs of silver payals(anklets) one gold nose pin of her mother and one mobile, forcibly. Thereafter they tied cloth on the eyes of her mother and

took her away towards the orchard and forgot to lock the door. They killed her parents. Police personnel asked her to lodge a report so she went to the police station and got written the report by someone and lodged the F.I.R. She proved her written report as Exhibit -Ka-1. She has further stated that the investigating officer asked her about the incident and she told whatever he asked. She has further stated that at the time of incident, one electric-bulb was lightening at the door of her house. In the light of electric-bulb, she witnessed that Rahul Singh and two other persons were killing and hanging her parents. She has further stated that accused persons first pressed the neck of her parents and tied the hands on the back thereafter they hanged them on the tree. She has further stated that in the room where she was locked, one *'Chimni'* (lamp) was lightening. She somehow came from her house and saw that Rahul and other persons were killing and hanging her parents on the tree. She has further stated that the accused persons were seen by the village-people also. The accused persons were armed with small guns. She identified the accused persons present in the Court and told that these are the accused persons who killed her parents.

20. P.W.-2 Shri Ram is brother-in-law of the deceased Raju. He has stated that he did not see anything. Whatever he has stated was told by Ms. Kunti, P.W.-1.

21. P.W.-3 is Shiv Baran Singh, who was the Gram Pradhan at that time. He stated in the Court that the incident occurred at about 2-3 O' Clock in the night. He reached on the spot after hearing the noise and found the dead bodies of the deceased persons hanging on a mango-tree, in the orchard. Km. Kunti and other persons were present there. He asked Km. Kunti about the incident. She told him about the incident. This witness has stated that these facts were narrated to him by Kunti at about 5.00 A.M. in the morning. He did not see the incident himself. When he reached the spot, police was present there.

22. P.W.-4 is Dr. Arvind Kumar Srivastava who conducted post-mortem on the cadavers of both the deceased and found the following ante-mortem injuries on the cadaver of Raju :-

"Ante Mortem Injuries

Ligature mark around the neck 15 cm x 2-1/2 cm (front side mostly) present, transversely circular over the prominence adam, Base of ligature mark pale soft, reddish margins. As described - C gap of 2 cm. post and lateral aspect of neck. Total circumference of neck 43 cms."

The cause of death has been mentioned *"due to asphyxia as a result of ante mortem strangulation."*

23. On the cadaver of deceased Manju, the following ante mortem injuries were found :-

"Ante Mortem injuries

i). Circular ligature mark of 12 cm x 2 cm over adam apple. C-Gap on lateral and Postirior aspect of 28 cm. Transversely placed over the front and lateral aspect of neck. Base of ligature mark pale, soft reddish margins. Ecchymosis on the either side of the ligature mark. Perchamentization of skin under the ligature mark present.

Total Circumference of neck - 40 cm. Hyoid Bone on Palpation fractured."

Cause of death has been mentioned *"due to asphyxia as a result of ante mortem strangulation."*

24. The time of death has been mentioned within one day from the time of post-mortem and has been explained i.e. within twenty four hours.

25. We examined the evidence of P.W.-1 Km. Kunti who is the only eye-witness of the incident, we found that Km. Kunti in her statement has stated that accused persons forcibly picked up two pairs of silver payals (anklets) and one gold nose-pin and one mobile-set from her house at the time of the incident but nothing has been mentioned about this loot or picking up of jewellery in the F.I.R. Km. Kunti who is also the complainant of the case has mentioned in the F.I.R. that she alongwith her deceased parents was sitting in front of the door of her house at 2.00 A.M. in the night and accused Rahul alongwith his two aides came there. But when she was examined in the court as P.W.-1, she has stated that at about 10-11 A.M. in the night, she alongwith her parents was sleeping outside the house and accused Rahul alongwith his two aides reached there. The time mentioned in the F.I.R. and stated as P.W.-1 has a remarkable difference and it is a major contradiction in the statement of the alleged eye-witness.

26. The motive of crime has neither been alleged nor proved. Though it is not always necessary to prove the motive of the crime because no one can peep into the mind of a miscreant but where the direct evidence is of weak type, then it gives strength to the prosecution case. Km. Kunti has stated in her cross- examination that there was no enmity of her with Rahul or his aides. In the examination-in-chief, she has also stated that accused were armed with small guns but nothing is there in the F.I.R. about these guns which is a material fact. She has stated that some village-people saw the incident, at another place she denies the same. The evidence of P.W.-1 does not have a ring of truth. The story of prosecution and the evidence led to prove the same is not worthy of credence, to prove the charge levelled against the convict Rahul beyond reasonable doubt. The evidence is not such as to raise the confidence of the court. In the present matter, the prosecution could not prove the charges levelled against the convict beyond reasonable doubt as evidence of only eye-witness of the incident i.e. P.W.-1 is not worthy of credence. There are contradictions on the point of time and also what have been written in the F.I.R. and what have been stated in the court.

27. The source of light though stated by the P.W.-1 has not been shown in the site-plan Exhibit- Ka-6, the distance from the house of the deceased where P.W.-1 was present, and of the place of occurrence was about 70-72 paces. In the darkness of in a night, it is not possible to witness the incident which is being caused in a orchard without proper and direct light. Hence to sum up, that the prosecution could not prove the charges levelled against the accused beyond reasonable doubt. The learned trial court has erred in appreciating the evidence of P.W.-1 and holding guilty and convicting the accused on the basis of that evidence. The Court is conscious of the fact that the parents of the complainant were murdered but whether it was the appellant who has killed them that has not been proved by the prosecution by cogent and clinching evidence. Thus, the appellant is entitled for acquittal hence, he is acquitted of the charges. The impugned judgement and order passed by the trial court deserves to be set-aside and death reference is liable to be rejected.

28. Consequently, the criminal appeal preferred by the convict is allowed. The impugned judgement and order dated 15.6.2017 passed by the trial court in Sessions Trial No.341 of 2011 State Vs. Rahul Singh @ Govind Singh arising out of Crime No.858 of 2010 under Section 302/34, 394, 411, 120-B I.P.C., Police Station Dalmau, District Rae Bareli wherein the convict Rahul Singh @ Govind Singh has been punished with death sentence under Section 302 I.P.C., is hereby set aside.

29. Capital sentence Reference registered as Capital Sentence No.2 of 2017, referred under Section 366 of Cr.P.C. for confirmation of Capital sentence awarded to the convict/appellant, in aforesaid Sessions Trial, is hereby rejected.

30. Let the convict Rahul Singh @ Govind Singh convict in Sessions Trial No.341 of 2011 State Vs. Rahul Singh @ Govind Singh arising out of Crime No.858 of 2010 under Section 302/34, 394, 411, 120-B I.P.C., Police Station Dalmau, District Rae Bareli be released from the concerned jail, if not required in any other case.

31. Appellant Rahul Singh @ Govind Singh is directed to file personal bond and two sureties each in the like amount to the satisfaction of the court concerned in compliance with Section 437-A of the Code of Criminal Procedure, 1973.

32. Let a copy of this order alongwith original record be transmitted to the trial court concerned forthwith for necessary information and further action.

(2022)03ILR A106
APPELLATE JURISDICTION

CRIMINAL SIDE
DATED: ALLAHABAD 16.03.2022

BEFORE

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

Capital Case No. 4 of 2020
With
Reference No. 3 of 2020

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

Counsel for the Appellant:
From Jail, Sri Abhay Raj Yadav, Sri Dinesh Kumar, Sri Rakesh Prasad

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

A. Criminal Law - Code of Criminal Procedure,1973 - Section 374(2) - Indian Penal Code,1860 - Section 302, 376-challenge to-conviction/death penalty-blind murder-FIR anti-timed-testimony of PW-1 renders the testimony of PW-3 and PW-4 unreliable and unacceptable-PW-3 is a chance witness whose presence at the spot appears unnatural and her testimony that she narrated everything to PW-1 is at variance with what PW-1 states-PW-3 though speak of being a witness of both rape and murder but gives no description of how the victim was murdered-ligature marks found on the neck, have no explanation in the ocular account and there is no recovery of ligature, either from the spot or from anywhere else-recovery of vest is completely bogus, the vest could not be forensically connected with the crime-the testimony of PW-4 that he saw accused running away from a distance is also unrelaible becuase the sugarcane crops would have blocked his view, even otherwise, PW-3 could not disclose the colour of clothes worn by the accused when he noticed him runnning away-no presence of spermatozoa in

swabs and clothes, hence, the offence of rape cannot be said to be proved-the prosecution is guilty of hiding the truth by not seizing the trouser and shoes alleged to be noticed by PW-4 near the body of the deceased and by not carrying out DNA profiling of the biological material that could be recovered/noticed, or already recovered, this raises a question regarding the bona fides of investigation-Thus, ocular account rendered by PW-3 and PW-4 not worthy of acceptance to hold the appellant guilty and there is no forensic evidence to link the appellant with the crime-Prosecution failed to prove the charges against the appellant-the benefit of doubt must go to the accused-prayer to confirm the death penalty is rejected.(Para 1 to 30)

The appeal is allowed. (E-6)

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

1. This appeal from jail by appellant questions the judgment and order of conviction and punishment dated 24.01.2020 and 28.01.2020, respectively, passed by Additional District & Sessions Judge/Fast Track Court No.1, Amroha in Sessions Trial No. 196 of 2017, convicting the appellant under Sections 302 and 376 I.P.C. and punishing him with death penalty and fine of Rs. 50,000/- under Section 302 I.P.C. and imprisonment for life and fine of Rs. 50,000/-, coupled with a default sentence of one year additional imprisonment, under Section 376 IPC. As death penalty has been awarded, the court below has sent a reference for confirmation of death penalty which has been registered as Reference No. 3 of 2020.

2. Considering the nature of the offence, the name of the victim, members of her family and witnesses of that village has not been disclosed and therefore, wherever required, they have been described either by an alphabet or witness number.

INTRODUCTORY FACTS

3. (i) The prosecution case has its genesis in a written report dated 24.02.2017 (Exb. Ka-1), lodged by PW-1 (husband of the victim), scribed by PW-2 (nephew of PW-1), which was registered as Case Crime No. 170 of 2017 at P.S. Nawgawa Sadar, District Jyotibaphule Nagar at 17.35 hrs on 24.02.2017 of which the Chik FIR (Exb Ka-7) was proved by PW-7 (Santosh Kumar Singh). In the FIR, PW-1 alleged that his wife (victim), on 24.02.2017, at about 2 pm, went to the field to harvest mustard crop. When she did not return, PW-1 went in search of her. During search for the victim, PW-3 (a lady) informed PW-1 that she saw two men taking the victim into the field of X. On receipt of information when the field of X was scanned, at about 4.00 pm, in between standing sugarcane crop of X, the victim was found lying dead with clothes torn. By alleging that PW-4 (grandson of PW-1) had informed the informant of having seen the appellant with another man running away, FIR was lodged against the appellant and one unknown person.

(ii) By about 9 pm on 24.02.2017, inquest proceedings were completed and an inquest report (Exb. Ka-9) was prepared by Veerpal Singh (PW-8) of which PW-2 and PW-4, amongst others, are witnesses. The inquest report notices that the body was of an old lady aged about 75 years and it had no lower wear.

(iii) On 25.02.2017, at 12:10 pm, autopsy of the body was conducted by Dr. Deepak Verma (PW-6). The autopsy report (Exb. Ka-2), inter alia, notices:-

(a) Rigor mortis all over the body;

(b) Ante-mortem injuries:-

(1) Contusion size 10 x 8 cm present on right side of face and temporal region;

(2) Ligature mark size 26 x 1.5 cm present on both side of neck, 4 cm below from left ear pinna and 2 cm below from right ear pinna, 4 cm below from chin;

(3) Multiple abraded contusion involving an area 16 x 12 cm both side of neck till both medial ends of clavicle;

(4) Abrasion size 5 x 4 cm present on left side of mandible;

(5) Multiple small abrasions present on both side of upper chest in area 22 x 11 cm, largest 1 x .2 cm and smallest .5 x .1 cm;

(6) Abrasion sized .2 x .1 cm present on dorsal aspect of right thumb; and

(7) Bleeding from mouth present.

(c) Internal Examination:-

(1) Hyoid Bone found fracture;

(2) 500 ml semi-digested food in the stomach;

(3) Semi-digested food in the small intestine;

(4) Faecal matter in the large intestine; and

(5) Genital organ: abrasions present on left inner wall of vagina.

(d) Cause & Manner of death: Asphyxia, due to strangulation.

(e) Estimated time of death: Between one-half and a day before.

(iv) On 26.02.2017, the appellant was arrested and a *Baniyan* (vest) is stated to be recovered at his instance from below a Tree standing in a vacant field. The recovery is witnessed by PW-5. The recovery memo (Exb. Ka-4) records that the accused pointed towards semen mark on the vest which was encircled by a red pen for forensic examination. It be noted that from the record it appears that the appellant was medically examined on 26.02.2017 which revealed no fresh and external injury but the medical examination report has not been exhibited.

(v) On 27.03.2017, charge-sheet (Exb. Ka-6) prepared by PW-7 is submitted against the appellant under Section 302/376 I.P.C. on which, after cognizance, the case was committed to the Court of Session and, vide order dated 17.03.2018, charge of offences punishable under sections 376 and 302 IPC were framed against the appellant. The appellant pleaded not guilty and claimed for a trial.

(vi) During the course of trial, the prosecution examined as many as eight witnesses: **PW-1** is the informant (husband of the deceased victim); **PW-2** is the nephew of the informant and the scribe of the FIR; **PW-3** is a village lady, who is an eye-witness of the incident; **PW-4** is the grandson of PW-1, who saw the appellant running away from the spot in just a knicker and a vest; **PW-5** is the witness of recovery of *Baniyan* (vest) at the instance of the appellant; **PW-6**, namely, Dr. Deepak Verma, is the doctor who conducted autopsy of the body and prepared the autopsy report; **PW-7,** namely, Santosh Kumar Singh is the Investigating Officer, who proved various stages of the investigation including registration of FIR, recovery of vest and other articles; and **PW-8**, namely, Veer Pal Singh, is a police witness, who proved the inquest proceeding.

(vii) After the submission of charge-sheet, a forensic report, dated 07th April, 2017, (Exb. Ka-17), prepared by the Joint Director, Forensic Laboratory, U.P, Amroha, was received in respect of following articles:-

(a) *Petticoat* recovered from the spot, alleged to be worn by the deceased;

(b) *Kurta* (upper-wear) found on the body of the deceased;

(c) Saree found on the spot;

(d) Nose pin;

(e) Key;

(f) *Baniyan* (Vest) Sando (recovered at the instance of the appellant); and

(g) Swab obtained from *labia majora* & pubic area of the deceased.

As per the report, on Articles (a), (c) and (f), human blood was found. Human blood was not found on articles (b), (d), (e) and (g). No spermatozoa seen on (a), (b), (c), (f) and (g).

(viii) The incriminating circumstances appearing in the prosecution evidence were put to the accused to record his statement under Section 313 Cr.P.C. The accused claimed that he has been falsely implicated; that no vest was recovered at his instance; and that he is a resident of Bihar, who works as a Labour. However, no defence evidence was led.

(ix) The trial court by relying on the ocular account and the medical evidence, held the charge proved. Accordingly, it convicted the appellant under Sections 302 and 376 I.P.C. and punished him as above.

(4) We have heard Sri Rakesh Prasad and Sri Abhay Raj Yadav for the appellant; Sri Amit Sinha, learned A.G.A., for the State and have perused the record.

SUBMISSIONS ON BEHALF OF THE APPELLANT

(5) Learned counsel for the appellant submitted as follows:

(i) That on careful scrutiny of the entire evidence, the FIR appears ante-timed inasmuch as entries in some of the papers prepared during investigation were at variance with the Chik FIR; copy of the FIR was delivered to the informant (PW-1) after several days; the body was dispatched in a private vehicle; and there was inordinate delay in sending the body for autopsy. All of this suggest that the prosecution story was weaved on suspicion and guess-work.

(ii) That except PW-3, there is no eye-witness of the incident. The testimony of PW-3 in respect of culpability of the appellant does not inspire confidence for the following reasons:- (a) PW-1 (the informant) who was the first to be informed by PW-3 states that PW-3 did not disclose the name of the appellant and had only informed that two men were seen taking the victim into the sugarcane crop in the field of X. This statement of PW-1 is at variance with PW-3, who not only improves upon the disclosure made by her to PW-1 but also states that except PW-3, there was no one else. This improvement/alteration suggests that the prosecution is hiding the truth and has not come with clean hands; (b) PW-1 states that when the deceased did not timely return, he went in search of her, on way, while returning from the fields, PW-3 met PW-1 and informed PW-1 that PW-3 saw two persons taking the victim into the sugarcane crop but, PW-3, in her testimony, states that after seeing the incident she got nervous and went back home and, thereafter, she came to inform PW-1. If that was so, the FIR would have reflected the information; (c) PW-3 is a chance witness, who does not have her own field next to the field from where the body of the deceased was recovered or from where the deceased was taken therefore, it is not probable that she would have been present at the spot to witness the incident; and (d) that her statement was recorded on 25.2.2017 and, importantly, her presence is not shown in the site plan (Ex. Ka-3) prepared by PW-7 on 24.02.2017.

(iii) That the testimony of PW-4 is not reliable because, firstly, according to PW-1, PW-4 reported to PW-1 having seen

two persons running away from the spot but PW-4 states that he saw just the appellant and, secondly, there were tall sugarcane plants in that field which would block his vision. Otherwise also, the testimony of PW-4 is inconclusive and on its own cannot form basis of conviction.

(iv) That recovery of the *Baniyan* from open place, firstly, is bogus, false and planted and, secondly, is inconsequential as it could not be proved that it carried blood of the deceased. Otherwise also, it has not been demonstrated by any evidence that the appellant was wearing the same vest at the time of occurrence.

(v) That the offence of rape could not be established because presence of spermatozoa was neither noticed on the clothes, or swabs taken from private part, of the deceased nor on the vest recovered at the instance of the appellant. Further, the *Baniyan* (vest) though, as per forensic report, carried stain of human blood but, interestingly, the presence of blood is not noticed in the recovery memo. Moreover, there is no DNA profiling of the blood found on vest to connect it with the deceased. Even the blood group was not matched. Thus, there is no forensic evidence to link the appellant with the crime.

(vi) The appellant is not a domicile/ permanent resident of the village and had no association with the deceased therefore, it is highly improbable as to why he would commit the crime more so, when the victim is a 75 years old lady. Rather, it is a case of blind murder of a sensitive nature therefore, to solve out the case, the police picked the appellant, a resident of Bihar, who had no support, and framed him in the case. The malicious nature of the investigation is apparent from the circumstance that no effort was made to trace out the second accused or to seize the trouser of the suspect which, according to PW-4, was lying at the spot. Because, if the prosecution story is to be believed then the accused-appellant was running in just a knicker and a vest therefore, he must have left the remaining clothes behind. This creates a serious doubt in the prosecution case and throws possibility of the prosecution hiding the truth and this suspicion gets fortified by the circumstance that there is no compliance of the provisions of section 53-A CrPC to enable DNA profiling.

(vii) The presence of ligature mark around the neck of the deceased finds no explanation in the testimony of the eye-witness (PW-3). Even the ligature has not been recovered therefore, it appears, the deceased died in some other manner than alleged by the prosecution.

(viii) Lastly, it is not one of those rarest of rare cases where death penalty could be awarded. More so, when the appellant is not a person with any past criminal record and is of young age.

SUBMISSIONS ON BEHALF OF THE STATE

6. **Per contra**, learned A.G.A. submitted as follows:

(i) That the FIR could not be demonstrated to be ante-timed. More over, nothing has come on record to suggest that the investigation was tainted with animosity or malice.

(ii) That, admittedly, neither PW-1 nor PW-2 is an eye-witness therefore, their deposition cannot be used to contradict or doubt the statement of PW-3 and PW-4, who are eye-witnesses. Further, PW-3 and PW-4 were consistent and nothing has been suggested to them as to with what motive would they falsely

implicate the appellant. Further, nothing has been elicited from them in their cross-examination to render their testimony untrustworthy or unreliable.

(iii) That absence of spermatozoa in the vaginal swab or swab obtained from pubic area or the *Baniyan* (vest) is not conclusive to rule out sexual assault, particularly, when from the testimony of PW-6 it is established that there were signs of sexual assault and the body condition (lower garment missing) as well as the ocular account suggested that the victim was sexually assaulted.

(iv) That non recovery of the ligature by itself would not be fatal to the prosecution case because once PW-3 noticed the appellant over the body of the deceased, the burden was on the appellant to explain as to in what circumstances he was in that position and there being not much time gap between him being noticed with the deceased in that position and the recovery of the body of the deceased from the same spot, in absence of explanation, inference can be drawn that it was the appellant who committed rape as well as murder of the deceased. Otherwise also, it is quite possible that the Saree or the clothes worn by the deceased might have been used as a ligature to strangulate the deceased.

(v) That in respect of non-seizure of the trouser, no suggestion / question was put to I.O. (PW-7) or to PW-8, who conducted inquest and no question was put to the eye witness (PW-3) to elicit whether the accused appellant was wearing trouser or not therefore, on that ground, no adverse inference can be drawn against the prosecution.

(vi) That medical examination of the accused appellant was conducted though its report has not been exhibited.

(vii) That though sentence is at the discretion of the Court, but there are aggravating circumstances which may justify death penalty. The aggravating circumstance is that it is a case of rape and murder of 75 years old woman which is an expression of depravity and exhibition of a conduct that shocks the conscience.

PROSECUTION EVIDENCE

7. Having noticed the rival submissions, before we proceed to weigh and analyse the submissions made, it would be useful to notice in brief the testimony of the witnesses examined by the prosecution. Their testimony is as follows:

8. **PW-1** - the informant. He states that on the date of the incident the deceased had left at about 2.00 pm to harvest mustard crop standing in his field. When the deceased did not timely return, PW-1 went in search of her, on way, PW-1 met PW-3 who informed PW-1 that two persons were seen taking the deceased, by pulling her, into the sugarcane field. On receipt of that information, PW-1 went to the field of X and, at about 4.00 pm, found the deceased lying dead, naked from below. He stated that the appellant and his associate were seen running away from the sugarcane field by PW-4. Whereafter, he got the report lodged at P.S. Nauganwa, after getting it scribed by PW-2, which was marked Ex. Ka-1. **In the cross-examination**, PW-1 stated that his village is about 100 meters away from his field; the deceased was found lying in the field of X which had standing sugarcane crop taller than a man; that the accused-appellant is a resident of Bihar and had come to the village in the month of November/ December 2017; that at the time when he was searching for his wife there were hundreds of villagers with him; that while leaving to harvest the crop the deceased

had taken a *Darati* (harvesting tool) and a *Chaadar* (a cloth spread); that the accused-appellant was not known to the deceased; that the accused Upendra works on the Kolhu (expeller) of one Y, a resident of another mohalla (area); that neither PW-3 nor PW-4 had given him information with regard to the name of that person whom they saw; that when PW-3 met PW-1 and gave the information, it must be about 3.30 pm; that PW-3 met PW-1 while PW-3 was returning from her field; that PW-3 met PW-1 about 150 meters away from the field of X; that field of PW-3 is 100-150 meter south of PW-1's field; that field of PW-4 adjoins PW-1's field; that PW-4 is son of PW-1's son; that PW-1 stayed with the body of his wife for about one hour; that PW-1 and the scribe reached police station between 5 and 6 pm; that the report was written at the police station; that it must have taken an hour to lodge the report; that he received copy of the FIR after few days; that after the FIR, the police visited the spot second time on the next day; and that on the date of the incident police had reached the spot at about 4 pm and conducted the inquest and prepared inquest report at 4 pm. He denied the suggestion that the deceased was murdered by unknown persons; the incident was not witnessed by any one and that the report was lodged after deliberation and in consultation with the police.

9. **P.W.-2, nephew of the informant** is the scribe of the FIR. He states that he scribed whatever was told to him by the informant. In the cross-examination he stated that PW-1 (informant) had reached police station before he could reach. He reached there about 5 minutes later. PW-1 had brought paper before he could reach. He reached there by about 5.30 pm. He denied the suggestion that he had written the report on the suggestion of the I.O.

10. **P.W.-3-** the eye-witness. She states that on the date of the incident it was Shivratri. It must have been around 4 pm. She had gone to collect grass from the fields; there, the deceased was harvesting mustard crop. Upendra (the appellant) came and took the deceased to a nearby sugarcane field. When, PW-3 reached the spot, she saw the appellant committing rape. After committing rape, the appellant killed the deceased. After seeing all of this, PW-3 got scared and came back to her house and disclosed everything to PW-1. **In her cross-examination**, she stated that she is on visiting terms with the informant; that she informed the informant (PW-1) as well as the I.O. about the incident on the date of the incident itself; that she did not inform PW-1 that there were two persons involved; that she informed PW-1 about the incident at about 4 pm or may be 4.30 pm; that the place of the incident is just a field away from her her own field; that in between her own field and the place where the incident occurred there is another field where there is also standing crop, the height of which is not much; that, on a daily basis, she goes to the field to collect grass and there is no fixed time for collecting grass; that on the date of the incident, she must have been there at the field for one and a half hour and that she must have gone to the field on or about 3 pm; that she returned only after witnessing the incident and she has seen the appellant lying over the victim; and that there was nobody other than herself at the spot. During her cross-examination, when confronted by her statement recorded under Section 161 Cr.P.C., wherein she stated that she got afraid after witnessing the incident and returned back home and had not disclosed about the incident to anyone, she denied having made such statement to the I.O. She clarified it by stating that while she was returning, on her way back home,

she did not meet anyone but when she had kept the collected grass at her house, she went to the house of PW-1 to tell him about the incident and it was then, that PW-1 went in search of his wife. She denied the suggestion that she is lying because of her relationship with PW-1. She also denied the suggestion that she had not seen the incident.

11. **PW-4-** is the grandson of PW-1. He stated that on 24.02.2017, at about 4 pm, while he was going towards his field, he saw the appellant running out of the sugarcane crop in the field from where the body was recovered. Later, he came to learn that at that spot the appellant had killed his grandmother. **In his cross-examination**, when confronted that he had not disclosed the time (4 pm) to the I.O. as to when he saw the accused appellant coming out of that field, he stated that he does not know the reason as to why it was not written by the I.O. He denied the suggestion that the time disclosed by him is on the basis of legal advice. He also stated that he is not aware as to who killed his grandmother and that for the first time he is stating that the appellant had killed his grandmother. He stated that he saw the accused running away from a distance of about 50 meter; and that he did not come face to face with the deceased while he was running away. He stated that at that time, the accused was wearing a knicker and a vest whereas at the spot trouser *(pant)* and *Jooti* (lady shoes) were lying near the body. He could not tell the colour of the clothes worn by the accused and he stated that at that time there was nobody else. He also stated that he did not meet PW-3 on the date of the incident. He stated that his grandfather (PW-1) had come to know about the murder before him and that on the same day he had spoken about the incident to PW-1. He further stated that after coming to know about the murder, he had visited the spot where the body was lying. On being questioned as to when the police had arrived at the spot, he could not remember the time but stated that PW-1 (informant) went to the police station along with the police. He also stated that by the time, after arrival, the police went back it was night. He denied the suggestion that he did not see what he has stated.

12. **PW-5 (witness of recovery of vest).** He proved that at the pointing out of the appellant a vest, kept beneath a brick, underneath a Sheesham tree, standing in an open field, was recovered of which seizure memo (Ex. Ka-4) was prepared. **In his cross-examination**, he stated that the vest had no stain of any kind on it. The vest was blue coloured and no mark was put on it by the I.O. He admitted that the place from where the recovery was made is about a kilometer away from his village and that he was informed from before that the accused would come there for recovery of vest. He also admitted that he knows the informant from before. He denied the suggestion that nothing was recovered in his presence and that because of his relationship with PW-1 he is telling a lie.

13. **PW-6 - Dr. Deepak Verma**, the doctor who conducted the post-mortem. He proved the post-mortem report and stated that he had also prepared a vaginal smear slide for examination by forensic laboratory. Interestingly, the injury no.1 in his autopsy report which is noted as contusion, in his oral deposition is disclosed as an abrasion. **In his cross-examination**, he stated that injury nos. 1, 3 and 6 could not be caused from lathi /danda but they could be a result of friction on account of rubbing against the ground and

could also be a consequence of falling over gravel. He stated that injury no. 2 could be a consequence of strangulation with the aid of rope or a cloth. He stated that on injury no.2 no impression of finger nails or finger were noticed nor he made effort to find it. But on private parts of the deceased, abrasion was noticed and signs of sexual assault were also noticed and that abrasion could not be a result of scratching. He stated that in the nails or hands of the deceased neither hair nor skin was found. He added that the deceased must have had a meal two hours before her death.

14. **PW-7-Santosh Kumar Singh,** the Investigating Officer (I.O.). He stated that he took over investigation of the case on 24.2.2017; after obtaining Chik report, recording statement of FIR scribe and the person who prepared Chik FIR, inspected the spot and prepared site plan (Exb. Ka-3); that he recorded the statement of the informant (PW-1) and the eye-witnesses (PW-3 and PW-4) on 25.02.2017; that on 26.02.2017, he arrested the accused who confessed about committing the crime and on his pointing out, vest was recovered of which seizure memo is Ex. Ka-4. On 27.2.2017, the accused's medical examination report was received which was entered in the CD. On 01.03.2017, he recorded the statement of witnesses A, B and C *(all of them not examined),* who all supported the prosecution case. He stated that on 08.03.2017 (vide Ex. Ka-5), he sent the recovered articles for forensic examination and on 27.03.2017, he submitted charge-sheet (Ex. Ka-6). He stated that the GD entry No.17 (Ex. Ka-8) in respect of the Chik FIR (Ex. Ka-7) was made by Constable Clerk Rajveer Singh under his direction, at 17:35 hours on 24.02.2017, whose signature he recognises. **In his cross-examination**, he stated that PW-1, in his statement recorded under Section 161 Cr.P.C., stated that PW-3 had informed PW-1 about the incident after cremation of the deceased. He stated that in the site plan that has been prepared by him he had not shown the area of the fields adjoining the field from where the body was recovered. He stated that the standing crop of sugarcane though tall was not very dense. PW-7 stated that in the site plan, point C is the spot from where witnesses spotted the accused running. He stated that he has not mentioned the distance between A and C. *(Note: A is the spot where deceased was harvesting mustard*). He clarified it by stating that between point A and C there are 6 fields though the distance between them has not been mentioned. He admitted that sugar cane crop between the points A and C were tall but not dense. He further admitted that he did not mention the distance between point D and point C (*Note: Point D is the spot where the accused were noticed running*). He admitted that the field from which body was recovered had standing sugar cane crop. He admitted that near the spot there is a field of one Z (not examined) and of no other person and that surrounding the spot there is jungle and fields but no public rasta (road). He denied the suggestion that he colluded with the informant to frame the accused to solve out the case when in fact it was some unknown person who committed the offence. **On 04.01.2020, he was again examined on recall** to prove the material exhibits that were recovered and sent for forensic examination. On his statement, they were marked exhibits and the forensic report was also exhibited. Notably, the Sando *Baniyan* (vest) marked M.Ex. No.6 was white coloured. **In his cross-examination**, he stated that the place from where the vest/ *baniyan* was recovered had been a vacant field near the place of

incident with no standing crop though it was ploughed. He stated that though it was not mentioned in the seizure memo that the vest carried blood-stained, but, it had blood-stain. He admitted that the forensic report did not disclose presence of spermatozoa on the vest. He denied the suggestion that the recovery of *Baniyan* (vest) is bogus.

17. **PW-8, S. I. Veerpal Singh**. He conducted the inquest proceeding. He proved the inquest report (Ex. Ka-9) and that the condition of the body was described as follows: marks of strangulation on neck, nose - bleeding; *kurta* (top wear) - white coloured - torn; *petticoat* and saree of blue colour. He proved the papers in respect of inquest proceedings and autopsy. **In cross-examination**, he stated that in the Chik FIR (Ex. Ka-7) and GD (Ka-16) the distance between spot and the police station is 20 km, whereas in Inquest report it is 22 km. He denied the suggestion that at the time of preparing the inquest report there was no FIR in existence and that the FIR was written after inquest. He stated that at about 9 pm the body was sent for autopsy in a private vehicle. The distance between the spot and the post-mortem house is 30 km. In Form No.13 the distance between police station and police headquarter (district) is 18 km and the distance between the spot and police headquarter is 15 km. As per entry in Form No.13, body reached R.I. *(district police headquarter)* on 25.02.2017 at 9.10 hrs. It reached CMO at 11.50 hrs.. He denied the suggestion that inquest and other papers were not prepared on the date and time mentioned. He also denied the suggestion that the FIR of the case was prepared on 25.02.2017 and only thereafter inquest was done and, therefore, the body of the deceased reached post-mortem house on 25.02.2017.

18. At this stage, we may observe that initially the FIR was registered only under section 302 IPC on 24.02.2017. It has not come in the testimony of prosecution witnesses as to when charge under Section 376 IPC was added. Moreover, no GD Entry of addition of section 376 IPC has been exhibited. But, we found from the record (Case Diary) that the charge of section 376 IPC was added on 25.02.2017 after the statement of PW-3 was recorded under section 161 CrPC.

19. Having noticed the oral testimony of the witnesses, we shall now have a glimpse at the forensic evidence. In so far as the **forensic evidence** is concerned, as per the autopsy report, internal examination of private parts of the victim, though, notices an abrasion on left inner wall of vagina, but no bleeding. Importantly, author of the autopsy report, namely, PW-6, in his deposition, does not rule out possibility of sexual assault on the victim. Notably, one *Kurta* (upper wear), one *Dhoti*, one *Petticoat* (lower wear), one nose pin (yellow metal) and one key (metallic) were sealed and sent for forensic examination and, it appears, swabs from pubic area and vagina (*labia majora*) were also taken and sent for forensic examination. The forensic report, dated 07.04.2017, sent by Forensic Laboratory, U.P. Moradabad (*refer to paragraph 3 (vii) above*), reports that no spermatozoa was noticed in the vaginal/ pubic area swab or in the articles i.e. clothes of the victim and *Baniyan* (vest) of the accused. The *Baniyan* (vest) of the accused and *Petticoat* and Saree of the victim disclosed presence of human blood. But neither the DNA profile nor blood group of the blood stain present were matched to connect it either with the deceased or with the accused-appellant. Notably, PW-6, the autopsy doctor, stated

that in the nails and hands of the deceased no skin or hair could be found. Thus, the forensic evidence is not conclusive in respect of commission of rape but does not rule out rape of the victim. Further, it does not connect the appellant with the crime. Consequently, the case depends on ocular evidence to prove both the charge i.e. rape as well as murder.

ANALYSIS

20. As we have already noticed the entire evidence laid by the prosecution, we now proceed to analyse the same in the context of the submissions made. The submissions on behalf of the appellant to assail the conviction can be summarised as follows: (a) that it is a case of blind murder, the FIR is ante-timed and with a view to solve out the case the appellant, who is a resident of Bihar with no support in the area, has been falsely implicated; (b) the testimony of PW-1 renders the testimony of PW-3 and PW-4 unreliable and unacceptable; (c) that PW-3 is a chance witness whose presence at the spot appears unnatural and her testimony that she narrated everything to PW-1 is at variance with what PW-1 states; (d) that PW-3 though speaks of being a witness of both rape and murder but gives no description of how the victim was murdered; (e) that ligature marks found on the neck, have no explanation in the ocular account and there is no recovery of ligature, either from the spot or from anywhere else; (f) that the recovery of vest is completely bogus and, otherwise also, the vest could not be forensically connected with the crime; (g) that the testimony of PW-4 that he saw the accused - appellant running away from a distance is also unreliable because the standing crops would have blocked his view, even otherwise, PW-3 could not disclose the colour of clothes (vest and knicker) worn by the accused-appellant when PW-3 noticed him running away; (h) that there is no presence of spermatozoa in the swabs and clothes, hence, the offence of rape cannot be said to be proved; and (i) the prosecution is guilty of hiding the truth by not seizing the trouser and shoes alleged to be noticed by PW-4 near the body of the deceased and by not carrying out DNA profiling of the biological material that could be recovered / noticed, or already recovered, as per the mandate of section 53-A CrPC.

21. First, we shall examine whether the FIR is ante-timed. To ascertain whether an FIR is ante-timed, the court has to carefully scrutinise not only the oral deposition of the witnesses but also the papers that are prepared in connection with the investigation, inquest, autopsy, etc. Ordinarily, papers relating to inquest, autopsy including challan nash, etc bear the details that are reflected in the Chik FIR, if an FIR exists, because, as a matter of course, where an FIR is registered, the I.O. carries with him a copy of the entries in the report, therefore, columns in prescribed forms relating to various informational fields are filled by having a look at it. In the instant case, the Chik FIR discloses the time of occurrence as 16.00 hrs and the distance of police station to the place of occurrence as 20 km. The inquest report (Ex. Ka-9) which, as per the report, was completed at 21.00 hrs on 24.02.2017 discloses the distance as 22 km. But the inquest report bears the case crime number of the case at hand. Therefore, merely because of the discrepancy in the distance mentioned in the inquest report with the Chik report, it would not be appropriate for us to hold that the FIR is ante-timed. Thus, to probe further on the issue, we would

have to refer to the deposition of the witnesses. In the testimony of PW-1 (the informant), during cross-examination, it has come that the police arrived at the spot at 4.00 pm and completed the inquest then. Interestingly, the FIR has been lodged at 17.35 hrs, that is, at 5.35 pm. Importantly, when PW-1 was further questioned as to when he received copy of the FIR, PW-1 stated that he received it after few days. The check report of the FIR (commonly referred to as Chik report) is prepared in triplicate, as per Regulation 97 of UP Police Regulations, and one copy is to be handed over to the informant then and there. If copy was not given to the informant on the day it was lodged, it creates a doubt whether the FIR was lodged at the time it is purported to have been lodged. But, PW-1 is an aged person (aged about 70 years), husband of the deceased (who herself was aged 75 years), therefore, may be in a state of shock he did not collect the copy and may be his statement with regard to inquest being conducted at 4.00 pm was an inadvertent error due to fading memory or confusion. At this stage, we may also notice the statement of PW-4 having a bearing on the issue. PW-4, during cross examination, in vernacular, states as follows: "*Ghatna sthal par police bhi aa gayi thi. S. P. saheb baad mein aye thhe. Thana police kitne samay tak ghatna sthal par rahi nahi bata sakta. Ghatna sthal se hum thane chale gaye thhe. Police wale ghatna sthal se mere Dada ji ko apne sath thane le gaye thhe. Samay ka mujhe dhyan nahi hai kis samay le gaye thhe. Ghatna sthal se police jab thane gayi thhi us samay raat ho gayi thi.*" The above-quoted statement would suggest that the police had arrived and the informant (PW-1) had gone with the police to the police station. When this statement of PW-4 is read in conjunction with the statement of PW-1 that the police had arrived at 4 pm and conducted the inquest, possibility of the FIR being ante-timed arises and, therefore, we cannot rule out the possibility of the FIR being ante-timed. More so, because the constable clerk who prepared Chik report and made GD entry of its lodgement has not been produced by the prosecution.

22. We shall now proceed to test the ocular account. To suitably test the ocular account, we divide it into two parts. The first is eyewitness account of the whole incident rendered by PW-3 and the other is the eye witness account of a circumstance rendered by PW-4. To properly assess the merit and reliability of their deposition, we would have to first examine whether these witnesses are consistent in respect of the time of the incident. According to PW-1, the deceased took to the fields at about 2.00 pm. At 3.30 pm, when the deceased did not return, PW-1 went in search of her and met PW-3 (eyewitness) on way about 150 meters away from the field of X where the body of the deceased was found. At 4.00 pm, he could discover the body. On the other hand, according to PW-3, at about 4.00 pm, while she was collecting grass, she saw the deceased being taken/ pulled by the accused into the standing sugarcane crop. Whereafter, she witnessed the commission of rape as well as murder and got scared. In that shocked state, without telling anyone, she went back home, kept the collected grass at home and returned to inform PW-3 about the whole incident at 4.00 pm or may be 4.30 pm. Importantly, according to PW-3, she left her house to collect grass at about 3 pm and stayed in the field for about an hour and a half. In so far as PW-4 is concerned, he saw the accused-appellant running away at about 4 pm, notably the time i.e. 4 pm was not disclosed by him to the I.O. under section

161 CrPC. Thus, if we could guess the time of occurrence from the testimony of the prosecution witnesses, it would be between 3 pm and 4 pm. Now, what needs to be ascertained is whether accused-appellant was seen by PW-3 committing the offence and whether PW-3 informed PW-1 about it. In this regard, PW-1 is adamant that PW-3 did not disclose the name of the accused-appellant. Rather, she disclosed presence of two unnamed persons. PW-1, further, **in his cross-examination**, states that even PW-4 did not disclose the name of the accused. At this stage, what assumes importance is that the FIR, which was lodged at 5.35 pm, does not disclose receipt of information from PW-3 regarding commission of rape and murder by accused-appellant. The FIR only expresses suspicion against the appellant and another because they were seen running away from near the spot by PW-4. Although that, by itself, is not a ground to completely discard the testimony of PW-3, but it does put us on guard to carefully scrutinise and test the testimony of PW-3. More so, because, we do not see a good reason for PW-1, whose wife is killed, to hide such information if it had otherwise been available to him. Another circumstance which creates doubt in our mind about complete information being provided by PW-3 to PW-1 is that it took half an hour for PW-1 to discover the body. Importantly, PW-1 was informed, according to him, at 3.30 p.m. by PW-3; whereas, the body was found at about 4.00 p.m. The distance from the spot and the point where information was given by PW-3 to PW-1 is just about 150 meters, as per the statement of PW-1, this therefore, confirms that PW-1 did not have complete information from PW-3 when he was searching for his wife.

23. Now, we proceed to test the testimony of PW-3. Before that, it would be useful to notice that the statement of PW-1 and PW-3, under section 161 CrPC, was recorded on 25.2.2017 by the I.O. The case diary (CD Parcha No.II) of 25.2.2017 suggests that the statement of PW-1 and PW-3 was recorded by I.O. after cremation of the deceased as is also clear from the statement of PW-7. PW-7 stated that statements of PW-1 and PW-3 were recorded on 25.2.2017; and that PW-1 stated that PW-3 gave him information about the incident and involvement of the appellant after cremation. Notably, up to 25.2.2017, the case was registered only as a case of murder but, after their statements were recorded on 25.02.2017, under section 161 CrPC, section 376 IPC was added. As regards the time when section 376 IPC was added on 25.2.2017, it is difficult to determine because the GD entry has not been produced by the prosecution. The concerned constable clerk has also not been examined. Once we notice this position, the question that arises in our mind is whether the improvement in prosecution case was a consequence of autopsy report, or it was in usual course. The answer to this question is always difficult, if not impossible. But this question by itself raises a suspicion with regard to the prosecution story being contrived and this suspicion, in absence of blemish free evidence, may become insurmountable and entitle the accused to the benefit of doubt.

24. Be that as it may, we now proceed to assess the testimony of PW-3. PW-3 is a chance witness who, on the date of incident, was collecting grass from her field. In the site plan (Ex. Ka-3), four points are relevant. Points A, B, C and D. Point A is the spot from where the deceased was brought to point B and eventually killed. The distance between Point A and B is 50 meters. Point A is located on a mustard field of PW-1. Just south of that

mustard field there is sugarcane crop of PW-1 and further south of sugarcane crop of PW-1, there is field of Z where there is wheat crop. East of field of Z there is ploughed vacant field of W, adjoining which, there is field of X where sugarcane crop is shown standing and in midst of which point B is located from where the body of the deceased was recovered. Point D is the spot south of point B where the accused was noticed running away by PW-4 at 4 .00 pm. Point C is the spot from where the witnesses saw accused running at point D. Importantly, point C is in midst of wheat field of another tenure holder and in between point C and point D there is a wheat field of yet another tenure holder. But, most importantly, point D falls in sugarcane field of X. The distance between point C and point D is not mentioned in site plan but from the testimony of PW-4 the distance appears to be 50 meters. What is interesting in the site plan is that neither the field of PW-3 nor the location of PW-3 is shown. PW-4 says that he was the only one there and so does PW-3 by claiming that except her there was none. Perhaps none could notice each other because of the height of sugarcane crop which, according to PW-1 and the I.O., were tall and tall enough to cover the height of a man. In this kind of a situation, watching the incident from a distance is highly unlikely. Importantly, no one states to have heard shrieks of the victim, which might have attracted attention. In such a scenario, it could only be a matter of chance that one could witness the incident more so, when the area is away from the village, not near a road or Rasta. In that background, we have to assess whether the ocular account of PW-3 and PW-4 is confidence inspiring.

25. PW-3 states that while she was picking grass in her field *(the location of which is not disclosed in the site plan)*, the deceased was harvesting mustard in her (PW-1's) field, when, at about 4 pm, appellant came, held the deceased by her hand and pulled her and took her into the sugarcane field. When PW-3 reached the spot she saw accused-appellant committing rape. After committing rape, appellant killed the deceased. Seeing all of this, PW-3 got scared and went home. She disclosed all of this to PW-1. Notably, in her entire testimony, she does not disclose whether the deceased raised an alarm, whether PW-3 heard shrieks of the deceased and whether the deceased offered resistance. In such circumstances, how could she assume that the accused-appellant committed rape is a mystery. Further, in what manner the accused-appellant killed the deceased is also not disclosed by PW-3. During cross-examination, PW-3 stated that neither she raised an alarm nor she told any body on way back home, but narrated, all of what she saw, to PW-1. Interestingly, PW-1 denies receiving any such information from PW-3 on the day of the incident, which is also reflected by the FIR lodged by PW-1. Importantly, in the course of cross-examination, PW-3 was confronted with her previous statement that she got scared and went home without telling anyone about the incident, upon which, she stated that she did not make any such statement. Another important feature in her deposition is that PW-3 went to collect grass at 3.00 pm and returned in about an hour and half after seeing the deceased dead but this is in conflict with the deposition of PW-1 where he states that PW-3 gave information at about 3.30 pm. Further, if PW-3 had really discovered the spot and had given information to PW-1, as stated by her, then why PW-1 would have taken one-half hour to discover the spot, as we have already noticed above. There is another aspect which renders PW-3 deposition unreliable, which is that, according to her, the I.O.

recorded her statement on the day of the incident, which is not correct, as her statement was recorded next day. When we consider her statement as a whole, we find that she is just a chance witness; she does not state that she reached the place of occurrence on hearing shrieks or cries; she gives no description of resistance being offered by the deceased; she gives no description of how the deceased was murdered; she states that information of the incident was given to the police and PW-1 on the day of the incident, which is incorrect, rather, she gave information next day, after cremation; and her conduct of returning back home and then going again to break the news to PW-1 appears unnatural and, in fact, that part of her conduct is negated by the testimony of PW-1 and the circumstance that the FIR bears no detail of her narration against the appellant except that she saw two unknown persons pulling the deceased into the sugarcane field of X. The sum and substance, of the analysis is that the testimony of PW-3 does not inspire our confidence. Either she just saw what is disclosed in the FIR lodged by PW-1, that is, two unknown men taking the deceased into sugarcane field, or she is spinning a story.

26. In so far as PW-4 is concerned, his testimony does not inspire our confidence for several reasons, namely, he too, is a chance witness; he saw the accused running alone at 4.00 pm from a distance of about 50 meters whereas, PW-1 states that PW-4 informed him that PW-4 saw two persons running away. Importantly, the time (4 pm) of PW-4 spotting the accused is not in his statement before I.O. and, further, it appears improbable, because, according to PW-1, 4 pm is the time when search was complete and the body was discovered. Another aspect which raises a doubt about his deposition is that, according to PW-4, he came to know about the murder after about one hour and that PW-1 came to know about the murder before him. This statement of PW-4 baffles us because, according to PW-1, search was on for the deceased since 3.30 pm and several villagers were there and body was discovered by about 4.00 pm. Therefore, if PW-4 witnessed the accused running away at 4.00 pm, he sure would have noticed people around in search of his grand mother. All of this renders his deposition unworthy of acceptance. In addition to above, there are other reasons also, which renders his deposition unworthy of acceptance. These are - PW-4 did not come face to face with the accused; PW-4 could not remember the colour of the clothes worn by the accused; and, most importantly, between the place (point C), from where he saw accused running, and point D, where the accused was seen running, there was sugarcane crop of considerable height (see deposition of PW-1 and PW-7), which might block the vision. All of this suggests that it is a case of blind murder and the prosecution case is built on guess-work or suspicion or to work out the case at the suggestion of the police.

27. At this stage, we may notice only to reject the submission of the learned A.G.A. that why would the prosecution witnesses of fact implicate the accused-appellant with whom they have no proven enmity, more so, when nothing could be elicited from the prosecution witnesses as regards the reason for his false implication. The answer to this lies in the oft-quoted observation of the Apex Court in the case **Shankarlal Gyarasilal Dixit vs State Of Maharashtra, 1981 (2) SCC 35**, where, in paragraph 33, it was observed :

"Our judgment will raise a legitimate query: If the appellant was not present in his house at the material time, why then did so many people conspire to involve him falsely ? The answer to such questions is not always easy to give in criminal cases. Different motives operate on the minds of different persons in the making of unfounded accusations. Besides, human nature is too willing, when faced with brutal crimes, to spin stories out of strong suspicions"

In that context we may add by observing that the accused is presumed innocent unless proven guilty. Therefore, the prosecution evidence has to be tested before it is accepted. Conviction is to be recorded only when the evidence is found reliable, truthful and trustworthy. Where doubts arise in respect thereof, the benefit of doubt would go to the accused. As regards the appellant not being able to elicit good reason for his false implication through the cross-examination of prosecution witnesses, it be noticed that the accused was a resident of Bihar, a labour, who was not even represented by a private counsel but by an Amicus Curaie at the time when statement of PW-1 was recorded. Expecting such a person to have the means to find out/discover motives for his implication is difficult to imagine. It might be a case where he could be a soft target to solve out an otherwise complex case. Be that as it may, we need not speculate on that, the upshot of the discussion made above is that the testimony of the eye-witnesses does not inspire our confidence.

28. In so far as the recovery of vest is concerned, firstly, it is not incriminating because no semen stain is found on it, as was alleged at the time of preparing the memo of recovery, and, secondly, the blood found on it, which was not even noticed at the time of recovery, was not connected either with the deceased or the accused by DNA profiling or serologist report. In addition to that, the recovery witness PW-5 is an acquaintance of PW-1 and, **in his cross-examination**, PW-5 states that his place of village is about a kilometer away and that he was informed in advance to be present at the spot as the accused were to arrive for the recovery. This suggests that the recovered item was planted. Moreover, recovery is not from a concealed place. Rather, it is from an open field which had no standing crop. Another interesting feature of the recovery is that in the seizure memo (Ex. Ka-4), there is no indication about the presence of blood on the *Baniyan* (vest) though, it is there in respect of semen stain. But, the forensic report rules out presence of spermatozoa. Rather, it discloses presence of human blood, which is contrary to the seizure memo. To explain this aspect, the I.O. (PW-7) states that though blood-stain was noticed but, by mistake, he failed to mention the same in the seizure memo. This statement of PW-7 is not acceptable for the reason that PW-5, who is a witness of the recovery, during cross-examination, specifically stated that neither blood nor semen stain was present and that no mark was made on the vest at the time of recovery as mentioned in the seizure memo. Thus, for all the above reasons, we are of the view that the recovery of vest is inconsequential.

29. At this stage, we may observe that the investigation has not been up to the mark. Notably, from the statement of PW-4, it appears, a trouser and shoes were noticed near the body at the spot. But, surprisingly, there is no seizure of them. Most importantly, blood and other biological material was not collected from the accused for DNA profiling as per the requirement of

section 53-A CrPC. It is difficult to accept that if the accused appellant had committed rape and had left his trouser on the spot, there would be no material available for DNA profiling. This raises a question regarding the bona fides of the investigation. More so, when the initial report was with regard to the involvement of two persons. Further, rape of an aged woman, who is a stranger to the accused, baffles us. It was therefore a case where the investigating agency ought to have been diligent and circumspect because of the fundamental principle of criminal jurisprudence that fouler the crime stricter the proof. But, here, in the age of scientific advancement, the investigation was anything but scientific.

30. For all the reasons recorded above, as we have found the ocular account rendered by PW-3 and PW-4 not worthy of acceptance to hold the appellant guilty and there is no forensic evidence to link the appellant with the crime, we have no hesitation in holding that the prosecution has failed to prove the charges against the appellant beyond reasonable doubt. Therefore, the benefit of doubt must go to the accused. Consequently, the **appeal is allowed**. The impugned judgment and order of the trial court is set aside. **The reference to confirm the death penalty is answered in the negative and the prayer to confirm the death penalty is rejected.** The appellant is acquitted of all the charges for which he has been tried. The appellant is in jail and shall be released forthwith unless wanted in any other case subject to compliance of the provisions of section 437-A CrPC to the satisfaction of the court below.

31. Let the record of the lower court along with certified copy of this order be sent forthwith to the court below for information and compliance.

(2022)03ILR A122
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.03.2022

BEFORE

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

Capital Cases No. 13 of 2021
Connected with Reference No. 10 of 2021

Monu Thakur ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Archit Mandhyan, Sri Pradeep Kumar Mishra, Sri Vinay Saran (Senior Adv.)

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

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 374(2) - Indian Penal Code,1860-Section 302, 376, 326-A, 354, 354-A, 452 - Protection from Children from Sexual Offences Act,2012 - Sections 7/8, 5/6-challenge to-conviction/death penalty-PW-1's daughter got burnt-she died of septicaemia as a result of burn injuries sustained by her-injury report discloses victim had suffered thermal burns to the extent of 80 to 85 percent-prosecution failed to prove that the accused entered the house of the victim, misbehaved with her, or sexually assaulted her in any manner-in absence of admissible evidence to prove the foundational facts of commission of penetrative sexual assault, the presumptive provisions of Section 29 of the POCSO Act would not get attracted-the dying declaration of the victim has not been exhibited nor it has been put to the accused while recording his statement u/s

313 Cr.P.C.-neither the recording Magistrate not the doctor has been examined-A retrial may be ordered when the original trial has not been satisfactory for particular reasons-But retrial cannot be ordered on the ground that the prosecution did not produce the proper evidence-witnesses had exonerated the accused by giving their affidavits saying it was a case of accidental burns-non-exihibited dying declaration makes allegation against three persons whreas two of them are not named and one is mentioned without parentage and proper address-doctors did not speak about a word about recording of dying declaration-in these circumstances, if the prosecution chose not to prove the dying declaration, it cannot be said the the prosecution was prevented from leading evidence in that regard-no forensic evidence such as DNA profiling to connect the appellant to the crime-no application moved by any party to summon the recording magistrate or the doctor to prove the alleged dying declaration-PW-1, 2, 3 have not supported the prosecution case- no need to summon the magistrate, when the prosecution as well as victim's family both are not relying on it-in the absence of proof of foundational facts, the benefit of presumption would not be available to the prosecution u/s 29 of the Act.(Para 1 to 45)

The appeal is allowed. (E-6)

List of Cases cited:

1. Noor Aga Vs St. of Punj. (2008) 16 SCC 417

2. Bhola Singh Vs St. of Punj. (2011) 11 SCC 653

3. Gorakh Nath Prasad Vs St. of Bih. (2018) 2 SCC 305

4. Babu Vs St. of Ker.(2010) 9 SCC 189

5. Mahadevu @ Papu Vs St. of Karn. (2020) SCC OnLine Kar 3327: (2020) 6 Kant LJ 545;

6. Amol Dudhran Barsagade Vs St. of Mah. CRLA No. 600 of 2017

7. Swapan Mondal Vs St. (2021) SCC Online Cal 2007

8. Shahid Hossain Biswas Vs St. of W. B.(2017) 3 Cal LT 243

9. Justin Vs U.O.I. & ors. (2020) SCC Online Kerala 4956

10. Ukha Kolhe Vs St. of Mah. (1963) AIR SC 1531

11. Ramanlal Rathi Vs St. (1951) AIR Cal 305

12. Nasib Singh Vs St. of Punj. & anr. (2022) 2 SCC 89

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

1. This appeal, forwarded by the Senior Superintendent, District Jail, Aligarh, vide letter dated 27.09.2021, on the request of the appellant Monu Thakur, assails the judgment and order of the court of Additional District and Sessions Judge /Special Judge (Pcoso Act), First, Hathras, dated 23.09.2021, in Special Sessions Trial No.40 of 2019, convicting the appellant Monu Thakur under Sections 302, 376, 326-A, 354, 354-A, 452 IPC and Sections 7/8 and 5/6 of the Protection of Children from Sexual Offences Act, 2012 (for short Pocso Act) and sentencing him as follows:

(i) Under Section 302 IPC, death sentence with fine of Rs.50,000/- and a default sentence of additional six months S.I.;

(ii) Under Section 326-A IPC, imprisonment for life with fine of Rs.5,000/- and a default sentence of additional six months S.I.;

(iii) Under Section 376 IPC read with Section 5/6 of Pocso Act, imprisonment for life with fine of

Rs.50,000/- and a default sentence of additional six months S.I.;

(iv) Under Section 354 IPC read with Section 7/8 of Pocso Act, five years R.I. with fine of Rs.5,000/- and a default sentence of additional one month S.I.;

(v) Under Section 452 IPC, seven years R.I. with fine of Rs.10,000/- and a default sentence of additional three months S.I.;

(vi) Under Section 354-A IPC, three years R.I. with fine of Rs.3,000/- and a default sentence of additional fifteen days S.I.

All sentences to run concurrently.

2. As death penalty was awarded by the court below, a reference has been sent to this Court under Section 366 (1) CrPC for confirmation of death penalty which has given rise to Reference No.10 of 2021.

3. Considering the nature of the crime, we are not disclosing the name of the victim, members of her family as well of the witnesses of that area (locality) and, therefore, wherever required, they have been described by their witness number.

INTRODUCTORY FACTS

4. The prosecution case is based on a written report (Ex. Ka-1) dated 16.04.2019 submitted by PW-1 (the informant - father of the victim) at P.S. Sikandrarao, District Hathras, at 11.57 hours, of which GD entry (Ex. Ka-4) and Chik FIR (Ex. Ka-3) was made / prepared by PW-4. In the FIR, it was alleged that, on 15.04.2019, at about 10 pm, when PW-1 and his wife (not examined) were away, their daughter (the victim), aged about 14 years, who was with her maternal grand mother *(Nani)* (PW-2), the accused-appellant, aged 25 years, came to the house and misbehaved with the victim. When victim resisted his actions, the accused set her ablaze. On registration of the FIR, PW-4 prepared a letter for medical examination of the victim and got the victim medically examined on 16.04.2019, at 3.25 pm, through a lady constable Sadhna (not examined), of which medical / injury report (Ex. Ka-6) was prepared by Dr. Gufran Ahmed (PW-6) at J.N. Medical College Hospital, Aligarh Muslim University, Aligarh. The injury report reflected thermal burns to the extent of 85% on head, neck, part of face, anterior and posterior trunk, upper limb and lower limb, genitalia. Thermal burns were from kerosene oil and were found grievous in nature. The general condition of the patient was noted as critical. In the column concerning Central Nervous System of the patient it was noted conscious and oriented. The internal examination of Genitalia was made by doctor on duty of Obstetrics and Gynaecology Department. The remarks in respect thereof were as follows:- no bleeding seen; no tear on vulva; and small healed tear present on hymen at 7 O'clock position. After being admitted in the said hospital on 16.04.2019, the victim died there on 01.05.2019, at 1.45 am. Autopsy was conducted by PW-5, who prepared an autopsy report (Ex. Ka-5) dated 2/5/2019, which indicates that autopsy started at 12.15 hrs and completed at 12.45 hrs. In the column relating to ante-mortem injuries, it is mentioned in the autopsy report that there were superficial to deep burn all over body except parts of chest, legs, feet and buttocks. The cause of death was septicaemia as a result of ante mortem 80% thermal burn injuries. At the bottom of the autopsy report, there is a note made under the signature of Dr. Rashmi Choudhari (not examined), dated 2/5/2019, which reads: *Local examination- labia B/L swelling; Pv-Hymen intact; no bleeding from vagina;*

vaginal slide & swab prepared for spermatozoa detection.

5. The inquest was conducted on 01.05.2019 at the hospital itself. Inquest report (Ex. Ka-2) was also witnessed by PW-1. A death certificate (Ex. Ka-7) was also issued. The vaginal smear slide and vaginal swab were sent for forensic examination and they did not reveal presence of spermatozoa though there was presence of blood. Half burnt jeans and half burnt bra and plastic kerosene container recovered during the course of investigation were also sent for forensic examination wherein the presence of kerosene oil was proved. After investigation, the second Investigation Officer (I.O.) (PW-8) submitted a charge sheet on which, after taking cognizance, vide order dated 22.07. 2019, charges were framed against the appellant by the court of Special Judge (Pocso Act) of offences punishable under Sections 452, 354, 354-A, 326-A, 302 IPC and, later, by order dated 13.09.2021, charge of offence punishable under Section 376 IPC and Section 5/6 of Pocso Act was added.

PROSECUTION EVIDENCE

6. During the course of trial, the prosecution examined as many as nine witnesses. Their testimony is being noticed below.

7. **PW-1** is the informant who is not an eye witness of the incident. PW-1 stated that on the date of the incident i.e. 15.04.2019 he and his wife were out of their home; his daughter (the victim), aged 14 years, was at home with her maternal grand mother (PW-2) when, at about 10 pm, the accused-appellant entered the house and misbehaved with the victim. When the victim resisted, the accused-appellant set her ablaze. PW-1's mother-in-law (PW-2) tried to nab the accused but he escaped. In respect whereof, PW-1 lodged report, scribed by 'X' (not examined), on 16.4.2019 at P.S. Sikandrarao, District Hathras. He proved the written report, which was marked Ex. Ka-1. He also stated that the place of occurrence was shown to the I.O. by his mother-in-law and that in the inquest report he had put his signature, which was marked Ex. Ka-2.

During cross examination, he stated that the written report was not read out to him by the scribe; that he had just put his signatures thereon; that the name which he mentioned in the report, he does not know; that the I.O. had recorded his statement. He stated that during the investigation, while recording his statement under Section 161 CrPC, he had stated that on 15.04.2019, at about 10-10.30 pm, while the victim and his mother-in-law were at home and he and his wife were out, on return, his mother-in-law (PW-2) had informed him that the victim met with an accident on account of which, she got burnt and, after coming to know about the truth, he, his wife, his mother-in-law, the victim and one villager had given affidavits to *Kaptan Sahab* (the Superintendent of Police) through the I.O. He stated that in his presence the I.O. had not recorded the statement of his daughter. He also stated that when he returned home and had taken the deceased to Medical College Aligarh, she was not conscious. He also stated that in his presence, no Magistrate had taken the statement of the victim and that he is not aware whether victim's statement was recorded by the Magistrate. He stated that his daughter had turned conscious after several days but she did not disclose to him that the incident occurred because of the

accused-appellant. He stated that whatever he had stated to the I.O. was told to him by his mother-in-law and that the name of the accused-appellant was mentioned in the report on being prompted by the villagers due to their enmity in the village. He stated that the information with regard to the incident was given to him at home by his mother-in-law (PW-2).

On further cross examination, he stated that he is not sure with regard to the date on which the victim died. He stated that victim remained in the hospital for 20-21 days. He stated that the I.O. had not recorded the statement of his mother-in-law in his presence. He admitted that at the time of the incident only his mother-in-law (PW-2) and the victim were present in the house. He stated that he is not aware whether PW-3 was present. He stated that his wife is now no more alive.

In the cross examination on 5.08.2020, he added that when his daughter had regained consciousness, she had told him that she caught fire while cooking food on the gas because when she tried to pick up *Masala Dani* (spice container) from the almirah, the bottle of kerosene oil fell over the gas burner. PW-1 stated that when he came to know about the truth, he submitted an affidavit to the Superintendent of Police. He also stated that when the Magistrate had come to record the statement of his daughter, PW-1's wife, PW-1's mother-in-law and 3-4 ladies of the village were present, who gave their statement to the Magistrate, but the victim had not given any statement because she was unconscious. He further stated that PW-1's wife and mother-in-law (PW-2) had informed the Magistrate that what the ladies have told him is incorrect. When that was told to the Magistrate, the Magistrate left stating that he would return as and when the victim regains consciousness. But, the Magistrate did not come thereafter to record victim's statement. PW-1 reiterated that the accused-appellant neither misbehaved with the victim nor set her on fire.

8. **PW-2 (the maternal grand mother of the victim)**. She stated that at the time of the incident on 15.04.2019, she was sitting outside the house. The victim was cooking food. Kerosene oil fell and the victim caught fire; and by the time PW-2 and others could rush to douse the fire, the victim got burnt. She stated that the incident must have occurred at around 8 pm; and because of the incident, the case was got registered against the accused-appellant. She stated that her statement was recorded by the I.O.; that at the time of the incident, there was no one else, except her; and that she showed the place of the incident to the I.O.

In the cross examination, she stated that the victim caught fire because kerosene bottle fell over the gas burner while the victim was cooking food. She stated that at the time of the incident, her son-in-law (PW-1) and her daughter were out of home. She stated that her statement was recorded by PW-7 and not by any other I.O. She confirmed that she had stated before the I.O. that the victim caught fire while cooking food on gas burner as the bottle of kerosene oil accidentally fell on the gas burner when the victim tried to pick a *Masala Dani* (container of spices) from the cabinet above. She reiterated that the accused-appellant did not misbehave with the victim and that he did not ablaze the victim after pouring kerosene. She stated that when PW-1 and her daughter returned, they were informed about the incident and when they came to know the truth, they gave their affidavits.

On further cross examination, she stated that victim remained in the hospital for 20-22 days and that, during her treatment, PW-2 did not visit the hospital. PW-2 stated that she does not know when the victim regained consciousness though she visited the hospital once. She stated that she had shown the burnt clothes of the victim and the bottle of kerosene to the I.O. She stated that PW-2' daughter (mother of the victim) used to stay with the victim at the hospital and after her daughter's death (victim's mother), she has shifted to Mathura.

9. **PW-3**. He stated that while he was on his way to the village, on 15.04.2019, between 10-10.30 pm, he heard loud noises coming from the house of PW-1. When he entered the house of PW-1, he saw PW-1's daughter (the victim) ablaze and PW-2 trying to douse the fire, consequently, as a matter of courtesy and humanity, he helped her in dousing the fire. He stated that PW-2 told him that the victim got burnt while cooking food on gas as kerosene bottle fell over the gas burner while picking up *Masala Dani* (container of spices). This witness was declared hostile and was cross examined by the prosecution.

In the cross examination, when confronted with his statement recorded under Section 161 CrPC he admitted what was written there. He denied the suggestion that the accused-appellant had misbehaved with the victim and had put her on fire. He also denied the suggestion that PW-2 had not informed him that the victim got accidentally burnt on account of kerosene oil bottle falling over gas burner.

In the cross examination at the instance of the accused-appellant, he stated that the accused-appellant had not misbehaved with the victim and that the report against the accused was got lodged through PW-1 by persons inimical to the accused-appellant. He stated that he, PW-1, PW-2 and the victim's mother all had given affidavits to the Superintendent of Police, Hathras through the I.O. On being confronted with the affidavit, he recognised his signatures on the affidavit. He also stated that the victim had turned unconscious at the time of the incident and had regained consciousness 4-5 days later at Aligarh Medical College. He stated that the concerned Magistrate had not recorded the statement of the victim as the victim was not in a state to give her statement, as she was unconscious. He also stated that whatever the Magistrate had recorded was told to him by the ladies present at the hospital and that when it was pointed to the Magistrate that the victim was not conscious, therefore how her statement could have been recorded, the Magistrate said that he would come again, but he never came.

10. **PW-4-Constable Anil Kumar.** He proved the GD entry / registration of the FIR (Case Crime No.190 of 2019) made on 16.04.2019, at 11.57 hours. He stated that the victim was sent with lady constable Sadhna and a Chitthi Majrubi (letter for medical examination of the injured) to the hospital and was got medically examined. In his cross-examination he denied the suggestion that no incident had taken place or that the case was registered without a written report.

11. **PW-5- Dr. J.M. Sharma,** the doctor, who carried out autopsy of the body, proved the autopsy report and stated that the internal examination of genitalia of the body was carried out by Dr. Rashmi Chaudhary (not examined). The cause of death, according to him, was on account of

septicemic shock, caused by infection on account of 80% thermal burns.

12. **PW-6 - Dr. Gufran Ahmad**, the doctor who medically examined the victim on 16.04.2019. He stated that on 16.04.2019, at 3.25 pm, the victim, aged 13 years, was brought by lady constable Sadhna for medical examination. At that time, he was posted as Chief Medical Officer in the Medical College and he carried out the medical examination. He stated that the victim was brought on a stretcher; her pulse was 108 per minute; respiration was 18 per minute; blood pressure was 90/62; and she had thermal burns upto 85% on account of being burnt by kerosene oil. PW6 stated that he referred the victim to the plastic surgery department. He proved the injury report which was marked Ex. Ka-6.

In the cross examination, he stated that when the victim was brought before him, she was serious and 85% burnt and was not in a position to walk. In PW-2's presence the victim remained for about half an hour and thereafter, was shifted/referred to another department after being provided first aid.

13. **PW-7-Manoj Kumar Sharma (the first investigation officer)**. He stated that after registration of the case, he took over the investigation under the direction of the Inspector In-charge, D.K. Sisodiya (PW-8). Upon registration of the FIR, the victim was sent for medical examination through a lady constable Sadhna. The victim was taken to J.N. Medical College, Aligarh. When he went there with lady constable, he came to know that the victim is under treatment and is not in a position to get her statement recorded. When he came to the house of the victim, no one in the neighbourhood was prepared to give statement on fear of generation of ill-will. Thereafter, he made effort to arrest the named accused but he could not be found. On 17.04.2019, the statement of PW-2 (witness of the incident) was recorded. On inspection of the place of incident, one 5 liter empty bottle of kerosene and half burnt clothes of the victim were recovered. On 19.04.2019, he recorded the statement of the informant (PW-1) and his wife. On 22.04.2019, he again went to J.N. Medical College to record the statement of the victim but came to know that she was put on oxygen. He also tried to get her statement recorded under Section 164 CrPC but as she was not in a condition to appear in court, her statement under Section 164 CrPC could not be recorded. During investigation, he came to know that the statement of the victim was recorded by ACM-II, Aligarh, which was perused by him on 01.05.2019 in which it was written that when the victim was cooking food, three persons including one Monu had tried to misbehave with her and when she resisted, they poured kerosene and set her on fire. He stated that after the death of the deceased, vide GD entry No.36, dated 05.05.2019, Section 302 IPC was added and the investigation was taken over by PW-8. He also stated that statement of the victim was recorded, which was video-graphed. ***(Note:-*** *This alleged statement was neither exhibited nor the video recording of that was proved and got exhibited. This appears to be a part of the case diary; it exculpates the accused-appellant and supports the story of accident as stated by PW-2).* PW-7 further stated that during the course of investigation he had received affidavit of victim and PW-3. He also stated that he had collected the school certificate of the victim which disclosed her date of birth as

02.10.2007. He proved the site plan of the place prepared by him during investigation, which was marked Ex. Ka-7. He proved the recovery of half burnt clothes and the container of kerosene oil. The recovery memo of which was marked as Ex. Ka-8.

In the cross examination, he stated that he could not record the statement of the victim initially but when the victim's condition improved, he recorded her statement in the presence of lady constable Sadhna Sagar (not examined). He stated that recording of her statement was video-graphed and computer CD was also prepared. ***(Note:-*** *Neither a transcript nor the video recording of this statement was got exhibited and importantly the lady constable Sadhna Sagar was not examined)*. He further stated that prior to the recording of the statement of the victim, he had recorded the statement of informant (PW-1) and victim's mother (not examined) as well as victim's grand mother (PW-2) and the witness (PW-3). He stated that the affidavit of the victim was obtained on 29.04.2019. He stated that he made an effort to get the statement of the victim recorded under Section 164 CrPC. He stated that he had incorporated the contents of the affidavit and the dying declaration of the victim in the case diary.

14. **PW-8- D.K. Sisodiya**. He is the investigating officer who took over the investigation after the death of the victim. He stated that he raided places to arrest the accused and, ultimately, on 17.05.2019, he could manage to arrest the accused and got his statement recorded. On 21.05.2019, he got the statement of informant and the inquest witnesses recorded. Thereafter, on 24.05.2019, he recorded the statement of grand mother and mother of the victim; and on 28.05.2019 he recorded the statement of an independent witness and Dr. J.M. Sharma and Dr. Gufran Ahmad, thereafter, submitted charge sheet against the accused-appellant, which was exhibited as Ex. Ka-9. He also stated that after submission of the charge sheet, the report of the forensic laboratory was received, which was incorporated in the case diary.

In the cross examination, he stated that at the time when he was assigned investigation the victim was dead, therefore he had no opportunity to record the statement of the victim. He admitted that the victim's statement was recorded by the earlier I.O., Manoj Kumar Sharma and lady constable Sadhna of which entry is there in the Case Diary (CD). He admitted that he had not recorded the statement of the victim though he had read the statement of the victim incorporated in the case diary. He denied the suggestion that without proper investigation of the matter, he submitted charge sheet.

15. **PW-9 Shaheen,** the doctor who did internal medical examination of the victim on 16.04.2019. She stated that, on 16.04.2019, the victim, aged 13 years, was brought to the hospital in a burnt condition. PW-6 had medically examined her and in the team constituted for internal examination of the victim, she was a member. During internal examination, she did not notice any bleeding from victim's private part and there were no injuries noticed though the hymen was found torn at 7 O'clock position. She proved her notings on the injury report marked Ex. Ka-6. On being questioned by the court as to when hymen can be torn at 7 O'clock position, she stated that this could be a consequence of sexual assault (rape) or penetration or manipulation. She reiterated that hymen was found torn.

In her cross examination by the defence, she reiterated what she stated above but added there was no injury noticed on the vulva. She denied the suggestion that she submitted report without medical examination.

16. The incriminating circumstances appearing in the prosecution evidence were put to the accused-appellant who claimed that he is innocent and not guilty. He, however, did not disclose the reason as to why he was implicated. But, interestingly, the dying declaration alleged to have been recorded either by the Magistrate or by the I.O. was neither exhibited nor put to the accused during his examination under Section 313 CrPC. The defence, however, led no evidence.

TRIAL COURT FINDINGS

17. The trial court found the victim to be a minor with her date of birth being 02.10.2007; that the lodging of the FIR and submission of charge sheet against the accused-appellant was proved by PW-1 and PW-8, respectively; that the place of incidence was proved by the prosecution witnesses; and that the medical report (Ex. Ka-6) proved that hymen of the victim was torn therefore, by placing reliance on the provisions of Section 29 of the Pocso Act, burden was cast on the accused to prove his innocence and, thereafter, by relying on the dying declaration (Paper No.39 Ka/1) and the statement of PW-2 that because of the incident FIR was lodged against Monu Thakur, held that the prosecution was successful in proving the charge against the appellant. Consequently, the trial court recorded conviction and awarded punishment as above.

18. Challenging the judgment and order of conviction and sentence, this appeal has been filed.

19. We have heard Sri Vinay Saran, learned Senior Counsel, assisted by Sri Pradeep Kumar Mishra and Sri Archit Mandhyan, appointed by the High Court Legal Services Committee to represent the appellant; and Sri H.M.B. Sinha along with Sri Awadhesh Shukla, learned AGA, for the State and have perused the record

SUBMISSIONS ON BEHALF OF THE APPELLANT

20. The learned counsel for the appellant submitted that the reverse burden put by Sections 29 and 30 of the Pocso Act applies only when the foundational facts in respect of commission of specified offences by the accused are proved by legally admissible evidence. In absence of proof of foundational facts with regard to commission of offence punishable under the Pocso Act, the reverse burden cannot be placed on the accused to prove his innocence therefore, the judgment and order of the trial court is vitiated by a manifestly erroneous approach in law. Sri Saran submitted that the prosecution examined only two eye witnesses, namely, PW-2 and PW-3. Neither PW-2 nor PW-3 stated before the court that the accused-appellant misbehaved with the deceased or poured kerosene on the deceased and set her on fire. Rather, they deposed that the deceased got burnt accidentally because the kerosene oil bottle fell over the gas burner while the deceased was cooking food. In so far as PW-1, the informant, is concerned, he is admittedly not an eye witness and his statement in the FIR is hearsay and cannot be considered substantive evidence to enable the court to proceed with an assumption that foundational facts of the specified offences punishable under the Pocso Act are proved.

21. In respect of the dying declaration, Sri Saran submitted that, no

doubt, from the testimony of the I.O. it appears that he received information of the dying declaration having been recorded by a Magistrate but the recording of the dying declaration by the Magistrate concerned and the fitness certificate of the doctor concerned for its recording is neither proved nor any such witness was examined to prove the same. Further, the dying declaration, on which reliance has been placed, is not even marked an exhibit and has not been put to the accused while recording his statement under Section 313 CrPC therefore, on this ground alone, the said dying declaration could not have been relied upon by the trial court. Sri Saran further pointed out that this is a case where even during investigation the witnesses had given their affidavits resiling from the allegations made in the FIR, and those affidavits were part of the police report, thus, the court ought not have treated the appellant as an accused sent for trial much less raising a presumption of his guilt under Section 29 of the Pocso Act. Summing up his submissions, learned counsel for the appellant submitted that this is a case where there is virtually no legally admissible evidence to record conviction and therefore the award of the death sentence is completely unwarranted. It has been submitted that, under the circumstances, the judgment and order of the trial court should be set aside and the appellant be honourably acquitted of all the charges for which he has been tried.

SUBMISSIONS ON BEHALF OF THE STATE

22. **Per contra,** learned AGA supported the judgment and order of the trial court and submitted that it is a case where witnesses were under pressure, may be for whatever reason, and therefore, they resiled from the accusation made in the FIR but that, by itself, cannot earn an acquittal for the accused-appellant inasmuch as the lodging of FIR against the appellant was proved and the medical examination report of the victim, who was a minor, was proved, which revealed that her hymen was torn at 7 O'clock position therefore, the foundational fact of offence punishable under Pocso Act was proved. Hence, the burden was rightly placed on the accused-appellant to prove his innocence, which he failed to discharge as he led no evidence. Further, at the time of admission in the hospital on 16.04.2019, the victim was marked conscious and oriented by the doctor who prepared the injury report and, therefore, as there appears a dying declaration on record and the foundational facts of the offence of penetrative sexual assault on a minor been proved, the burden was rightly placed on the accused to prove his innocence and, in absence of defence evidence, conviction was justifiably recorded. He further submits that though the recording Magistrate might not have been examined but as the existence of the dying declaration (Paper No.39 Ka-1) on record is admitted by the I.O., it could be taken into consideration. He therefore submits that the conviction recorded by the court below suffers from no infirmity.

23. On the question of sentence, learned counsel for the State submitted that since it is a case of rape of a minor and, thereafter, the minor was brutally burnt, which resulted in her death, death sentence awarded to the accused-appellant is not unwarranted, therefore, the appeal be dismissed and the death penalty be confirmed.

ANALYSIS

24. Having noticed the rival submissions and having perused the record

carefully, before proceeding further, we would have to first examine as to what is the true import of the provisions of section 29 of the Pocso Act (for short the Act) and as to when the benefit of that section would be available to the prosecution and to what extent. To have a clear understanding of the issue it would be necessary to have a look at the broad features of the Act and the offences punishable thereunder. The Preamble of the Act after narrating its genesis, sets out the object, purpose and reason for its enactment as follows:-

"An Act 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.

WHEREAS clause (3) of article 15 of the Constitution, inter alia, empowers the State to make special provisions for children;

AND WHEREAS, the Government of India has acceded on the 11th December, 1992 to the Convention on the Rights of the Child, adopted by the General Assembly of the United Nations, which has prescribed a set of standards to be followed by all State parties in securing the best interests of the child;

AND WHEREAS it is necessary for the proper development of the child that his or her right to privacy and confidentiality be protected and respected by every person by all means and through all stages of a judicial process involving the child;

AND WHEREAS it is imperative that the law operates in a manner that the best interest and well being of the child are regarded as being of paramount importance at every stage, to ensure the healthy physical, emotional, intellectual and social development of the child;

AND WHEREAS the State parties to the Convention on the Rights of the Child are required 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;

(c) the exploitative use of children in pornographic performances and materials;

AND WHEREAS sexual exploitation and sexual abuse of children are heinous crimes and need to be effectively addressed.

BE it enacted by Parliament in the Sixty-third Year of the Republic of India as follows:--"

25. Chapter-I of the Act includes provisions relating to title, extent and commencement of the Act as also definitions of the terms used in the Act. Chapter-II relates to sexual offences against children. Sexual offences are categorised as: (A) Penetrative Sexual Assault; (B) Aggravated Penetrative Sexual Assault; (C) Sexual Assault; (D) Aggravated Sexual Assault; and (E) Sexual Harassment. Chapter II also provides punishment for the offences specified therein. Chapter-III relates to using child for pornographic purposes and punishment therefor. Chapter-IV relates to abetment of and attempt to commit an offence and punishment therefor. Chapter-V relates to the procedure for reporting of cases. Chapter-VI relates to procedures for recording statement of the child. Chapter-VII relates to Special Courts as also presumption as to certain offences and presumption of culpable mental state including application of Code of Criminal Procedure, 1973 (CrPC), save as otherwise provided, to proceedings before a Special Court and for appointment of Special

Prosecutors. Chapter-VIII relates to the procedure and powers of special courts and recording of evidence. Chapter-IX contains miscellaneous provisions.

26. Section 42 falling in Chapter-IX provides that where an act or omission constitutes an offence punishable under the Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376-AB, 376B, 376C, 376D, 376DA, 376-DB, 376E, section 509 of the Indian Penal Code (45 of 1860) or section 67 B of the Information Technology Act, 2000 (21 of 2000), then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under the Act or under the Indian Penal Code as provides for punishment which is greater in degree.

27. Section 42A provides that the provisions of the 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 the Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency.

28. Having noticed the broad features of the Act, we now proceed to notice the presumptive provisions contained in section 29 of the Act on which reliance has been placed by the trial court while convicting the appellant. In fact, there are two separate sections in that regard in the Act, namely, section 29 and section 30, they read as follows:-

"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."

29. A perusal of the provisions of Section 29 of the Act would reflect that they relate to the offences defined under Sections 3, 5, 7 and 9. Section 3 relates to penetrative sexual assault; Section 5 relates to aggravated penetrative sexual assault; Section 7 relates to sexual assault; and Section 9 relates to aggravated sexual assault. Neither penetrative sexual assault nor aggravated sexual assault to be an offence, punishable under section 4 and section 6 respectively, requires a culpable mental state of the offender. For commission of an offence of sexual assault as defined in Section 7 of the Act, presence of sexual intent on the part of the offender is required. Similarly, for an offence of sexual harassment as defined in Section 11,

the presence of sexual intent on the part of the offender is required. To obviate the burden of proving sexual intent of the offender, the Legislature in its wisdom has put Section 30 in the Act which provides that where any offence under the Act requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state though it shall be a defence for the accused to prove the fact that he had no such mental state with respect to that act charged as an offence in that prosecution.

30. Section 31 of the Act applies the provisions of Code of Criminal Procedure, 1973 (CrPC) including the provisions as to bail and bonds to the proceedings before a Special Court save as otherwise provided in the Act. Section 31 also provides that for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session and the person conducting a prosecution before a Special Court, shall be deemed to be a public prosecutor. The special provisions relating to procedure and powers of special courts and recording of evidence have been engrafted in the Act through Chapter-VIII thereof. Section 33 of the Act is relevant in the context of the instant case, and is extracted below:-

"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. "

31. Sub-section (1) of section 28 of the Act provides for designation of Special Courts to try offences under the Act. Sub-section (2) of section 28 of the Act provides that while trying an offence under the 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. A conjoint reading of Sections 28, 31 and 33 of the Act would make it clear that the Special Court empowered to try an offence punishable under the Act shall be deemed to be a Court of Session and shall have all the powers of a Court of Session to try offence under the Act as well as other offences, with which the accused may, under the Code of Criminal Procedure, 1973, be charged at the same trial. Meaning thereby that, by virtue of section 220 (1) of the Code of Criminal Procedure, 1973, 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. But, now, a question would arise as to whether on those other offences, the presumptive provisions of Sections 29 and 30 would apply as would apply to the offences specified under the Act. Before we proceed to dwell on this issue it would be useful to first examine as to when and in what situation a presumption under section 29 could be raised.

32 The principle that a person should be presumed innocent until proven guilty is a fundamental principle in criminal jurisprudence and finds support in Article 14 (2) of the International Covenant on Civil and Political Rights. But in special circumstances the legislature may put a reverse burden on the accused to prove his innocence. In a challenge to the vires of one such reverse burden clause, namely, the presumptive provisions contained in section 35 and 54 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act), the Apex Court in **Noor Aga vs. State of Punjab: (2008) 16 SCC 417**, in paragraph 33 of its judgment, observed: *"Presumption of innocence is a human right as envisaged under Article 14(2) of the International Covenant on Civil and Political Rights. It, however, cannot per se be equated with the fundamental right and liberty adumbrated in Article 21 of the Constitution of India."* In paragraph 34 of the judgment it was observed: *"Only because the burden of proof under certain circumstances is placed on the accused, the same, by itself, in our opinion, would not render the impugned provisions unconstitutional."* After observing as above, the court in paragraph 35 of the judgment observed: *"A right to be presumed innocent, subject to the establishment of certain foundational facts and burden of proof, to a certain extent, can be placed on an accused."* Ultimately, while upholding the vires of the provisions of Sections 35 and 54 of the NDPS Act, in paragraph 54 of the aforesaid judgment it was observed: *"provisions imposing reverse burden, however, must not only be required to be strictly complied with but also may be subject to proof of some basic facts as envisaged under the statute in question."* In **Bhola Singh v. State of Punjab, (2011) 11 SCC 653**, the Apex Court following its earlier decision in **Noor Aga's case (supra)**, in paragraph 10 of its judgment, with regard to the applicability of section

35 of the NDPS Act, observed: *"that as this section imposed a heavy reverse burden on an accused, the condition for the applicability would have to be spelt out on facts and it was only after the prosecution had discharged the initial burden to prove the foundational facts that section 35 would come into play."* In **Gorakh Nath Prasad V. State of Bihar, (2018) 2 SCC 305**, in paragraph 5 of the judgment, while dealing with a prosecution under the NDPS Act, the Apex Court observed: *"The NDPS Act provides for a reverse burden of proof upon the accused, contrary to the normal rule of criminal jurisprudence for presumption of innocence unless proven guilty. This shall not dispense with the requirement of the prosecution to having first establish a prima facie case, only whereafter the burden will shift to the accused. The mere registration of a case under the Act will not ipso facto shift the burden on to the accused from the very inception. Compliance with statutory requirements and procedures shall have to be strict and scrutiny stringent. If there is any iota of doubt the benefit shall have to be given to the accused."* In **Babu v. State of Kerala, (2010) 9 SCC 189,** in paragraph 27 and 28 of the judgment it was observed:

"27. Every accused is presumed to be innocent unless the guilt is proved. The presumption of innocence is a human right. However, subject to the statutory exceptions, the said principle forms the basis of criminal jurisprudence. For this purpose, the nature of the offence, its seriousness and gravity thereof has to be taken into consideration. The courts must be on guard to see that merely on the application of the presumption, the same may not lead to any injustice or mistaken conviction. Statutes like the Negotiable Instruments Act, 1881; the Prevention of Corruption act, 1988; and the Terrorists and Disruptive Activities (Prevention) Act, 1987, provide for presumption of guilt if the circumstances provided in those statutes are found to be fulfilled and shift the burden of proof of innocence on the accused. However, such a presumption can also be raised only when certain foundational facts are established by the prosecution. There may be difficulty in proving a negative fact.

28. However, in cases where the statute does not provide for the burden of proof on the accused, it always lies on the prosecution. It is only in exceptional circumstances, such as those as referred to herein above, that the burden of proof is on the accused. The statutory provision even for a presumption of guilt of the accused under a particular statute must meet the tests of reasonableness and liberty enshrined in Articles 14 and 21 of the Constitution." ***(Emphasis supplied)***

33. In the light of the decisions noticed above, the legal position that emerges is that though the presumption of innocence is a human right but there can be statutory exceptions to it. A statutory provision laying down the procedure for holding an accused guilty of an offence by raising a presumption with regard to his guilt, must meet the tests of being fair, just and reasonable as enshrined in Articles 14 and 21 of the Constitution of India. To ensure that a statutory provision putting a reverse burden on the accused does not violate the mandate of Articles 14 and 21 of the Constitution, it has to be interpreted in a manner that it does not lead to absurd result such as mistaken conviction on mere failure to lead satisfactory evidence in defence after submission of police report. As a result, the courts have been consistent in holding that the burden to prove his

innocence can be cast on the accused with the aid of presumptive clause only where the prosecution succeeds in proving the basic or foundational facts with regard to commission of the offence by the accused in respect of which the presumption is available to the prosecution under the statute. Mere registration of a case punishable under the statute, without proving the foundational facts with regard to its commission by the accused, will not ipso facto shift the burden on to the accused to prove his innocence. More so, because to prove a negative is difficult, if not impossible. It is only when a foundation is laid to prove, at least prima facie, existence of a fact that one can expect a person, called upon to refute its existence, to lead evidence negating its existence. Interpreting the provisions of section 29 of the Act in a manner that it puts absolute burden on the accused to prove a negative i.e. innocence, even in absence of prosecution proving the basic facts with regard to commission of specified offence(s) by the accused, in our view, would lead to complete miscarriage of justice and thereby render the provisions of section 29 of the Act vulnerable and in the teeth of Articles 14 and 21 of the Constitution. We, therefore, hold that to take the benefit of the presumptive provisions of section 29 of the Pocso Act, the prosecution, by leading legally admissible evidence, would have to prove the foundational or basic facts in respect of commission of the offence(s) specified therein by the accused. Mere submission of police report against the accused in respect of the offence(s) specified in section 29 of the Pocso Act would not absolve the prosecution of its responsibility to lead legally admissible evidence to prove the foundational facts with regard to their commission by the accused.

34. The above interpretation of section 29 of the Act is consistent with the view taken by various High Courts i.e. Karnataka High Court in the case of **Mahadevu @ Papu V. State of Karnataka, 2020 SCC OnLine Kar 3327 : (2020) 6 Kant LJ 545**; Bombay High Court in the case of **Amol Dudhran Barsagade V. State of Maharashtra, dated 23.04.2018, in Crl Appeal No.600 of 2017**; and Calcutta High Court in **Swapan Mondal Vs. State: (2021) SCC Online Cal 2007**, where a Division Bench, while affirming the view taken by a Single Judge Bench of that Court in **Shahid Hossain Biswas Vs. State of West Bengal, reported in (2017) 3 Cal LT 243,** in paragraph 109 of the judgment, observed as follows:-

"109. This leads us to an interpretation that the foundational facts of the prosecution's case have to be established by leading evidence before the statutory presumption in Section 29 or 30 can kick in. In this conclusion, I am inclined to refer to the judgment of Bagchi, J. in Shahid Hossain Biswas v. State of West Bengal, reported in (2017) 3 Cal LT 243, (at paragraphs 21-24 of the report) without any attempt at summarizing the same on my part, given the correctness of His Lordship's exposition of the law. Needless to say, while the following dicta is on Section 29, it is equally applicable mutatis mutandis to Section 30:

'21. ....I am not unmindful of the statutory presumption available to the prosecution in a case under the POCSO Act, 2012. Section 29 of the said Act reads as follows:-

"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 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."

22. The law, therefore, provides for a reverse burden upon the accused in a prosecution under sections 3, 5, 7 and 9 of the aforesaid Act. The statutory presumption creates an exception to the ordinary rule of presumption of innocence available to an accused in a criminal trial and puts the onus on the accused to rebut such presumption and establish his innocence. Presumption of innocence is a basic human right which is a vital facet of fair trial rights enshrined in various international covenants like the Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights (to which India is a signatory) but is not a fundamental right under Part III of the Constitution. [See Noor Aga v. State of Punjab, (2008) 16 SCC 417]. The concept of presumption of innocence has, in recent times, been reversed in many situations by creating statutory presumptions like under sections 113A, 113B or 114A of the Evidence Act shifting the burden on the accused to prove his innocence. Section 29 of the POCSO is, therefore, a species of such exception to the ordinary rule of presumption of innocence and must be borne in mind while appreciating the evidence of prosecution witnesses in a trial under the POCSO Act. The expressions "shall presume" and "unless contrary is proved" in the aforesaid provision creates a reverse burden on an accused to prove his innocence to earn an order of acquittal and absolves the burden of the prosecution to prove his guilt beyond reasonable doubt. How is the accused to discharge such burden? Sections 3 and 4 of the Evidence Act define the words `proved', `shall presume' and `disproved' as follows:-

Section 3:-

"Proved" - A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

"Disproved"- A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

Section 4:-

"Shall presume".-Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved."

23. A conjoint reading of the statutory provision in the light of the definitions, as aforesaid, would show that in a prosecution under the POCSO Act an accused is to prove `the contrary', that is, he has to prove that he has not committed the offence and he is innocent. It is trite law that negative cannot be proved [see Sait Tarajee Khimchand v. Yelamarti Satyam, (1972) 4 SCC 562, Para-15]. In order to prove a contrary fact, the fact whose opposite is sought to be established must be proposed first. It is, therefore, an essential prerequisite that the foundational facts of the prosecution case must be established by leading evidence before the aforesaid statutory presumption is triggered in to shift the onus on the accused to prove the contrary.

24. Once the foundation of the prosecution case is laid by leading

legally admissible evidence, it becomes incumbent on the accused to establish from the evidence on record that he has not committed the offence or to show from the circumstances of a particular case that a man of ordinary prudence would most probably draw an inference of innocence in his favour. The accused may achieve such an end by leading defence evidence or by discrediting prosecution witnesses through effective cross-examination or by exposing the patent absurdities or inherent infirmities in their version by an analysis of the special features of the case. However, the aforesaid statutory presumption cannot be read to mean that the prosecution version is to be treated as gospel truth in every case. The presumption does not take away the essential duty of the Court to analyse the evidence on record in the light of the special features of a particular case, eg. patent absurdities or inherent infirmities in the prosecution version or existence of entrenched enmity between the accused and the victim giving rise to an irresistible inference of falsehood in the prosecution case while determining whether the accused has discharged his onus and established his innocence in the given facts of a case. To hold otherwise, would compel the Court to mechanically accept the mere ipse dixit of the prosecution and give a stamp of judicial approval to every prosecution, howsoever, patently absurd or inherently improbable it may be."

35. The view taken by the Calcutta High Court has also been followed by Kerala High Court in **Justin Vs. Union of India and others: (2020) SCC Online Kerala 4956** wherein, in paragraphs 74 to 78 of the judgment, it has been observed as follows:-

"74. Evaluation of the above judicial pronouncements lead to the conclusion that, statutory provisions which exclude mens rea, or those offences which impose strict liability are not uncommon and that by itself does not make such statutory provisions unconstitutional. Further, Statutes imposing limited burden on the accused to establish certain facts which are specifically within his knowledge, is neither rare in Indian Criminal Law and nor do they, by itself make such statutory provisions unconstitutional. However, the statutory burden on accused should only be partial and should not thereby shift the primary duty of prosecution to establish the foundational facts constituting the case, to the accused. Such a provision should also be justifiable on the ground of predominant public interest. Hence, sections 29 and 30 of the POCSO Act, do not offend Articles 14 and 19 of the Constitution of India. They do not in any way violate the Constitutional guarantee, and hence not ultra vires to the Constitution.

75. It is stated that Art.21 will be infringed if the right to life or liberty of a person is taken away, otherwise than by due process of law. It has been judicially affirmed that Article 21 affords protection not only against executive action, but also against legislations which deprive a person of his life and personal liberty otherwise than by due process of law. When a statutory provision is challenged alleging violation under Art.21 of Constitution of India, State is bound to establish that the statutory procedure for depriving the person of his life and personal liberty is fair, just and reasonable. The main contention of the petitioners based on the alleged violation of Articles 20(3) and 21 of the Constitution of India on the ground that the presumption under the POCSO Act

imposes a burden on the accused to expose himself to cross examination which amounts to testimonial compulsion and that, it amounts to breach of his right to silence, and that the burden of proof is heavily tilted against him has to be considered in the light of the law laid down by the Supreme Court in Kathi Kalu Oghad's case (supra). The larger Bench held that the bar under Art.20(3) of the Constitution will arise only if the accused is compelled to give evidence. To bring such evidence within the mischief of Art.20(3), it must be shown that accused was under a compulsion to give evidence and that the evidence had a material bearing on the criminality of the maker. Supreme Court explained that, compulsion in the context must mean duress. The law as explained by the Larger Bench holds the field even now.

76. Hence the presumptions under sections 29 and 30 of the POCSO Act have to be examined on the anvil of tests laid down in Kathi Kalu Oghad's case (supra). While considering similar statutory provisions, Supreme Court, in Veeraswami's case, Ramachandra Kaidalwar's case, Noor Agas case, Kumar Export's case and Abdul Rashid Ibrahim's case has consistently held that the presumptions considered therein, which are similar to sections 29 and 30 of the POCSO Act do not take away the primary duty of prosecution to establish the foundational facts. This duty is always on the prosecution and never shifts to the accused. POCSO Act is also not different. Parliament is competent to place burden on certain aspects on the accused, especially those which are within his exclusive knowledge. It is justified on the ground that, prosecution cannot, in the very nature of things be expected to know the affairs of the accused. This is specifically so in the case of sexual offences, where there may not be any eye witness to the incident. Even the burden on accused is also a partial one and is justifiable on larger public interest.

77. In Noor Aga's case (supra) it was held that, presumption of innocence is a human right and cannot per se be equated with the Fundamental Right under Art.21 of the Constitution of India. It was held that, subject to the establishment of foundational facts and burden of proof to a certain extent can be placed on the accused. However, Supreme Court in various decisions referred above has held that, provisions imposing reverse burden must not only be required to be strictly complied with but also may be subject to proof of some basic facts as envisaged under the Statute. Hence, prosecution has to establish a prima facie case beyond reasonable doubt. Only when the foundational facts are established by the prosecution, the accused will be under an obligation to rebut the presumption that arise, that too, by adducing evidence with standard of proof of preponderance of probability. The insistence on establishment of foundational facts by prosecution acts as a safety guard against misapplication of statutory presumptions.

78. Foundational facts in a POCSO case include the proof that the victim is a child, that alleged incident has taken place, that the accused has committed the offence and whenever physical injury is caused, to establish it with supporting medical evidence. If the foundational facts of the prosecution case is laid by the prosecution by leading legally admissible evidence, the duty of the accused is to rebut it, by establishing from the evidence on record that he has not committed the offence. This can be achieved by eliciting patent absurdities or inherent infirmities in the version of prosecution or in the oral testimony of

witnesses or the existence of enmity between the accused and victim or bring out the peculiar features of the particular case that a man of ordinary prudence would most probably draw an inference of innocence in his favour, or bring out material contradictions and omissions in the evidence of witnesses, or to establish that the victim and witnesses are unreliable or that there is considerable and unexplained delay in lodging the complaint or that the victim is not a child. Accused may reach that end by discrediting and demolishing prosecution witnesses by effective cross examination. Only if he is not fully able to do so, he needs only to rebut the presumption by leading defence evidence. Still, whether to offer himself as a witness is the choice of the accused. Fundamentally, the process of adducing evidence in a POCSO case does not substantially differ from any other criminal trial; except that in a trial under the POCSO Act, the prosecution is additionally armed with the presumptions and the corresponding obligation on the accused to rebut the presumption."

(Emphasis Supplied)

36. At this stage, we may clarify that though the presumptive provisions contained in sections 29 and 30 are there in the Act but their operation is limited to the offences specified therein. No doubt, by virtue of sub-section (2) of section 28 of the Act, while trying an offence under the Act, a Special Court has also to try an offence other than the offence referred to in sub-section (1) of section 28 of the Act (i.e. the offences punishable under the Act), with which the accused may, under the Code of Criminal Procedure, 1973, be charged at the same trial but, as the presumptive provisions of section 29 are applicable only to the offences specified therein, they would not apply to prove an offence of murder punishable under section 302 IPC. In our view therefore, the trial court completely misunderstood the true import of the presumptive provisions contained in section 29 of the Pocso Act.

37. Now, reverting to the facts of the present case, as we have already noticed the entire prosecution evidence, we find that the prosecution has been successful in establishing the following: that a first information report was lodged by PW-1 *(who is not an eye witness)* in respect of an incident in which PW-1's daughter got burnt; that PW-1's daughter was a child; that in a burnt condition PW-1's daughter was admitted in the hospital on 16.04.2019 and was medically examined by PW-6 and PW-9 on that day; that she stayed alive in the hospital till her death, which took place on 01.05.2019; that her injury report (Ex. Ka-6), dated 16.04.2019 disclosed that the victim had suffered thermal burns to the extent of 80% - 85% referable to kerosene oil burns; that victim's internal medical examination, dated 16.04.2019, by PW-9 disclosed a rupture of her hymen at 7 O'clock position; and that the victim died due to septicaemia as a result of burn injuries sustained by her. However, with regard to the participation of the accused appellant in causing thermal burn injuries to the victim or making a penetrative sexual assault on the victim, the prosecution witnesses of fact in their deposition have not supported the story taken in the first information report. Rather, they claimed that the victim got accidentally burnt while cooking food as kerosene oil bottle slipped and fell on the gas burner. The prosecution witnesses also did not depose about the presence of the accused-appellant in the house at the time of the incident. Thus, by the evidence on record, the prosecution has

not been able to prove that the accused-appellant entered the house of the victim, misbehaved with her, or sexually assaulted her in any manner, and, thereafter, set her on fire. In absence of admissible evidence to prove the foundational facts of commission of penetrative sexual assault, or sexual assault, on the victim by the accused, the presumptive provisions of Section 29 of the Pocso Act would not get attracted as against the accused -appellant and, therefore, in our view, the judgment of the trial court is vitiated by a wrong approach in law.

38. The question that now arises for our consideration is whether there is any admissible evidence on the basis of which the conviction could be sustained. In this regard, the trial court placed reliance on Paper no. 39Ka/1, alleged dying declaration of the deceased and on statement of PW-2 in her statement in chief that because of the incident FIR was lodged against Monu Thakur. Before we deal with the dying declaration (Paper No.39 Ka/1), we shall examine the import of the statement made by PW-2 referred to above. It is well settled that for proper appreciation of oral testimony, the testimony has to be read in its entirety. Picking up a stray sentence, out of context, and coming to a conclusion is not at all permissible. The statement of PW-2 on which the trial court placed reliance is not that the FIR was lodged because Monu Thakur (the accused appellant) committed the act. Rather, it is that because of the incident, FIR was lodged against Monu Thakur. This statement in our view is not sufficient to conclude that the prosecution was successful in proving the foundational facts so as to trigger the presumption against the accused appellant under section 29 of the Act. Having said that, we shall now examine whether, in view of the alleged dying declaration of the victim/deceased (Paper No.39 Ka/1), stated to have been recorded on 16.04.2019, the appellant is liable to be convicted for the charged offences.

39. A dying declaration is admissible under Section 32(1) of the Evidence Act as an exception to the rule against hearsay evidence. If a dying declaration is duly proved and is found truthful, it can on its own form the basis of conviction. But before a dying declaration is relied upon by the court its making would have to be proved by legally admissible evidence. Unfortunately, in the instant case, neither the recording Magistrate nor the doctor, who certified the mental and physical condition of the victim, has been examined. Even if we assume that the concerned doctor was examined as one of the prosecution witnesses, he stated nothing about the dying declaration, probably, because the public prosecutor might not have deemed it necessary to lead evidence in that regard. Interestingly, the I.O. (PW-7) states that he came to know about the dying declaration having been recorded on 01.05.2019, the day the victim died. Notably, on death of the victim, the investigation was taken over by PW-8 from PW-7. But, surprisingly, even PW-8 does not proceed to record statement of the recording magistrate and does not enlist him as a witness. Thus, though the dying declaration (Paper No.39 Ka/1) is on record but this dying declaration has not been exhibited and it has also not been put to the accused while recording his statement under Section 313 CrPC, a fortiori, the same cannot be read and form basis of conviction. Consequently, we have no hesitation in holding that the conviction recorded by the trial court is unsustainable and is liable to be set aside.

40. Having found that the judgment of the trial court is liable to be set aside for the reasons recorded above, we shall now examine whether, for the reason that there exists a not proved and non-exhibited dying declaration on record, the matter should be remitted to the trial court for a retrial, or we, in exercise of our appellate power to take additional evidence, summon the recording magistrate and the doctor concerned to ensure that the alleged dying declaration stands exhibited.

41. As to when an appellate court, in an appeal against an order of conviction, exercising its power under section 386 (1) (b) CrPC, may direct for a retrial, a Constitution Bench of the Apex Court in the case of **Ukha Kolhe V. State of Maharashtra, AIR 1963 SC 1531** held thus:

"An order for retrial of a criminal case is made in exceptional cases, and not unless the appellate court is satisfied that the court trying the proceeding had no jurisdiction to try it or that the trial is vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial or that Prosecutor or an accused was, for reasons over which he had no control, prevented from leading or tendering evidence material to the charge, and in the interest of justice the appellate court deems it appropriate, having regard to the circumstances of the case, that the accused should be put on his trial again. An order of retrial wipes out from the record the earlier proceeding, and exposes the person accused to another trial which affords the prosecutor an opportunity to rectify the infirmities disclosed in the earlier trial, and will not ordinarily be countenanced when it is made merely to enable the prosecutor to lead evidence which he could but has not cared to lead either on account of insufficient appreciation of the nature of the case or for other reasons."

(Emphasis supplied)

After holding as above, the Court proceeded to notice a Division Bench decision of the Calcutta High Court in **Ramanlal Rathi V. State, AIR 1951 Cal 305**, wherein Harries, C.J. observed:

"If at the end of a criminal prosecution the evidence leaves the Court in doubt as to the guilt of the accused the latter is entitled to a verdict of not guilty. A retrial may be ordered when the original trial has not been satisfactory for particular reasons, for example, if evidence had been wrongly rejected which should have been admitted, or admitted when it should have been rejected, or the court had refused to hear certain witness who should have been heard. But retrial cannot be ordered on the ground that the prosecution did not produce the proper evidence and did not know how to prove their case.

(Emphasis supplied)

42. After considering various decisions including the Constitution Bench decision in **Usha Kolhe's case (supra)**, in a recent decision in **Nasib Singh V. State of Punjab and another, (2022) 2 SCC 89**, a three-judge Bench of the Apex Court, on the issue as to when an appellate court may direct for a retrial, summarised the law, in paragraph 33 of its judgment, as follows:

"33. The principles that emerge from the decisions of this Court on retrial can be formulated as under:

33.1. The Appellate Court may direct a retrial only in "exceptional'

circumstances to avert a miscarriage of justice;

33.2. Mere lapses in the investigation are not sufficient to warrant a direction for re-trial. Only if the lapses are so grave so as to prejudice the rights of the parties, can a retrial be directed;

33.3. A determination of whether a "shoddy' investigation/trial has prejudiced the party, must be based on the facts of each case pursuant to a thorough reading of the evidence;

33.4. It is not sufficient if the accused/ prosecution makes a facial argument that there has been a miscarriage of justice warranting a retrial. It is incumbent on the Appellant Court directing a retrial to provide a reasoned order on the nature of the miscarriage of justice caused with reference to the evidence and investigatory process;

33.5. If a matter is directed for re-trial, the evidence and record of the previous trial is completely wiped out; and

33.6. The following are some instances, not intended to be exhaustive, of when the Court could order a retrial on the ground of miscarriage of justice :

(a) The trial court has proceeded with the trial in the absence of jurisdiction;

(b) The trial has been vitiated by an illegality or irregularity based on a misconception of the nature of the proceedings; and

(c) The prosecutor has been disabled or prevented from adducing evidence as regards the nature of the charge, resulting in the trial being rendered a farce, sham or charade."

In view of the law noticed above, it is clear that a retrial can be directed in exceptional circumstances but not merely to enable the prosecutor to lead evidence which he could but has not cared to lead either on account of insufficient appreciation of the nature of the case or for other reasons.

43. In the instant case, we notice that the investigating officer (PW-7 & PW-8) in spite of having noticed that there existed a dying declaration on record did not care to record the statement of the magistrate concerned who recorded the dying declaration. In fact, the public prosecutor or the special prosecutor, as the case may be, also made no attempt to apply to the court to summon the recording magistrate to record his statement to get the alleged dying declaration exhibited. It is not a case where the prosecutor has been disabled or prevented from leading evidence material to the charge. The reason for not getting the dying declaration exhibited / proved appears in the testimony of the witnesses. It has come in the testimony of PW-1, the father of the victim, that when the magistrate had come to record the statement of the victim, the victim was not in a state to give her statement and, therefore, the magistrate had recorded what the ladies present there had told him and when the magistrate was questioned in that regard, the magistrate said that he would come again but he never came. Further, from the prosecution evidence including the statement of the I.O. (P.W.7), it is clear that the witnesses even during the course of investigation had exonerated the accused by giving their affidavits wherein they took a stand that it was a case of accidental burns. Otherwise also, the non-exhibited dying declaration, namely, paper no. 39 Ka/1, makes allegation against three persons. Two of them are not named whereas name of Monu is mentioned without parentage and proper address. Importantly, two doctors, namely, PW-6 and PW-9, of the hospital where the victim was admitted have been examined but they

did not speak a word about recording of dying declaration. In these circumstances, if the prosecution chose not to prove the dying declaration, it can not be said that the prosecution was prevented from leading evidence in that regard. Rather, there may be some reasons which the prosecution did not want to disclose. Be that as it may, as we have not been shown any application from victim's family to recall or call any witness and there is also no complaint brought to our notice with regard to extension of threat, or of coercion, upon the witnesses to desist from speaking the truth, we are of the considered view that merely because the dying declaration was not proved, the matter does not call for a retrial.

44. We also examined whether we should summon the magistrate concerned to get the alleged dying declaration exhibited. After examining the issue we have taken a decision that it would not be appropriate on our part to summon the magistrate concerned for the following reasons: (a) that the alleged dying declaration implicates three persons, out of which only one is named; (b) that the one named, is Monu without the suffix "Thakur" and his parentage is also not disclosed and even the address is not complete; (c) that there exists no forensic evidence such as DNA profiling to connect the appellant to the crime, if any; (d) that there is no application moved by any party to summon the recording magistrate or the doctor to prove the alleged dying declaration; and (e) that PW-1, PW-2 and PW-3, namely, the witnesses of fact, have not supported the prosecution case as against the appellant and as per the statement of I.O. (PW-7), during the course of investigation, affidavits were given by witnesses exonerating the accused-appellant. Under these circumstances, we do not deem it necessary to summon the concerned magistrate to get the alleged dying declaration exhibited, particularly, when the prosecution as well as the victim's family both are not relying on it.

45. In view of the discussion above, as we have found that there is no worth-while evidence on record to prove the charges against the accused-appellant; and that in absence of proof of foundational facts with regard to commission of specified offences punishable under the Act, the benefit of presumption would not be available to the prosecution under section 29 of the Act, we have no hesitation in allowing the appeal and rejecting the reference. The appeal is therefore **allowed.** The judgment and order of the trial court is set aside. The reference to confirm the death penalty is rejected. The appellant is acquitted of the charges for which he has been tried. He shall be released forthwith unless wanted in any other case subject to compliance of the provisions of section 437-A CrPC to the satisfaction of the trial court below.

46. Let the lower court record be sent along with certified copy of the order to the trial court for compliance.

(2022)03ILR A145
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 11.03.2022

BEFORE

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

Criminal Appeal No. 818 of 1981

Puttan @ Shiv Shanker & Anr. ...Appellants
Versus
The State of U.P. ...Respondent

Counsel for the Appellants:

J.N. Chaudhary, Gaurav Mishra, Rajendra Prasad Mishra, Sanjay Kumar Srivastava

Counsel for the Respondent:
G.A.

A. Criminal Law - Code of Criminal Procedure,1973 - Section 374(2) - Indian Penal Code, 1860-Sections 302/34, 307/34, 394-challenge to-conviction- a broad daylight murder with strong motive-direct evidence-the statements of three witnesses PW-1, PW-2, PW-3 have categorically supported the evidence, which is fully supported by the medical evidence-no recovery of any fire-arm weapon is not a ground to acquit the accused when his presence, active participation and using firearm has been established and proved-injuries sustatined by deceased are result of one weapon-injured witness was not produced by the prosecution cannot be a ground to throw out the prosecution case in its entirety-no independent witness had come forward to support the prosecution as there were number of passengers present on the bus can hardly prove fatal to the prosecution case-stomach of the deceased was found empty in medical examination, determination of time of death solely with reference to the stomach contents is not very certain and determinative factor-the prosecution has proved its case beyond reasonable doubt against the appellants-order passed by trial court convicting the appellants is upheld.(Para 1 to 59)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Rizwan Khan Vs St. of Chhattisgarh (2020) 9 SCC 627

2. St. of H.P. Vs Pardeep Kumar(2018) 13 SCC 808

3. Masjit Tato Rawool Vs St. of Mah. (1971) SCC (Cr.) 732

4. Gopal Singh Vs St. of U.P. (1979) AIR SC 1932

5. Sheo Dershan Vs St. of U.P., (1972) SCC (Cr.) 394

6. R. Prakash Vs St. of U.P. (1969) 1 SCC 48 , 50

7. Shivappa Vs St. of Karn. (1995) 2 SCC 76

8. Jabbar Singh Vs St. of Raj. (1994) SCC Cr. 1745

9. Dhirendra Singh @ Pappu Vs St. of Jharkhand CRLA No. 580 of 2018

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

1. **Puttan, Ram Chandra and Lali alias Ram Shanker,** were tried by the Sessions Judge, Unnao in Sessions Trial No. 480 of 1980 : *State Vs. Puttan @ Shiv Shanker and Ram Chandra* and Session Trial No. 336 of 1983 : *State Vs. Lali alias Ram Shanker,* respectively, arising out of Case Crime No. 220 of 1980, under Sections 302/34, 307/34 and 394 I.P.C. at police station Achalganj, District Unnao.

2. Vide judgment and order dated 22.09.1981 passed in Sessions Trial No. 480 of 1980, the Sessions Judge, Unnao, acquitted the accused persons, *Puttan alias Shiv Shanker and Ram Chandra*, for the offence punishable under Section 307/34 I.P.C., however, convicted and sentenced them in the manner as stated herein below :-

"i. Under Section 302/34 I.P.C. to undergo imprisonment for life; and

ii. Under Section 394 I.P.C. to undergo imprisonment of five years R.I.."

Both the sentences were directed to run concurrently.

3. Later on, vide judgment and order dated 16.03.1984 passed in Sessions Trial No. 336 of 1983, the Sessions Judge, Unnao convicted and sentenced co-accused Lali alias Ram Shanker in the manner as stated herein below :-

"i. Under Section 302/34 I.P.C. to undergo imprisonment for life; and

ii. Under Section 394 I.P.C. to undergo imprisonment of five years R.I.."

Both the sentences were directed to run concurrently.

4. Feeling aggrieved by the judgment and order dated 22.09.1981 passed in Sessions Trial No. 480 of 1980, convicts/appellants, *Puttan alias Shiv Shanker and Ram Chandra* have filed Criminal Appeal No. 818 of 1981, whereas convict/appellant Lali alias Ram Shanker has filed Criminal Appeal No. 268 of 1984 against the judgment and order dated 16.03.1984 passed in Sessions Trial No. 336 of 1983.

5. It is pertinent to mention that during the pendency of the aforesaid criminal appeals, convict/appellant Lali alias Ram Shanker of Criminal Appeal No. 268 of 1984 died on 02.12.2018, hence his appeal stood abated vide order dated 30.01.2019.

6. Now, the instant Criminal Appeal No. 818 of 1981 filed on behalf of convicts/appellants **Puttan alias Shiv Shanker** and **Ram Chandra** is surviving and we proceed to decide the same.

7. The informant Chandra Shekhar (P.W.1) had lodged the F.I.R., alleging therein that in the year 1977, his son Kaushal Kishore was murdered by Puttan, Moti, Lali, Ram Chandra (accused) and others. The report of the said incident was registered by Hari Kishore (deceased) at police station Achalganj and Hari Kishore (deceased) was doing *pairvi* of the said case. The said case is still going on in Court. On account of fear, they are residing at Unnao.

It has further been alleged by Chandra Shekhar (P.W.1) that on 21.06.1980, he and his son Hari Kishore (deceased) had gone to village Padri Kalan to meet their relative, namely, Krishna Kumar Misra. On the next morning i.e. on 22.06.1980, he and his son Hari Kishore (deceased) were returning from roadways bus, bearing registration No. UTC 9646, from village Padri Kalan to Unnao. At about 9 a.m., the said bus stopped near the grove of one Rajju Shukl, which is one kilometer north from Padri Kalan, for boarding of the passenger and issuing tickets. All of a sudden, Puttan alias Shiv Shanker, son of Prayag Narayan (convict/ appellant no.1) armed with single barrel gun, Lali alias Ram Shanker (co-accused) son of Narayan Lodh, armed with *katta (pistol)*, Moti Yadav (co-accused) armed with double barrel gun and Ram Chandra (convict/appellant no.2) armed with a pistol, entered the bus from its back door. After that, they dragged Hari Kishore (deceased) out of the bus, who was sitting near the rear gate of the bus and snatched his licensed gun and his bag containing 25 cartridges, gun licence, wrist watch and Rs. 150/- cash. After that, all the four accused persons fired upon Hari Kishore (deceased) with their respective weapons, causing him injuries. As a consequence, Hari Kishore (deceased) succumbed to his injuries.

It has also been alleged by Chandra Shekhar (P.W.1) that the said incident was witnessed by Munnu Pandey, son of Shivkanth Pandey, resident of Padri

Kalan, Sri Chandra Prakash Awasthi (P.W.3), Laxmikant, son of Ram Shanker Dixit, and Rajendra alias Raje (P.W.2), son of Lala Ram Pandey and other passengers travelling in the said bus. After that, Munnu Pandey proceeded by the same bus for treatment.

8. Thereafter, on the day of incident itself i.e. on 22.06.1980, Chandra Shekhar (P.W.1) and Krishna Kumar proceeded to police station Achalganj on a bicycle, wherein Chandra Shekhar (P.W.1) dictated the incident to Krishna Kumar, who after scribing it, handed over the same to Chandra Shekhar (P.W.1). After reading the same, Chandra Shekhar (P.W.1) put his signature thereon and lodged it at police station Achalganj.

9. The evidence of P.W.5- Dinesh Kumar shows that on 22.06.1980, he was posted as Constable Moharrir at police station Achalganj. On that day, a written First Information Report was received from Chandra Shekhar (P.W.1), on the basis of which, he prepared Chik F.I.R. (Ext. Ka. 6), which is in his handwriting and signature. A copy of the said chik F.I.R. was handed over to Chandra Shekhar (P.W.1). On the basis of the said F.I.R., case was registered, entry of which was made in G.D. report no.16 at 12:30 p.m. He proved the original copy of G.D. (Ext. Ka-7) which is in his handwriting and signature. The special report of the present case was sent through Constable Shiv Singh at 2.15 p.m., entry of which was made in G.D. as Report no.18 (Ext. Ka-8) .

In his cross-examination, P.W.5 denied the suggestion that the F.I.R. was registered after investigation. In the General Diary dated 22.06.1980 no other case was registered apart from the present case. Report of other crime was registered in the General Diary at 8.05 p.m. He denied the suggestion that entries in the general diary were anti-timed. Till 12 o'clock that day no constable or inspector returned from the place of occurrence.

10. A perusal of the chik F.I.R. reveals that the distance between the place of the incident and police station Achalganj is 10 miles (16 Kms.). It is significant to mention that a perusal of the chik FIR also shows that on it's basis, case crime no. 220 of 1980, under Sections 394, 302, 307 I.P.C. was registered against Puttan alias Shiv Shanker, Ram Chandra (appellants), Lali alias Ram Shanker and Moti Yadav (died during investigation of the case).

11. The investigation of the case was conducted by P.W.7- S.I. Shri Hari Krishna Verma, who, in his examination-in-chief, had deposed before the trial Court that in June, 1980, he was posted as Station Officer at police station Achalganj, District Unnao. On 22.06.1980, the written report of the present case was lodged at the police station in his presence. He deposed that his signature was also on chik F.I.R. (Ext. Ka.6). He conducted the investigation of the present case. He went with the informant (P.W.1) to the place of occurrence. Since the place of occurrence was the common way, it was necessary to reach there.

On reaching the place of incident, he inspected the dead body and in the presence of witnesses, he prepared Panchayatnama (Ext. Ka.2) of the dead body in his handwriting and put his signature thereon, wherein the witnesses had also put their signature, After that, he prepared challan lash (Ext. Ka.9), photo lash (Ext. Ka.10) and letter to C.M.O. (Ext.

Ka.11) in his handwriting and put his signature thereon. After that, the dead body of Hari Kishore (deceased) was sealed on the spot and sent to the mortuary for post-mortem through Constable Konde Ram along with necessary documents. After that, he recorded the statement of informant (P.W.1), inspected the place of occurrence and prepared the site plan (Ext. Ka.12) in his handwriting and signature. He found near the dead body two empty cartridges, seven pellets, one bullet, one *tikli*, a piece of bus ticket from the pocket of the deceased, three coins of ten paisa denomination and one coin of five paisa denomination. He recovered these items and prepared recovery memo (Ext. Ka. 4), which is in his handwriting and signature. After that, he took into custody a tericot pant covered with blood containing marks of shrapnel, which was taken off from the body of the deceased. He proved pant (Ext. I), belt (Ext. II), empty cartridge (Ext. III), big pellet (Ext. IV), seven small pellets (Ext. V) and *tikli* (Ext. VI), which were found at the place of the incident. He collected blood stained earth and plain earth from the place of occurrence under recovery memo (Ext. Ka.3). After that, he recorded statement of witnesses Krishna Kumar, Rajesh Kumar, Chandra Prakash (P.W.1), Laxmikant and also recorded the statement of witnesses of Panchayatnama. In the evening, when he saw the bus no. UTC 9646 going to Padri Kalan from Unnao, he stopped it and recorded the statement of its driver Rajendra Kumar (P.W.2) and conductor Santosh Kumar.

On 23.06.1980, he searched for injured Munna Pandey and the accused persons, but couldn't find either of them. On 24.06.1980 when he received post-mortem report of deceased Hari Kishore, he recorded it in case diary. He kept searching for the accused. On the information of absconding accused, he initiated proceedings against accused under Section 82/83 Cr.P.C. and on receipt of order, SI Qamrul Haq served notice for initiating proceedings under Section 82/83 Cr.P.C. On 03.07.1980, he received the information regarding the surrender of accused in the Court. On 17.07.1980, he recorded the statement of accused Puttan and Ram Chandra in the lock-up of the Court. On 06.08.1980, he recorded the statement of injured Munnu. On 17.07.1980, he came to know that accused Moti was murdered. After completion of investigation, he submitted the charge-sheet (Ext. Ka. 13) against the accused persons on 02.09.1980.

In cross-examination, P.W.7 deposed before the trial Court that witness Chandra Shekhar (P.W.1) did not give statement before him that Puttan and Ram Chandra had forcefully dragged the deceased out of bus. This witness had also not stated that Moti had snatched the bag of Hari Kishore and Lali had snatched the gun. The aforesaid witness had also not stated that all the four accused again fired upon Hari Kishore. This witness had also not stated that accused had threatened the driver, conductor and passengers.

P.W.7 had further deposed that on 22.06.1980, at 05:30-06:00 p.m., he recorded the statement of witness Raje (P.W.2). When he reached the place of incident, about 30-40-50 persons were present. He did not know that Raje (P.W.2) was an eye-witness of the incident. As other witnesses pulled back on account of panic, therefore, Raje (P.W.2), despite being an eye-witness, kept him as a witness of Panchayatnama. He did not think it appropriate to write this reason in the Panchayatnama. He denied that FIR was not prepared till the time of Panchayatnama, therefore, Raje (P.W.2) was kept as witness of Panchayatnama.

Raje (P.W.2) did not tell him that one other passenger had sustained injury in the incident. Raje (P.W.2) had also not stated in his statement that Chandra Shekhar (P.W.1) was also travelling in the said bus. Raje (P.W.2) had also not stated him that Lali (co-accused) had snatched the gun and Moti (co-accused) had snatched the bag. P.W.2-Raje had also not stated to him that the accused had threatened the driver, Chandra Shekhar (P.W.1) and other passengers.

P.W.7 has stated that on 22.06.1980, he recorded the statement of witness Chandra Prakash Awasthi (P.W.3). This witness had not stated that Chandra Shekhar (P.W.1) was also travelling from the said bus because he did not ask. This witness had stated that he saw Moti (co-accused) armed with double barrel gun, Puttan (appellant no.1) armed with single barrel gun, Lali (co-accused) and Ram Chandra (appellant no.2) armed with *katta (pistol)* were dragging Hari Kishore (deceased) (Ext. Kha. 1). This witness had also not stated in his statement that Moti and Lali (co-accused) had snatched the bag and gun, respectively. This witness had also not stated the fact of threatening the driver, conductor and other passengers by the accused nor he asked.

P.W.7 had further deposed before the trial Court that witness Santosh Kumar Awasthi did not state about rampage or firing from the back portion of the bus. He denied that FIR was prepared after due deliberation and consultation with the police. On 22.06.1980, he went to Padri Kalan to search for accused and also search for the injured. On the same day, he also searched injured at Unnao. He further deposed that mention was made in the case diary about search of the accused but not about the search of injured. On 23.06.1980, he went to Padri Kalan to search for injured, and mention of this was also made in the case dairy. He denied that effort was made to make fake injured witness but he did not succeed. He denied that information was received at the police station only to the effect that one person was lying dead on the road. As the driver and conductor of the bus did not state about seeing the accused at the time of the incident, therefore, he did not find it proper to make identification of the accused from them.

12. Going backward, the post-mortem of the dead body of the deceased Hari Kishore was conducted on 23.06.1980 at 12:00 noon at District Hospital, Unnao by P.W. 4- Dr. J.N. Bajpai, who found the following ante-mortem injuries on his person :-

"Ante-mortem injuries of deceased Har Kishore :

1. Gun shot wound of entry, ½" x ½" x brain cavity deep on the right side of face, 1 inch in front of right ear. Margins inverted and contused. Blackening and tattooing present.

2. A gun shot wound of entry, 1/3" x 1/3" x brain cavity deep, on the left temporal region, with bleeding from left ear. Margins inverted and contused. No blackening or tattooing present.

3. A gun shot wound of entry, ½" x ½" x chest cavity deep on the right side of chest, 2" above right nipple. Blackening and tattooing present. Margins inverted and contused.

4. Six gun shot wounds of entry 1/3" x 1/3" x abdominal cavity deep on the lower part of right side of abdomen in the right iliac region in an area 3 ½" x 3 ½". Blackening and tattooing present. Margins inverted and contused.

5. A gun shot wound of entry, 1 ½" x 1 ½" x abdominal cavity deep on the

lower part of the right of abdomen, 5" below umbilicus with loop of lacerated small intestine protruding from the wound. Blackening and tattooing present. Margins inverted and contused.

6. A gun shot wound of entry 1/3" x 1/3" x chest cavity deep on the left side of chest in the region of left nipple. Blackening and tattooing was present. Margins inverted and contused.

7. A gun shot wound of entry 1/3" x 1/3" x chest cavity deep on the left side of chest 3" above injury no.6. Blackening and tattooing was present.

8. Three gun shot wounds of entry 1/3" x 1/3" x bone deep on the inner part of left arm upper half in an area 2½" x 1". No blackening or tattooing present.

9. Ten gun shot wounds of entry, 1/3" x 1/3" x bone deep on the back of left arm in an area 6" x 4". No blackening or tattooing present.

10. A gun shot wound of entry, 1" x ¾" on the back of left arm, 1" above injury no.9. No blackening or tattooing present.

11. A gun shot wound of entry 1/3" x 1/3" x muscle deep on the left scapula. No blackening or tattooing present.

12. Four gun shot wounds of entry 1/3" x 1/3" x chest cavity deep on the left side of chest, 5" below left armpit. Blackening and tattooing present.

13. A gun shot wound of entry, ½" x 1/3" x muscle deep on the outer part of left buttock. No blackening or tattooing present.

14. Three gun shot wounds of entry 1/3" x 1/3" x muscle deep on the left side of buttock middle part. No blackening or tattooing present.

15. A gun shot wound of entry ½" x 1/3" x muscle deep on the lower part of left buttock.

As per the opinion of P.W. 4- Dr. J.N. Bajpai, the deceased died due to coma, shock and haemorrhage on account of gun shot injuries.

13. It is significant to mention that P.W.4-Dr. J.N. Bajpai had reiterated the aforesaid cause of death of the deceased and stated before the trial Court that on 23.06.1980, he was posted as Radiologist in Sadar Hospital, Unnao. On the said date, at around 12 noon, he conducted post-mortem examination of the dead body of deceased Hari Kishore, which was brought in a sealed condition by Constable Kode Ram and identified by him. According to him, the deceased Hari Kishore was aged about 27 years; he died a day ago; the physic of the deceased was average; rigor mortis was present in the lower extremities of the dead body; and there were no signs of rotting on the dead body. He further deposed that on internal examination of the deceased, he found fracture of middle cranial fossa; fracture base of skull; brain was lacerated; the third and fourth ribs of the right side of the chest were fractured; the pleura was lacerated and contains a litre of fluid; both lungs were lacerated; pericardium was lacerated; heart had been torn into pieces; empty peritoneum was lacerated and contained a litre of fluid; stomach was empty; small and large intestines were lacerated; liver was lacerated on the left side; spleen was lacerated; and urinary bladder was lacerated. He further deposed that nine big shots and eight pieces of waddings were recovered from the dead body and sealed and sent to the S.P., Unnao. He proved the post-mortem report (Ext. Ka. 5). He further deposed that the above injuries were sufficient in the ordinary course to cause death and there is a possibility of instant death from such injuries. The death of the deceased could be

attributable on 22.06.1980 at around 08:00 a.m.. All the injuries could be caused by fire arm.

In cross-examination, P.W.4 had deposed before the trial Court that duration of death could be between 6-7 hours either way. The shots containing blackening or tattooing or wadding could be caused by a very close range of about 3 feet. The injuries which did not contain blackening or tattooing could be caused at a distance of more than four feet. Since stomach was found empty it can be said that the deceased had not eaten any food within four hours of his death.

14. The case was committed to the Court of Sessions by the Judicial Magistrate-I, Unnao vide order dated 10.10.1980 and the trial Court charged the appellants, Puttan and Ram Chandra, for the offence punishable under Sections 323/34, 307/34, 394 I.P.C. They pleaded not guilty to the charges and claimed to be tried. Their defense was of denial.

15. The prosecution in support of it's case has examined six witnesses, out of which P.W.1-Chandra Shekhar, who is the informant and father of the deceased, P.W.2-Raje, who is the friend of the deceased and P.W.3-Chandra Prakash Awasthi, who was travelling in the bus at the time of the incident, were examined as eye-witnesses of incident, whereas Dr. J.N. Bajpai, who conducted post-mortem examination of deceased Hari Kishore, was examined as P.W. 4; Constable Moharrir Dinesh Kumar of police station Achalganj was examined as P.W. 5; Santosh Kumar, who was the Conductor of the bus from which deceased Hari Kishore was said to have been dragged out and murdered, was examined as P.W. 6; and Investigating Officer S.I. Sri Harikishan Verma, who conducted the investigation and proved various documents and memos drawn up by him, was examined as P.W. 7.

16. Reverting to the testimony of the witnesses of fact, P.W. 1-Chandra Shekhar, in his examination-in-chief, had stated before the trial Court that he had four sons, namely, Kaushal Kishore, Raj Kishore, Jugul Kishore and Hari Kishore (deceased). His son Raj Kishore was convicted in the murder case of Gauri Shanker. Gauri Shanker was real brother of accused Puttan. In the year 1977 his son Kaushal Kishore was murdered and report of said murder was lodged by his son Hari Kishore (deceased) against Puttan, Ram Chandra, Motilal, Lali, Bacchu and others. The said murder case of Kaushal Kishore was still going on during the pendency of the present murder case of Hari Kishore. Hari Kishore (deceased) who was the witness of the said murder case of Kaushal Kishore was doing *pairvi*. On account of the said murder case, the accused Puttan and others were furious with him and therefore, on account of fear, he and his family left the village and started residing at Unnao. Accused Puttan has two brothers, one of them, namely, Gauri Shanker, was murdered and in the said murder case of Gauri Shanker, son of P.W.1 Raj Kishore was convicted. The third brother of Puttan namely, Bacchu alias Prem Shanker is absconding in the murder case of Kaushal Kishore.

P.W.1 had further deposed before the trial Court that the incident was around a year ago. On 21.06.1980, he and his son Hari Kishore went to the house of their relative Krishna Kumar Mishra. There is a paved road from Padri to Unnao, in which buses of roadways were plying. The bus

from Unnao turned near Mangat Khera and went towards Padri. On 22.06.1980, at 08:30 a.m., he, his son Hari Kishore (deceased) and Krishna Kumar Mishra were going to Unnao by roadways bus. His son Hari Kishore was having gun and bag, in which 25 cartridges, one watch, 150 cash and gun license were lying. The bus was overcrowded. His son Hari Kishore sat beside window of rear seat of the bus. He was seated in the left side of middle seat of the bus. At around 08:30 a.m., the bus left from Padri to Unnao. After plying about one kilometer from Choti Padri, the bus stopped near the grove of Rajju Shukl, wherein the bus conductor issued the tickets to the passengers and took passengers on board. When the bus stopped, Hari Kishore (deceased) started shouting. At that time, it was around 09:00 a.m. When he looked out of the window, he saw that at the rear window, accused Putan and Ram Chandra were forcibly dragging Hari Kishore (deceased) out of the bus. Moti Yadav and Lali Lodh accompanied them. Puttan (appellant no.1) was armed with single barrel gun. Accused Moti (died during investigation) was armed with double barrel gun. Ram Chandra (appellant no.2) and Lali (co-accused) were armed with country-made pistols. Accused and his companion dragged Hari Kishore (deceased) out of the bus. Moti Yadav (co-accused) snatched the bag of Hari Kishore (deceased) and Lali (co-accused) snatched the gun of Hari Kishore (deceased). The said scuffle occurred on the western side of the bus and in the said scuffle, Hari Kishore (deceased), accused and his companions moved 4-6 steps towards the southern side. After that, accused Puttan and Ram Chandra armed with gun and pistol, respectively, fired a shot upon Hari Kishore (deceased). The said fire was done by the accused at a distance of about 1½ hands. After that, accused Moti and Lali fired upon Hari Kishore (deceased) with their respective weapons. After this, all the four accused persons fired one more shot. Hari Kishore (deceased) fell there and died.

P.W.1 had further deposed that among the passengers who were travelling in the bus, Rajendra Pandey alias Raje (P.W.2), resident of Bhivani, Chandra Prakash Awasthi (P.W.3), resident of Pariyar, who was residing in Unnao at the time of the incident, Laxmikant, resident of Bhumbhuwar etc. came out from the bus and saw the incident. One passenger Munna Pandey was injured in the incident. After the incident, the accused threatened the bus driver to take away the bus from there and threatened that if anyone gives evidence against them, then, they will see to them. After saying this, the accused went towards Choti Padri. After the accused persons left, he got down from the bus and saw Hari Kishore (deceased) had died. He further deposed that during the incident, he was inside the bus and witnessed the incident from window of the said bus. He did not get down from the bus because of fear. After around 10 minutes, the bus left for Unnao. Munna Pandey also went to Unnao on the same bus and he, thereafter, did not meet him. After that, he went to Padri Kalan along with Krishna Kumar and he left Rajendra, Chandra Prakash and Laxmikant near the dead body. From Padri Kalan, he took a cycle and went to police station Achalganj along with Krishna Kumar. At Achalganj, his son Yugul Kishore, who is the master, met him at *chauraha* (crossroad), wherein he got a report written by Krishna Kumar on his dictation. Whatever he dictated, Krishna Kumar wrote on the report and after reading it, he put his signature thereon. He proved the report (Ext. Ka.1). He, then, proceeded to police station and lodged the

said report therein. The senior Munshi prepared chik report and provided him a copy of it. After that, he came back to the place of incident along with the Inspector from police station. The Inspector prepared the Panchayatnama of the dead body. Two empty cartridges were found near the dead body. After that, the Inspector interrogated him and he told him the incident.

P.W.1 had further deposed that accused Moti Yadav was murdered during the pendency of trial and accused Lali was absconding. Accused Lali threatened that if any one adduces evidence against him, he will kill him. The brother of Puttan, namely, Bacchu, also gave the same threat. The witness Rajendra was also threatened by Bachu, Lali and Mewa Lal and upon climbing of his house, they fired, on account of which, his sister died and his nephew was inured and admitted in the hospital. On account of this fear, Chandra Prakash Awasthi (P.W.3) and Laxmikant were scared to give evidence.

In cross-examination, P.W.1 had deposed before the trial Court that in the murder case of Kaushal Kishore, Baggad was also an accused. Baggad was also murdered during this case. He denied the suggestion that he and his son had murdered Baggad. The murder of Moti was committed in old judge campus outside the Court of Gupta Sahab, Additional District Judge when he was handcuffed and sent to Jail. The accused of murder of Moti was caught on spot. He did not know whether the said accused was awarded life imprisonment or not. He further denied the suggestion that in the murder of Moti, he was also arrested by the police of police station Unnao. It is also wrong to say that Moti was murdered as revenge for the murder of Hari Kishore (deceased). He further denied that he gave money for the murder of Moti and through him got Moti murdered and that he was doing *pairvi* of him. At what time of the day the accused climbed the house of Rajendra Pandey alias Raje (P.W.2) is not known to him. After the said incident, he never met Raje (P.W.2). He did not know whether father of Mewa Lal had written a report in the police station on 21.06.1981 for robbery at the house of Mangli, Puttan and one washer-man and also causing injuries to Sharda Prasad and sister-in-law of Puttan, in which, he, his son and witness Raje (P.W.2) were accused. It is wrong to say that Raje (P.W.2) and his sister were killed in the same incident. He further deposed that brother of Raje (P.W.2), Prabha Shankar is known to him.

The trial of murder of Vijay Ahir of Umrao Khera was started in the year 1977 against his son Hari Kishore (deceased), Raj Kishore and brother of Raje (P.W.2), Prabha Shankar and that the case was a false one and the informant himself stated that he did not lodge the report. He further stated that it is wrong to say that due to their fear, the witnesses could not be produced and they were acquitted. He further stated that his real brother-in-law, Ram Shankar, resides at Bhumbhuwar. The son of Ram Shankar, namely, Laxmikant is the witness of the said case. The father's name of Krishna Kumar Mishra, resident of Padri Kalan, is Pyare Lal Mishra. Krishna Kumar Mishra is his son-in-law in relation. He further stated that in his knowledge no other person related to Krishna Kumar resides at Padri Kalan. The father of Munnu, who received injuries during the incident, was Shiv Kanth, who resides at Padri Kalan. After the incident he did not ask the name of bus driver or conductor. He also did not ask the names of the passengers travelling in the bus. He did not get the bus ticket issued till the time of incident. As the bus stopped, the incident occurred. He further stated that it was not

the government stoppage, but the bus used to stop to issue bus tickets. After they boarded the bus at Padri Kalan until the time of incident, no ticket was issued by the conductor of the bus. He did not get the fact written that he was seated in the middle seat of the bus. He did not tell the said fact as the Inspector did not ask him.

At the time of incident, when he first saw Hari Kishore (deceased), he was being dragged out of the bus by the accused persons and his one leg was inside and another leg was outside the bus. At that time neither he nor Krishna Kumar or Laxmikant tried to save him. He did not alight from the bus on account of fear. He asked for help from other passengers of the bus, but none of them came forward. He did not remember whether the fact, that Puttan and Ramchandra forcibly dragged the deceased outside the bus, was written in the report or not, but he told it to the Inspector. He did not tell why the Inspector did not write the said fact in his statement. Puttan and Ramchandra were armed with weapons in one hand and by the other hand, they were dragging Hari Kishore (deceased) out of the bus. His son in order to save himself was pulling himself towards other side, but the accused persons were dragging him outside. When his son was dragged out of the bus, he carried a bag and gun. He did not remember whether in the said scuffle, clothes of Hari Kishore (deceased) were torn or not. During the scuffle, the gun and bag did not fall from his hand. While giving statement to the Inspector, he stated that Moti snatched the bag of Hari Kishore (deceased) and Lali snatched the gun. He did not tell the reason as to why the same was not written in his statement. After snatching the bag, Moti hold it in his hand and did not put on the floor. After snatching the gun, Lali held the gun in his hand. When the accused shot fire, Hari Kishore was in standing position. He further deposed that first the accused had caught him, then left him and opened fire upon him. He did not remember whether Hari Kishore (deceased) fell after the first fire or not. He could not say after how many shots were fired during the firing, Hari Kishore fell on the ground. When Ram Chandra and Puttan (appellants) had fired initially, the face of Hari Kishore (deceased) was on the west side and the killers were facing west. From which side Moti and Lali fired, he could not say surely but they fired from the side. He did not remember whether it was written in the report that the first shot was fired by Ram Chandra and Puttan (appellants). If it was not written, he could not tell the reason thereof. It was not written in the report about firing again by the four accused, but he told the Inspector and why the same was not written in his statement, he could not give any reason thereof. After the incident, it was not considered appropriate to get written in the report that the accused threatened the bus driver, conductor and other passengers. He told the Inspector, but why he did not write this thing, he could not give any reason thereof. The accused had not opened any fire inside the bus. Mannu Pandey (injured) was standing 8 steps east-south outside the bus from his son when he got hurt.

P.W.1 had further deposed that when he alighted the bus, he did not have any conversation with Mannu Pandey (injured). He didn't have any own items. He didn't have a towel or anything to change after taking a bath. He did not remember whether he had written in the report "Krishna Kumar watching the incident' or not. He could not give any reason why it is not in his report. He did not tell in his statement to the Inspector that the incident was seen by Krishna Kumar. He had seen

the accused from which direction they had fled away. He did not remember whether the direction of the accused' escape was written in the report or not or whether he had told the same to Inspector. He could not give any reason why the Inspector did not write this in his statement. When the Inspector was preparing the site plan, then, the direction of the accused' escape was shown. After the incident, he stayed at the spot for 20-25 minutes. He and Krishna Kumar went to Krishna Kumar's house together from the place of incident. Around half an hour took place to reach Krishna Kumar's house. He went to the police station Achalganj on a cycle from Krishna Kumar's house. He stayed around 15 minutes at Krishna Kumar's house. The police station Achalganj is 7 miles from Krishna Kumar's house. He did not try to write a report even in Padri Kalan. The matter of writing the written report was thought on reaching Achalganj. The written report was scribed by sitting 1-1½ furlong from the police station. It would have taken a total of 15 minutes to write the report. They stayed at the police station for about half an hour. His signature was taken on the report at the police station and not on any paper. He gave the same written report to Munshi at the police station. He stayed on the spot with the inspector till 11 o'clock in the night. He did not come to Unnao with the corpse. He did not remember whether he had signed any paper at the scene of the incident or not. After 3-4 days of the incident, he met the Inspector again. He did not remember whether he (Inspector) got him to sign some papers at that time or not.

P.W.1 had further deposed that it is wrong to say that the death of his son did not happen in front of him and he is telling the false story of going by bus. It is wrong to say that he may have gone there on the information of his son's body being found in Unnao. He also denied that witness Munnu Pandey is not absconding, but he does not want to establish the story of the evidence.

He denied the suggestion that the report was written after consultation and deliberation with the police. He denied the suggestion that the police of police station Achalganj had a friendship with his son. He denied the suggestion that he falsely implicated the accused on account of personal enmity.

17. P.W.2-Raje, who is a farmer by occupation and resident of Nevarna, police station Achalganj, deposed in his examination-in-chief that he was also called Rajendra Kumar. He knew Hari Kishore (deceased), who was murdered. He also knew accused Ramchandra and Puttan. He knew Lali Lodh and Moti Yadav (co-accused).

P.W.2 had deposed that the death of Hari Kishore (deceased) took place more than 1 year to 2-4 days. On that day, he went from his house to Unnao by bus. He boarded the bus from Padri Khurd. On the said bus, Chandra Shekhar Shukla (P.W.1) and his son Hari Kishore (deceased) were also there. The said bus was full of passengers. After running from Padri, the bus stopped near Rajju Shukla's garden, where tickets were issued and some passengers were also available. Hari Kishore (deceased) was sitting at the back seat of the bus near the window on the left. He was carrying a gun and bag. It was 9:00 a.m. On hue and cry, he looked out of the window and saw that Putan and Ram Chandra (appellants) grabbed Hari Kishore (deceased) by hand and dragged him out of the bus. He also got off from the front side of the bus and saw that Puttan was armed with gun, Ramchandra and Lali were armed

with *katta (pistol)* and Moti was armed with double barrel gun. Moti (co-accused) had snatched the bag of Hari Kishore and Lali had snatched the gun of Hari Kishore. First, Puttan and Ram Chandra (appellants) fired on Hari Kishore and after that all the four accused fired. The shot was fired from 24 steps back from the rear window of the bus. Chandra Shekhar Shukla (P.W.1) was also peeping the incident from inside the bus through the window. Laxmikant of Bhumbhuwar, Krishna Chandra of Padri Kalan and Mishra of Pariyar also got off the bus and saw the incident. A passenger of Padri was also shot in the incident. He immediately fled the scene of the incident. The accused had threatened the driver and conductor of the bus and said that they will face the same condition when they would not take out the bus. After threatening, accused ran away towards village. He went to Hari Kishore and saw that he was dead. On saying of Chandra Shekhar (P.W.1), he had stayed at the spot to supervise the dead body of Hari Kishore and Chandra Shekhar (P.W.1) had gone to lodge the report. He was staying there till the police arrived at the place of the incident. The Inspector had conducted the Panchayatnama of the corpse in front of him. P.W.2 had proved his signature on the Panchayatnama (Ext. Ka. 2). He further deposed that where the dead body of Hari Kishore was lying, Inspector took samples of blood stained and plain earth under recovery memo (Ext. Ka 3). He proved his signature on Ext. Ka.3. He further deposed that empty cartridges were also found near the corpse, which was taken in his possession by the Inspector under Ext. Ka.-4. He also proved his signature on Ext. Ka. 4. He further deposed that the Inspector took his statement and whatever he saw, he told the same to him.

P.W.2, in his examination-in-chief, had further deposed that when Puttan (appellant) was released on parole in this case, then, he threatened him not to give statement, otherwise, he would not be allowed to stay in the village. He stated that about 4-5 days ago, at around 1 o'clock in the night, when he was sleeping on the terrace, the brother of Putan and his other companions climbed on his house, showed him gun and said that "मै तुम्हे गवाही दिलाने आ गया हूँ।". Immediately thereafter, he ran, then, Bacchu fired which hit his sister and she died. He went to the police station and reported the incident. He filed a copy of the report which he got from the police station.

In cross-examination, P.W.2-Raje had deposed that at the time of the incident, he was not having any ticket of the bus because till that time ticket was not issued. He further deposed that no passenger of the bus was near Hari Kishore and accused. The passenger of the bus, who was shot, got shot when he was getting down from the rear window of the bus. He had fled towards his village Padri Kalan after being shot. He nor anyone else called him (injured) due to fear. No accused followed him (injured). He had informed the Inspector that another passenger was injured in the incident but the Inspector did not write this thing in his statement. He had told the Inspector that Chandra Shekhar (P.W.1) was also travelling from the said bus, however, he did not tell why this was not written by the Inspector. The matter of snatching the bag by Moti and snatching the gun by Lali was told by him to the Inspector but he could not tell why this fact was not written. The matter about threatening the driver, conductor and passengers by the accused were told by him to the Inspector, but he could not say why this was not written by the Inspector. He further deposed that during tussle, clothes etc. of Hari Kishore were not torn. Puttan and Ram Chandra were holding their

weapons in one hand and with the other hand were dragging Hari Kishore outside the bus. Hari Kishore was sitting in the bus with a bag and a gun in his hand. While pulling out of the bus, the bag and gun of Hari Kishore were in his hand and after pulling him out, Moti and Lali snatched it from him. After the incident, Chandra Shekhar (P.W.1) stayed on the spot for 10-5 minutes and then left. Chandra Shekhar (P.W.1) had got written the report by his son-in-law Mishra on the spot after the arrival of the Inspector. Hari Kishore (deceased) was wearing pants and bushirt at the time of the incident. He deposed that no ticket for that bus came out from Hari Kishore's pocket. An old ticket was definitely found from the pocket of Hari Kishore.

P.W.2 had further deposed that the bus by which they were travelling, was plying from Padri. After the incident, the accused went towards Padri from behind the bus. When the inspector came to the spot, he told him the direction of the escape of accused. When Puttan threatened him after he (Puttan) was released on parole, then, he didn't report anything but told the same to the Inspector. He had told this to Chandra Shekhar (P.W.1) also. There is no other person in his village in the name and parentage of him and his brother Prabha Shankar. It is wrong to say that Har Kishore was not killed in front of him and gave false testimony as a man of Chandra Shekhar's party.

18. P.W.3-Chandra Prakash Awasthi, in his examination-in-chief, had deposed before the trial Court that he knew Har Kishore (deceased), who was murdered. He also knew his father Chandra Shekhar (P.W.1). He knew accused Puttan and Ram Chandra. The incident of the murder of Hari Kishore happened about a year ago. On that day, at around 8:30 a.m., he boarded the roadways bus from Padri to go to Unnao. Chandra Shekhar Shukla (P.W.1) and his son also boarded the bus. The bus was too crowded. He was sitting in the front seat of the bus. Hari Kishore (deceased) was sitting on the back seat near the window on the left side and Chandra Shekhar (P.W.1) was sitting in the middle seat. At that time, the ticket was not distributed. After running about 1 kilometer from Padri, the Conductor stopped the bus to issue ticket near a garden. When the bus stopped, loud noise occurred. On hearing the noise, he and some others came down from the front window. On getting down, he saw that accused Puttan and Ram Chandra were dragging Hari Kishore out of the window by holding his hands. Hari Kishore (deceased) had a bag in one hand and a gun in another hand. When Har Kishore was pulled out of the bus, Moti snatched his bag and put it in his hand and Lali snatched his gun. Moti was carrying a double-barrel gun. Puttan had a single barrel gun. Lali and Ram Chandra had *katta*s. Ram Chandra and Puttan had shot one fire each on Hari Kishore (deceased) with their respective weapons. After that Lali and Moti also fired. After that all the four accused had made one fire each again. On sustaining injury of fire, Hari Kishore fell on the spot. The accused told the passengers of bus that they should immediately take out the bus and run away from here. They (accused) also threatened that if anyone adduced evidence, then, it would not be good. He further deposed that another passenger who was getting down from the vehicle while firing from the rear window was also injured in the firing. He did not know who he was and where he belonged. After the incident, he did not meet. He further deposed that after the incident, all the four accused went towards

Padri. After the incident, he saw that Har Kishore (deceased) was dead. Chandra Shekhar Shukla (P.W.1), and some other people stopped on the spot after the incident and the bus left. After a while, Chandra Shekhar went to the police station to lodge the report along with another person called Mishra. He was staying near the dead body on the spot. Around 3 o'clock in the day, the Inspector reached the spot by jeep along with the police team. Chandra Shekhar (P.W.1) had a copy of the report that he had received from the police station. He demanded from him (Chandra Shekhar) and saw it but as it was not clear, therefore, on the arrival of the Inspector, Chandra Shekhar (P.W.1) took a copy of the report from him and told Mishra to make a clean copy of it. After that, Mishra had prepared a copy of the report. On asking the Inspector, he told him the whole story of the incident.

In cross-examination, P.W.3-Chandra Prakash Awasthi had deposed that he did not have any relatives in Padri. He used to study in Unnao at that time. His paternal residence is at Mauja Pariyar, which is located in police station Safipur. Mauja Padri will be 14-15 miles east of Unnao. His village will be about 17-18 miles west of Pariyar, Unnao. After the incident, on saying of Chandra Shekhar Shukla (P.W.1), he left the bus and stayed on the spot. On that day, he had gone to get the horoscope of a boy for his niece's wedding. Mangal Shukla met him but could not get a horoscope. He had reached Padri on the first day in the evening and stayed overnight at Mangal Shukla's house. He took a bag with him. Since Mangal Shukla had told him that he do not want to get married yet, therefore, he did not go again to collect horoscope. He did not know the date of the incident. Since the son of Chandra Shekhar, namely, Hari Kishore was also studying in Unnao and he also studied in Unnao, therefore, there was a familiarity. Hence, Chandra Kishore (P.W.1) stopped him on the spot. When Inspector reached the spot, some people were present; some were gathering and some were going after seeing the incident. On asking by Chandra Shekhar Shukla (P.W.1), the paper given by the Inspector and from which Mishra had prepared a copy of it, was not seen by him because he was quite some distance. When Mishra had prepared the copy of the report given by the Inspector, then, Chandra Shekhar Shukla (P.W.1) brought the report and showed it to him, which was on plain paper. He did not remember whether it had the name or signature of Chandra Shekhar (P.W.1) at the bottom of the inscription. He denied the suggestion that asking for a report from Inspector and copying it by Mishra, has been said to be fake to remove the defect in the statement of Raje's witness. He did not remember whether he had informed the Inspector about the presence of Chandra Shekhar (P.W.1) in the bus. He could not say why this fact was not mentioned in his statement. He had told the Inspector about Ram Chandra and Puttan dragging Hari Kishore (deceased) from the bus. He did not tell the Inspector about being pulled by the four accused. He could not say how the Inspector wrote this when the accused were dragging Hari Kishore, then he did not try to catch or save him.

It was also told to the Inspector that Moti had snatched bag and Lali had snatched the gun, but he could not tell the reason why the Inspector did not write the same. He further deposed that after the incident, when Chandra Shekhar (P.W.1) started to go to lodge the report, then, he put *tahmad* upon the corpse. He stayed till 05:00 p.m. on the spot. He denied the suggestion that he did not see the incident

and he was Hari Kishore's (deceased) party, therefore, he gave false evidence.

19. P.W.6- Santosh Kumar, in his examination-in-chief, before the trial Court deposed that he was a bus conductor in Unnao roadways. In June 1980, he was also a bus conductor. In June, 1980, he was on duty on a bus going from Kanpur to Padri. On 22-6-80, he was assigned the duty on the bus bearing No. U.T.C. 9646. This bus had left for Unnao from Padri at 8 am. After running from Bada Padri, the bus stops at Chhoti Padi and the passengers are permitted from both places. He further deposed that usually their practice is that after leaving Padri, after running about 1 km, they stop the bus and issue tickets to the passengers. On 22-6-80 also, he issued tickets by stopping the bus 1 km ahead of Padri. On 22-6-80, when he started issuing tickets from the front of the bus, at the same time there was a ruckus at the rear seat of the bus and the sound of firing and people started running out of the bus. He stayed inside the bus. When the commotion calmed down and the passengers asked to take the bus forward, they went back to push the bus and saw that one person was dead. The passengers knew that the name of the deceased was Hari Kishore. Since the self of the bus was defective and used to start with a bang, therefore, this bus was stopped at Unnao and the passengers of Kanpur were transferred to another bus.

P.W.6 had further deposed that in the evening of the same day, he again took the same bus and went to Padri from Unnao. The place where the bullet incident took place, he had met the Inspector and told him the incident on his asking.

In cross-examination, P.W.6 had deposed that he told the Inspector about the ruckus that occurred in the bus but he did not tell the reason for not writing the same in his statement. He had told the Inspector about firing while giving the statement but he could not state why this was not written in his statement. He did not know Hari Kishore (deceased). At the time of the incident, he only issued 3-4 tickets.

20. The learned trial Judge believed the evidence of P.W. 1- Chandra Shekhar, P.W. 2-Raje and P.W.3-Chandra Prakash Awasthi and found the appellants Puttan and Ram Chandra guilty for the offences punishable under Sections 302/34 and 394 I.P.C. and, accordingly, convicted and sentenced them in the manner stated in paragraph-2.

21. As mentioned earlier, aggrieved by their conviction and sentences, appellants preferred the instant appeal.

22. Heard Shri Rajendra Prasad Mishra, Amicus Curiae for the appellant no.1- **Puttan**, Shri Akshat Kumar, Advocate holding brief of Shri Sanjay Kumar Srivastava, learned counsel for appellant no.2- **Ram Chandra** and Shri Arunendra, learned AGA for the State of U.P.

23. It has been argued by learned counsel for the appellants that appellant no.1- Puttan was armed with single barrel gun, appellant no.2- Ram Chandra was armed with country made pistol and co-accused Lali was armed with country made pistol and one Moti was armed with double barrel gun and all of them were assigned the role or firing at the deceased Hari Kishore, who succumbed to fire-arm injuries, and one Munnu Pandey also received injuries, but he was not produced or examined by the trial Court.

24. It has been further argued that though the deceased has received as many as 15 gun-shot injuries on his person but from the perusal of the post-mortem report of deceased it shows that dimension of the gunshot injuries received by the deceased shows that the same have been caused by one fire-arm weapon.

25. Learned counsel for the appellants further submitted that none of the eye witnesses were present at the place of occurrence and they have not seen the appellants as their ocular testimony completely belies the prosecution case.

26. It was next submitted that there is no independent witness of the occurrence though the incident has taken place in a roadways bus. Neither the deceased nor the other passengers on the bus had any ticket for travelling. There is no recovery of any weapon from the appellants which could show that the weapons with which they were armed with and had committed the murder of the deceased could be connected with the crime. They submitted that simply because there was a strong motive for the appellants to murder the deceased could not be a ground for their conviction and sentence by trial Court as because of the enmity there is every likelihood that the appellants may be falsely implicated in the present case by the informant.

27. Learned counsel for the appellants vehemently argued that the medical evidence belies the prosecution case considering the dimension of the gunshot injuries sustained by the deceased. It was argued that injuries sustained by the deceased by fire-arm weapon resulted from a single barrel gun.

28. It was lastly submitted that conviction and sentence awarded by the trial Court is against the evidence on record. Hence, it is liable to be set aside by this Court and the appellants be acquitted.

29. Per contra, learned AGA for the State has vehemently opposed the arguments of learned counsel for the appellants and submitted that the appellants had a strong motive to commit the crime and it is a case of direct evidence. The incident took place in the broad daylight at 9 a.m. in the morning and the deceased was shot dead by the appellants armed with fire arm weapons and the deceased received fifteen gunshot injuries on his person and he succumbed to injuries at the spot. PW1-Chandra Shekhar, who was the father of the deceased, had lodged the FIR of the incident on the same day at about 12.30 p.m. at the concerned police station naming the appellants in the present case.

30. The presence of three witnesses, P.W. 1- Chandra Shekhar, P.W.2-Raje and P.W.3-Chandra Prakash Awasthi, who was the school mate of the deceased, at the place of occurrence cannot be doubted as they had narrated the prosecution story in a categorical manner giving evidence before the trial Court that it was the appellants and co-accused Lali and Moti who were armed with weapons and had shot dead the deceased in a brutal manner.

31. He next submitted that simply because no weapon of assault was recovered from the pointing of the appellants cannot be a ground for the acquittal of the accused. He also submitted that from the evidence of P.W. 4-Dr. J.N. Bajpai, who had conducted the post-mortem report completely corroborates the prosecution case as has been set out by the three eye-witnesses namely, P.W. 1-Chandra Shekhar, P.W.2-Raje and P.W.3-

Chandra Prakash Awasthi. There is no inconsistency or ambiguity in their evidence, as medical evidence supports it and thus, the trial Court has rightly convicted and sentenced the appellants and the appeal is devoid of merit and accordingly, be dismissed.

32. We have given thoughtful consideration to the submissions advanced by learned counsel for the parties. We have perused the material on record along with the impugned judgment and order passed by the trial Court.

33. It transpires from the prosecution case as set out in the FIR, which has been lodged by Chandra Shekhar (P.W.1) father of deceased on 22.06.1980, at 12.30 p.m., at the concerned police station that Chandra Shekhar (P.W.1), along with his son/deceased Hari Kishore, had gone to village Padri Kalan to meet one of their relatives, namely, Krishna Kumar Misra. When they were returning next morning, i.e. on 22.06.1980 in a roadways bus No. UTC 9646 at about 8 a.m., the bus was stopped near the grove of Rajju Shukul at about 9 a.m. and the tickets were being issued by the conductor of the said bus. At that moment, appellant Puttan armed with single barrel gun, appellant Ram Chandra armed with pistol, co-accused Moti Lal armed with double barrel gun and accused Lali armed with pistol, came inside the bus from it's back door and dragged the deceased Hari Kishore out of the bus, who was sitting at the back side of the bus, and after snatching Hari Kishore's licensed gun, his bag containing 25 cartridges, gun license, wrist watch and Rs.150/- cash, the appellants and co-accused fired at him with their respective weapons, causing injuries to him and the deceased died instantaneously.

34. In the said incident, one Munnu Pandey, son of Shivmal Pandey resident of Padri Kalan, was also injured during the course of firing. The incident was witnessed by P.W.1-Chandra Shekhar, P.W.2-Raje and P.W.3-Chandra Prakash Awasthi.

35. The motive suggested in the FIR for the appellants to commit the murder of the deceased is that one Kaushal Kishore, who was the son of complainant Chandra Shekhar (P.W.1) and brother of deceased Hari Kishore, was murdered by the appellants Puttan, Ram Chandra and co-accused Lali, Moti and others and the report of the said incident was lodged by deceased Hari Kishore at police station Achalganj and the deceased was contesting the said case and doing *pairvi* and on account of the said pending case deceased Hari Kishore and his father Chandra Shekhar were living in District Unnao.

36. Chandra Shekhar (P.W.1), father of deceased Hari Kishore, who was an eye-witness of the case, after the incident accompanied Krishna Kumar to lodge FIR of the incident at police station Achalganj and the same was registered at the said police station at 12.30 p.m. The scribe of the FIR was Krishna Kumar. P.W.7-Sub-Inspector Hari Krishna Verma posted at police station Achalganj has drawn the chik report (Ext. Ka-6) and the entry was made in the G.D. Entry (Ext. Ka-7). P.W. 7- Sub-Inspector Hari Krishna Verma had also deposed before the trial Court that in his presence, the FIR of the present case was registered and he, after that, proceeded to the place of occurrence and had conducted the inquest proceedings, etc.. He further completed the investigation of the case and submitted charge sheet against the appellants and co-accused persons.

37. The prosecution has relied upon the evidence of three eye-witnesses of the incident, P.W.1-Chandra Shekhar, P.W.2-Raje and P.W.3-Chandra Prakash Awasthi.

38. The contention of learned counsel for the appellants is that the presence of three eye-witnesses viz. P.W. 1-Chandra Shekhar, P.W.2-Raje and P.W.3-Chandra Prakash Awasthi appears to be doubtful and the conviction of the appellants on the basis of the evidence by the trial Court does not inspire confidence, hence, the appellants be acquitted.

39. The said contention of learned counsel for the appellant is not at all acceptable as from the evidence of P.W.1-Chandra Shekhar, it transpires that on 21.06.1980, he and his son Hari Kishore (deceased) had gone to the house of their relative Krishna Kumar Mishra at Padri. On 22.06.1980, at 08.30 a.m., he, his son Hari Kishore (deceased) and their relative Krishna Kumar Mishra were returning from Padri to Unnao through roadways bus. After plying about one kilometer from Choti Padri, the bus stopped near Rajju Shukl's grove for the purpose of preparing tickets to the passengers and also took passengers on board. When the bus stopped at 09:00 a.m., Hari Kishore (deceased) shouted and on hearing the noise of Hari Kishore (deceased), he looked out of the window and saw that his son Hari Kishore was forcibly dragged by accused Puttan and Ram Chandra out of the bus from back door of the bus. At that time, co-accused Moti Yadav and Lali Lodh were accompanied by accused Puttan and Ram Chandra. He also stated that at that time, accused Puttan was armed with a single barrel gun; co-accused Moti was armed with double barrel gun; accused Ram Chandra and co-accused Lali were armed with country made pistols. After that, accused Puttan and Ram Chandra armed with gun and pistol, respectively, fired a shot each upon Hari Kishore (deceased) and thereafter co-accused Moti and Lali fired upon Hari Kishore (deceased) with their respective weapons. After firing a shot each, accused persons again fire one more shot, as a consequence of which, Hari Kishore (deceased) fell and died.

40. P.W. 3-Chandra Prakash Awasthi has fully supported the prosecution case. From the perusal of his evidence, it is apparent that he was also travelling in the same bus in which the deceased and his father PW1-Chandra Shekhar were travelling and in which the incident took place and the deceased was done to death by the appellants and co-accused after dragging him outside the bus and firing shots at him and the deceased succumbed to his injuries. It has come into the evidence of P.W.3-Chandra Prakash Awasthi that he was resident of Pariyar, Unnao, but had gone to village Padri Kalan and was travelling in the said bus and witnessed the incident. No doubt that in evidence it has come that he was friend of deceased Hari Kishore, who was a Teacher. There appears to be no material on record to show that the said witness was in any manner inimical to the appellants and the defense has not been able to demolish his evidence on any count. Hence, the evidence of P.W. 3-Chandra Prakash Awasthi is reliable and cannot be discarded.

41. Similarly, P.W. 2-Raje, who is a farmer and resident of village Nevarna, police station Achalganj, was also travelling in the said bus in which the deceased and his father were there. In his evidence, it has come that he had come from his village to Padri Kalan and from

there he was travelling to Unnao. He met deceased Hari Kishore and his father PW1-Chandra Shekhar and Laxmikant, who was resident of Bhumbuvar and one Chandrakant, resident of Padri Kalan on the same bus. In his evidence before the trial Court, he too has categorically stated how the incident had taken place as has been narrated in the FIR lodged by the father of the deceased Chandra Shekhar (P.W.1). In his evidence before the trial Court, he has stated that it was the appellants and co-accused, who have shot dead the deceased with their fire-arm weapons and further stated that the co-accused Moti snatched the bag of the deceased, whereas co-accused Lali had snatched the gun of the deceased which was carried by deceased at the time of incident. P.W. 2-Raje was also one of the witnesses to Panchayatnama, which further goes to show that his presence at the place of occurrence cannot be doubted. In the FIR also the complainant Chandra Shekhar (P.W.1) has mentioned about the presence of P.W. 3-Chandra Prakash Awasthi and P.W. 2 Raje along with other witnesses at the place of occurrence.

42. It is significant to mention that although P.W.1-Chandra Shekhar, P.W.2-Raje and P.W.3-Chandra Prakash Awasthi were subjected to extensive cross-examination, but nothing could be extracted therefrom, which could erode their credibility vis-a-vis the participation of the convicts/appellants in the instant case.

43. Thus, from the evidence of P.W. 1-Chandra Shekhar, P.W.2-Rajey and P.W.3-Chandra Prakash Awasthi, it has been categorically established that they were the eye-witnesses of the incident and their evidence fully establishes that it was the appellants who have committed the murder of deceased Hari Kishore with the co-accused person because of the strong motive as the deceased was contesting the murder case against them of his brother which annoyed the appellants and they brutally done to death the deceased in a broad day light which corroborates the ocular testimony supported by the post-mortem report of the deceased.

44. The argument of learned Amicus Curiae that deceased no doubt received many gunshot injuries from different fire-arm weapons, still it appears from the post-mortem report of the deceased that it can be caused by one fire arm weapon and the participation of the appellant no.1 Puttan and appellant no.2 Ram Chandra appear to be doubtful. Because of their inimical relationship, the appellant no.1 Puttan was implicated in the present case along with other co-accused persons.

45. The said argument of learned Amicus Curiae has no substance particularly from the perusal of the post-mortem report of the deceased shows that he received as many as 15 gunshot wounds of entry on his person and on different parts of the body and not only on one side of the body but in some of the injuries blackening and tattooing was found whereas, in other injuries no blackening or tattooing was found and as it is apparent from the prosecution case that the appellant Puttan was armed with single barrel gun, whereas appellant Ram Chandra was armed with country made pistol and co-accused Moti was armed with double barrel gun and Lali was armed with country made pistol and it cannot be said that the injuries sustained by the deceased are result of one weapon, moreover, from the evidence of P.W. 4 Dr. J.N. Bajpai also does not transpire that the

gunshot injuries sustained by the deceased Hari Kishore was a result of one fire-arm weapon.

46. Moreover, from the internal examination of the dead body of the deceased Hari Kishore, it transpires that there was a fracture of middle cranial fossa and fracture of the base of skull and the third and fourth ribs of the right side of the chest were also fractured. The pleura was lacerated. The brain, both lungs and pericardium were also in a lacerated condition. The heart had been torn into pieces and was empty. Peritoneum was lacerated. There was laceration in intestines, liver, left side of the spleen and urinary bladder. The stomach was found to be empty. Nine big shots and eight pieces of wadding were recovered from the dead body and were duly sealed and sent to the S.P., Unnao and from the post-mortem report of the deceased Hari Kishore the cause of death was coma, shock and hemorrhage due to gun shot injuries.

47. It has been next argued by learned counsel for the appellants that injured witness, namely, Munnu Pandey, who sustained injuries during the course of firing was not produced by the prosecution nor his medical examination was conducted which further belies the prosecution case and as has been narrated by the prosecution in the FIR.

48. The said argument of learned counsel for appellants is also of no relevance as it has come in the evidence led by the prosecution that Munnu Pandey was one of the passengers in the roadways bus in which deceased Hari Kishore and his father Chandra Shekhar and other two eye-witnesses were also travelling and he left the place of occurrence soon after the incident and his whereabouts could not be traced out and simply because he could not be produced by the prosecution cannot be a ground to throw out the prosecution case in its entirety as it appears that the said injured witness because of some fear from the accused persons, who committed the ghastly murder of deceased, did not have courage to give statement against them nor appeared before the Investigating Officer or before the trial Court to adduce evidence.

49. So far as the argument of learned counsel for appellants that no independent witness has come forward to support the prosecution as there were number of passengers present on the bus, the prosecution case, thus, does not appear to be a reliable one and the same is also of no consequence, is concerned, it would be apt to mention that in the case of **Rizwan Khan v. State of Chhattisgarh :** (2020) 9 SCC 627, while referring to its earlier decision in the case of **State of H.P. v. Pardeep Kumar** : (2018) 13 SCC 808, the Apex Court has observed and held that the examination of independent witnesses is not an indispensable requirement and such non-examination is not necessarily fatal to the prosecution case.

50. Applying the aforesaid law laid down by the Apex Court in the aforesaid decisions to the facts of the case in hand and when, as observed hereinabove, the prosecution witnesses viz. P.W.1-Chandra Shekhar, P.W.2-Raje and P.W.3-Chandra Prakash Awasthi have fully supported the case of the prosecution and they are found to be trustworthy and reliable, non-examination of the independent witnesses is not fatal to the case of the prosecution. More so, it is normally found that when such incident of murder takes place, it is very rare that witnesses appear to support

the same because of fear and other reasons. Hence, the non-production of any independent witnesses who were passengers in the bus can hardly prove fatal to the prosecution case.

51. Learned counsel for the appellants further stated that if the deceased and his father were coming back to their village from their relative's house in the morning, then, the stomach of the deceased shows that it was found to be empty which raises clouds of doubt about the prosecution case. It may be useful at this stage to refer to Modi's 'Medical Jurisprudence and Toxicology', Twenty Third Edition, which has specifically concluded that there is no absolute and definite standard that every human being would empty his stomach within two to three hours of taking the meals, irrespective of what kind of meal had been taken by the concerned person.

52. While discussing various judgments of the Apex Court, Modi in the aforesaid book at page 543 has recorded as under: -

"The state of the contents of the stomach found at the time of medical examination is not a safe guide for determining the time of the occurrence because that would be a matter of speculation, in the absence of reliable evidence on the question as to when the deceased had his last meal and what that meal consisted of [Masjit Tato Rawool v. State of Maharashtra, (1971) SCC (Cr.) 732; Gopal Singh v. State of Uttar Pradesh, AIR 1979 SC 1932; Sheo Darshan v. State of Uttar Pradesh, (1972) SCC (Cr) 394]. The presence of faecal matter in the intestines is not conclusive, as the deceased might be suffering from constipation. Where there is positive direct evidence about the time of occurrence, it is not open to the court to speculate about the time of occurrence by the presence of faecal matter in the intestines [Sheo Dershan v. State of Uttar Pradesh (1972) SCC (Cr.) 394]. The question of time of death of the victim should not be decided only by taking into consideration the state of food in the stomach. That may be a factor which should be considered along with other evidence, but that fact alone cannot be decisive [R. Prakash v. State of Uttar Pradesh (1969) 1 SCC 48, 50]"

53. The Apex Court in the case of **Shivappa v. State of Karnataka :** (1995) 2 SCC 76 held that medical opinion is admissible in evidence like all other types of evidence and there is no hard-and-fast rule with regard to appreciation of medical evidence. It is not to be treated as sacrosanct in its absolute terms. Agreeing with the view expressed in Modi's book on Medical Jurisprudence and Toxicology, the Apex Court observed that so far as the food contents are concerned, they remain for long hours in the stomach and the duration thereof depends upon various other factors. Indisputably, a large number of factors are responsible for drawing an inference with regard to the digestion of food. It may be difficult, if not impossible, to state exactly the time which would be taken for the purpose of digestion. Similarly, in the case of **Jabbar Singh v. State of Rajasthan :**(1994)SCC (Cr.) 1745, the Apex Court, while dealing with the evidence of DW-1 who had opined that since there was some semi-digested food, the occurrence must have taken place earlier and not at 3.00 a.m., reiterated the principle that this was an opinion evidence and the possibility of the deceased having eaten late in the night could not be ruled out.

54. In view of the above medical references, the view expressed in Modi's book and the principles stated in the

judgments of Apex Court, it can safely be predicated that determination of the time of death solely with reference to the stomach contents is not a very certain and determinative factor.

55. However, the contention of the learned counsel for the appellants in this regard does not also impress the Court as it was 9 a.m. in the morning when the incident took place and on the basis of stomach contents that it was found to be empty the prosecution case cannot be discarded as it was a month of summer and it has not come in evidence that the deceased consumed some food or not while leaving his relatives house, hence, to come to a conclusion about genuineness of the prosecution case through the contents of the stomach of the deceased is not at all safe where there appears to be a case of direct evidence of P.W. 1-Chandra Shekhar, P.W.2-Raje and P.W.3-Chandra Prakash Awasthi and the eye-witnesses have categorically supported the evidence before the trial Court, which is fully corroborated by the medical evidence.

56. It has also been argued by learned counsel for appellants that there is no recovery of any fire-arm weapon either at the pointing out or from the possession of the appellants to show that the weapon used in the crime which could have been sent to some Ballistic expert to get it compared with the nine big shots, eight pieces of wadding which were recovered from the dead body of the deceased. It is relevant to mention that in the case of **Dhirendra Singh alias Pappu Vs. State of Jharkhand (Criminal Appeal No. 580 of 2018, decided on 01.03.2021)**, the Apex Court has held that merely because the weapon is not seized cannot be a ground to acquit the accused when his presence and his active participation and using firearm by him has been established and proved.

57. In view of the aforesaid dictum of the Apex Court, the contention of the learned Counsel for the appellants in this regard is also not acceptable.

58. Thus, in view of the foregoing discussions it is clear that the prosecution has proved its case beyond reasonable doubt against the appellants. In the instant case, a broad daylight murder was committed by the appellants, who had strong motive to commit the murder of the deceased and they have done to death the deceased in a brutal manner by firing 15 gunshots at him and the deceased succumbed to his injuries and the statements of three eye-witnesses, P.W. 1-Chandra Shekhar, P.W.2-Raje and P.W.3-Chandra Prakash Awasthi, which were relied upon by trial Court, had fully supported the prosecution case. Thus, the impugned judgment and order passed by trial Court convicting and sentencing the appellants for offence in question is hereby upheld and the same does not require any interference by this Court in the instant appeal.

59. For the reasons aforesaid, the present appeal lacks merit and is accordingly, **dismissed.** The appellants, **Puttan alias Shiv Shanker** and **Ram Chandra,** are in jail. They shall serve the sentence as ordered by the trial Court in terms of the impugned judgment and order dated 22.09.1981.

60. Before we part with the case, we must candidly express our unreserved and uninhibited appreciation for the distinguished assistance rendered by Shri Rajendra Prasad Mishra, Amicus Curiae

appearing on behalf of appellant no.1-**Puttan** in the instant appeal.

61. 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)03ILR A168
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 28.03.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MRS. SAROJ YADAV, J.

Criminal Appeal No. 1003 of 1982

Raj Kumar & Anr. ...Appellants
Versus
The State ...Respondent

Counsel for the Appellants:
Sri Jai Pal Singh, *Amirucs Curiae* for the appellant no. 1

Counsel for the Respodent:
Sri Sheikh Wali-Uz Zaman, counsel for the appellant no. 2

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 374(2) - Indian Penal Code,1860 - Sections 302/34, 325/34-challenge to – conviction-murder-no prior meeting of mind-when the deceased's side complained about the destruction of paddy crop by the appellant's cattle, the appellants got enraged and went inside their houses and came back with their respective weapon-appellant no.2 assaulted the deceases with lathi and gunshot injury caused by appellant no.1 who are cousins and they live in separate houses which are adjacent-nothing on record to suggest that they planned with each other to kill the deceased-Hence, both the appellants would be liable for their individual act-appellant no. 2 is realesed from jail uon completion of sentence awarded whereas appellant no. 1 shall serve the sentence of life imprisonment.(Para 1 to 31)

B. To establish a case u/s 34 of IPC prosecution has to prove prior meeting of minds which may be determined from the conduct of the offenders unfolding itself during the course of action and the declaration made by them just before mounting the attack and it can also be developed at the spur of the moment, but there must be pre-arrangement or premeditation concert. (Para 24, 25)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Madan Mohan Pandey Vs St. of U.P. (1991) CRI. L.J. 467 (SC)

2. Rasikhbhai Ram Singh Rana & anr Vs St. of Guj. & Ors (1999) CRI. L.J 1975 (Guj. HC)

3. Rizan & anr. Vs St. of Chhatisgarh, thru Chief Secretary, Govt. of Chhatisgarh, Raipur (2003) AIR SC 976.

4. Ranjitham Vs Basavraj & ors. (2012) CRI. L.J. 2135

5. Arjun Vs St. of Mah. (2012) AIR SC 2181

6. Reena Hazarika Vs St. of Assam (2018) AIR SC 5361

7. Jangir Singh Vs St. of Punj. (2019) (1) CCSC 185 SC

8. Bhanwar Singh Vs St. of M.P. (2008) 16 SCC 657: (2008) 3 CCSC 1394 SC

9. Jaspal Vs St. of U.P. (2020) 110 ACC 119

10. Jasdeep Singh @ Jassu Vs St. of Punj. (2022) Live Law SC 19

(Delivered by Hon'ble Mrs. Saroj Yadav, J.)

1. This Criminal Appeal has been filed by the appellants/convicts Raj Kumar and Raj Kishore against the judgment and order dated 18.12.1982 passed by Sri I.N. Thakral VIIth Additional Sessions Judge, Hardoi in Sessions Trial No.144 of 1982 arising out of Crime No.926 of 1981, Police Station Kotwali, District Hardoi, wherein the appellants were held guilty and convicted under Section 302 read with Section 34 of Indian Penal Code, 1860 (in short I.P.C.) with imprisonment for life and a fine of Rs.1,000/- (one thousand). The appellants were also convicted under Section 325 read with Section 34 of I.P.C. with imprisonment of two years and a fine of Rs.500/-(five hundred).

2. Heard Sri Jai Pal Singh, learned *Amicus Curiae* for the appellant no.1- Raj Kumar, Sri Sheikh Wali-Uz Zaman, learned counsel for the appellant no.2-Raj Kishore and Sri Vishwash Shukla, learned A.G.A for the State respondent.

3. The facts necessary for disposal of this appeal as culled out are as under:-

i. A First Information Report (in short ***F.I.R.***) was registered at Crime No.926 of 1981 on the basis of written report presented by Ramesh Chand son of Ram Saran at Police Station Kotwali Hardoi on 22.11.1981 at about 4:45 P.M.. In the written report it was alleged that on 22.11.1981 at about 3:00 P.M. the uncle of the complainant went to his paddy-field and found that the cattle of Raj Kumar were grazing and destroying the paddy-crop. His uncle after ousting the cattle from the field went to house of Raj Kumar at about 3:30 P.M. to make a complaint about the same, there Raj Kumar and Raj Kishore met and when his uncle complained about the cattle, they said that he was accusing them falsely. After that Raj Kumar brought a gun and Raj Kishore a stick (lathi) from their houses and said just wait they will tell. Upon it his uncle raised a hue and cry, hearing a noise the complainant, his father Ram Saran and Nigendra Nath, Munshi, Ram Pal and many other people reached there. Thereafter Raj Kishore assaulted his uncle Prabhu Dayal with stick and Raj Kumar fired with gun on his father (the father of the complainant) which hit him and he died on the platform (Chabutara) in front of the house of appellants. Upon challenge made by all present there, both Raj Kumar and Raj Kishore ran away towards south.

ii. After investigation chargesheet was submitted in the Court, the concerned Magistrate after taking cognizance committed the case to the Sessions Court for trial. The trial court framed charges against accused persons on 03.09.1982 under Section 302 read with Section 34 of I.P.C. and Section 323 of I.P.C.. Subsequently the trial court amended the charges framed under Section 323 of I.P.C. and framed charge under Section 325 read with Section 34 of I.P.C. on 06.12.1982. The appellants denied the charges and claimed to be tried.

iii. The prosecution in order to prove its case examined nine witnesses in all. P.W. 1 Dr. S.N. Singh, Medical Officer, District Hospital Hardoi, P.W. 2 Ramesh Chandra, complainant, P.W. 3 Dr. U.D. Kapoor, District Hospital Hardoi, P.W. 4 Yashpal Singh Girewal, Senior Sub Inspector, P.W. 5 Prabhu Dayal uncle of the complainant and injured, P.W. 6 Head Constable Rajendra Kumar, and P.W. 7 Constable Sunil Kumar, P.W. 8 Munshi an independent eye witness and P.W. 9 Sri R.S. Verma, Sub Inspector. Apart

from the oral evidence the documents Exhibit Ka-1 to Exhibit Ka-18 were proved and exhibited. These are:-

Injury report of injured Prabhu Dayal Exhibit Ka-1, written report Exhibit Ka-2, postmortem report of deceased Ram Saran Exhibit Ka-3, charge-sheet Exhibit Ka-4, chick report Exhibit Ka-5, general diary (G.D.) Exhibit Ka-6, inquest report Exhibit Ka-7, Form No.379 Exhibit Ka-8, Police Form No.13 Exhibit Ka-9, report to C.M.O. for conducting postmortem Exhibit Ka- 10, specimen of seal Exhibit Ka-11, site plan of spot where incident took place Exhibit Ka-12, site plan of the place where fields were damaged by cattle Exhibit Ka-13, memo of blood stained and plain soil Exhibit Ka-14, search-memo of accused Raj Kumar regarding weapon of offence, Exhibit Ka-15, search memo of accused Raj Kishore regarding weapon of offence Exhibit Ka-16, report of Forensic Science Laboratory regarding soil collected from the spot Exhibit Ka-17 and report of Forensic Science Laboratory regarding blood stains found on the clothes of the deceased Exhibit Ka-18.

iv. Thereafter the statement of the appellants were recorded under Section 313 of the Code of Criminal Procedure (in short Cr.P.C.), wherein they denied the incident and stated that report has been lodged falsely. Appellant Raj Kishore further stated that witnesses have deposed being relatives of the deceased and he has been implicated in the crime due to the enmity of village party- bandi. Appellant Raj Kumar has also stated that Prabhu Dayal is the brother and Ramesh Chand is the son of the deceased. Witness Munshi is Bataidar (share-cropper) of Prabhu Dayal and supervise all his work. He has further stated that he and his brother were going towards field, at the same place his orchard is also there. He, after looking the field went towards the orchard and found that Prabhu Dayal was collecting woods from his orchard, he objected, then Prabhu Dayal abused him. On this he assaulted Prabhu Dayal with stick. Prabhu Dayal ran away towards his house abusing the appellant and said that he (Prabhu Dayal) will see him. Thereafter the appellant went to his house. About after one hour Ram Saran, Satish and six to seven other persons of the village came there. Ram Saran was armed with (tamancha) country made pistol. He (appellant Raj Kumar) was collecting the paddy which was drying in front of his house. They (persons of complainant side) challenged him (Raj Kumar) to kill and set ablaze his house. Upon it he entered his house and closed the door. He also raised noise to save himself. Then Satish asked his companions to enter into the house and kill him, upon it he brought the gun of his father from the house. Ram Saran climbed over the wall and loaded the cartridge in tamancha (country made pistol). His (Raj Kumar) gun was already loaded, as soon as Ram Saran aimed towards him he fired upon him with the gun to save himself. After being injured Ram Saran fell down from the wall. On noise raised by him, Ram Sewak, Lakhan and other people of the village came there and challenged Ram Saran, thereafter he (Raj Kumar) ran away and hid in the village.

v. The trial court after hearing the arguments of both the parties and analyzing the evidence available on record came to the conclusion that prosecution has proved the motive, place of occurrence and the commission of crime by the accused/appellants, by the testimony of all the three witness of facts i.e. Ramesh Chand, the complainant, Prabhu Dayal the injured brother of deceased and Munshi Lal an independent witness. The First Information Report of the case was lodged

promptly at the police station at about 4:45 P.M. and investigation also started immediately in the matter. The trial court did not convince with the arguments raised by the defence that the factum of injuries of Prabhu Dayal was not mentioned in the inquest report, as the witness Munshi Lal has signed Panchnama as Panch, but he did not tell about the fact that Raj Kishore inflicted lathi blow on Prabhu Dayal giving reasons that the inquest report is about the dead body of Ram Saran, the deceased. Trial Court has further concluded that the evidence of three eye-witnesses of facts has further been corroborated with medical evidence of P.W.1 Dr. S.N. Singh who has proved injury report of Prabhu Dayal and has stated that he (Prabhu Dayal) received grievous injury which could be caused on 22.11.1981 at about 3:30 PM with lathi. P.W.3 Dr. U.D. Kapoor conducted the postmortem on the cadaver of deceased Ram Saran and found following ante-mortem injuries:-

"(i) One fire arm wound of entry 3 cm x 2 cm x chest cavity deep on right side of front of chest at third intercostal space just below the right border of sternum. Margins inverted and lacerated. No blackening no charring. This wound is surrounded by multiple fire arm/wounds of entry in the area of 15 cm x 8 cm from right nipple to mid clavicular line on left side each of the size 0.2 cm x 0.25 cm x skin to chest cavity deep.

(ii) Lacerated wound 8 cm x 3.5. cm on lateral side of right fore arm 3 cm above wrist joint. Radious bone is fractured under-neath."

On internal examination the doctor found that second, third and fourth right ribs were broken and right side lung badly lacerated and left lung lacerated at some places. In his opinion the death was caused due to shock and hemorrhage caused by ante-mortem injuries. He has also opined that death would have been caused on 22.11.1981 and these injuries were sufficient in the ordinary course of nature to cause death. In the opinion of trial court the medical evidence is in corroboration of ocular account given by the eye-witnesses of the case. The learned trial court did not accept the theory of exercise of right of private defence put forward by the appellant Raj Kumar. The accused Raj Kumar took a defence that he fired upon the deceased in order to save his life, as the deceased was trying to kill him with country made pistol. To support his theory of private defence, accused Raj Kumar examined D.W.1, who was disbelieved by the trial court. The trial court has found his conduct suspicious, prior enmity with Prabhu Dayal was also established and some contradictions were also found.

vi. The trial court also concluded that evidence on record establishes that accused Raj Kumar entered in his own house, closed the doors when the deceased and his companions challenged him. He was behind the closed doors inside the house. According to the site plan exhibit Ka-12, there were many rooms inside the house, he would have entered in any of the rooms to save his life, there was no chance of his being shot at from the wall as is stated by Raj Kumar. Further there was another main gate opening towards northern side of his house, he had full opportunity of exit from that gate, to have recourse of law for his safety. Section 99 of I.P.C. provides certain circumstances in which there is no right of private defence and one of such provision is that there is no right of private defence in the cases where there is time to have recourse of the public authorities for protection. In the given circumstances, accused Raj Kumar had full

opportunity to save himself and to have the recourse of law. Further there was no eminent danger to his life or property. In the given circumstances, he has no right of private defence. Giving these main reasons, the learned trial court rejected the defence of the accused Raj Kumar i.e. right of private defence. It has further been observed by the trial court that as per the version of Raj Kumar, pistol has been shown in the hands of Ram Saran who had fallen from the wall after being shot at Chabutara, but there is no mention of it, where that tamancha had gone. Suggestion was made to P.W. 9 that pistol was lying near the dead body, but was not shown in the inquest report which was denied by him. In this regard D.W. 2 says nothing about that pistol was being seen by him at Chabutara near the dead body, instead he says that one Satish ran away with his pistol in hand. This theory of two pistols with the prosecution side is a new story developed by Lakhan D.W.2.

vii. Analyzing and concluding as aforesaid, the learned trial court came to the conclusion that prosecution has established that Raj Kishore inflicted lathi blow on Prabhu Dayal causing him grievous hurt and accused Raj Kumar fired with his gun at Ram Saran killing him at his Chabutara. Prosecution has proved the place, date and time of occurrence and also that the offence was committed by the accused persons/appellants. The trial court further concluded that Raj Kishore and Raj Kumar have common intention to kill the deceased so Raj Kishore was also held guilty under Section 302 read with Section 34 of I.P.C. Both the accused/appellants were also held guilty under Section 325 read with section 34 of I.P.C. for causing grievous hurt to Prabhu Dayal and convicted accordingly.

4. Being aggrieved of this conviction this appeal has been filed by the appellants/convicts.

5. Learned ***Amicus Curiae*** appearing for Raj Kumar argued that initially F.I.R. was registered under Sections 307/323 of I.P.C., but after investigation chargesheet submitted under Section 302/323/34 IPC against both the appellants. The charges were framed against the appellant No.1 Raj Kumar under Sections 302 & 323 read with section 34 of I.P.C and later on charge under section 323 of I.P.C. was converted to Section 325/34 I.P.C. Against appellant No.2-Raj Kishore also charges were framed under Sections 302 & 323 read with section 34 of I.P.C. later on charge under Section 323/34 of I.P.C. was converted to Section 325/34 I.P.C. The conviction is against the evidence on record and the findings of the trial court are perverse. The witnesses are related witnesses P.W.2 is the son of the deceased Ram Saran and P.W. 5 Prabhu Dayal is the real brother of the deceased. P.W.8 Munshi Lal is the share-cropper (Bataidar) of Prabhu Dayal. They have deposed falsely. He further argued that in the F.I.R. it has been alleged that cattle of appellant Raj Kumar were grazing the paddy crop of Pabhu Dayal, but in the inquest report and also in statements under Section 161 of Cr.P.C. of Smt. Raj Rani and Ramesh Chandra, there is mention of sugarcane crop. The witnesses have deposed that appellant Raj Kumar fired upon Ram Saran from a close distance of about 2 paces/5ft., but in the post-mortem report no blackening and charring was found. There is no proper explanation of injury No.2 found in the post-mortem report on the person of deceased. In fact the appellant Raj Kumar had acted in exercise of right of private defence as the deceased alongwith six to seven persons armed with

deadly weapons, reached at the house of appellant and appellant had eminent danger to life and property, as they threatened to kill the appellant Raj Kumar and also to set ablaze his house. He further argued that deceased aimed at appellant Raj Kumar with a country made pistol after climbing on the wall of the house of the appellant, then appellant fired upon the deceased and he died. He further argued that learned trial court did not appreciate the evidence in right perspective and did not accept the theory of private defence, while there was evidence and circumstances pointing out sufficiently that appellant Raj Kumar acted in exercise of right of private defence and nothing is offence which is done in the exercise of right of private defence. Hence accused Raj Kumar should be acquitted.

6. Learned *Amicus Curiae* for the appellant Raj Kumar relied upon the following case laws:-

a. Madan Mohan Pandey Vs. State of U.P. 1991 CRI. L.J. 467 (SC)

b. Rasikbhai Ram Singh Rana and another Vs. State of Gujarat and others 1999 CRI. L.J. 1975 (Gujarat High Court)

c. Rizan and another Vs. States of Chhatisgarh, through the Chief Secretary, Govt. of Chhatisgarh, Raipur AIR 2003 (SC) 976.

d. Ranjitham Vs. Basavaraj and others 2012 CRI. L.J. 2135.

e. Arjun Vs. State of Maharashtra AIR 2012 SC 2181

f. Reena Hazarika Vs. State of Assam AIR 2018 (SC) 5361.

7. Learned counsel for the appellant Raj Kishore submitted that he is challenging the judgment on one single point i.e. his offence travels only up to the limit of Section 325 of I.P.C. for causing injury to Prabhu Dayal, P.W.5, he has no concern with the death of Ram Saran. He did not participate in the offence with prior meeting of mind with appellant Raj Kumar. He further submitted that as per version of the prosecution, appellant Raj Kishore went inside his own house and appellant Raj Kumar went inside his own house and they both came out afterwards with their respective weapons in their hands and acted accordingly, so there remains no space for prior meeting of minds and any common object or intention to commit murder of deceased Ram Saran. He further submitted that appellant is liable to the offence committed under Section 325 of I.P.C. only.

8. Contrary to the submissions made on behalf of appellant -Raj Kumar and appellant Raj Kishore, learned A.G.A. argued that the contention of the learned *Amicus Curiae* for appellant Raj Kumar alleging the right of private defence is not worthy of credence because as per the version of the appellant Raj Kumar and his witness DW (2), five to six persons reached the house of the appellant Raj Kumar to kill him armed with deadly weapons like country made pistol, Bhala (Spear), Lathi (stick) etc., but no injury of any type was sustained by either of the appellants or any of their family members or any damage to their property. Appellant Raj Kumar has stated in her statement under section 313 Cr.P.C. that deceased Ram Saran climbed on the wall of his house armed with country made pistol and aimed towards him with intention to kill him (Raj Kumar), so he fired upon deceased and he fell down from the wall and died, but no such weapon was recovered near the body of the deceased. There is nothing on record that after the death of the deceased somebody took away the weapon of the deceased.

Enmity of D.W.2 with the family of complainant was also admitted. Learned A.G.A. further argued that even if there was any danger to appellant Raj Kumar to his life and property, that danger was not eminent and there was time to take recourse of the public authorities. Hence the theory put forward, of exercise of right of private defence is not worthy of acceptance.

9. Learned A.G.A., about the submission of the appellant Raj Kishore argued that both the appellants are cousins and they both came out of house with common object/intention to kill the deceased and to injure the persons of complainant side. Hence the appeal should be dismissed.

10. Considered the submissions made by the learned counsel for both the appellants as well as learned A.G.A., also perused the record including the impugned judgment and referred case laws.

11. The incident of firing upon the deceased Ram Saran by Raj Kumar is admitted at the date time and place, qualified with a claim that he fired upon the deceased Ram Saran in exercise of right of private defence of person and property, as the deceased alongwith other five to six persons reached the house of Raj Kumar, and he closed himself inside the house then deceased Ram Saran climbed on the wall of his house armed with country made pistol and aimed on him with an intention to kill, so he took out the licensed gun of his father and as soon as Ram Saran loaded his country made pistol and aimed at him (Raj Kumar), he (Raj Kumar) fired upon Ram Saran and he (Ram Saran) fell down from the wall after getting injured and died. Now only question remains whether the appellant Raj Kumar acted in exercise of right of private defence or he committed the murder of the deceased Ram Saran, as he went there to complain about the destruction of paddy-field by the cattle of Raj Kumar.

12. The contention made by the counsel for Raj Kumar that in the inquest report there is mention of sugarcane and not of paddy-field, while the witnesses have mentioned about the paddy-field, makes no difference because inquest report is prepared about the condition of the dead-body and to ascertain the prima facie cause of the death. P.W.1 and P.W.2 have clearly stated in their evidence that they told to the Investigating Officer about the destruction of paddy-field and not of sugarcane-field. In the site-plan also there is no mention of sugarcane-field by the Investigating Officer.

13. As far as right of private defence is concerned, the law as contained in Section 96 to 106 of I.P.C. relevant sections are quoted herein below:-

"96. ***Things done in private defence-*** *Nothing is an offence which is done in the exercise of the right of private defence.*

97. Right of private defence of the body and of Property:- *Every person has a right, subject to the restrictions contained in Section 99, to defend-*

First- His own body, and the body of any other person, against any offence affecting the human body;

Secondly- The property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass.

99. Act against which there is no right of private defence:- *There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant acting in good faith under colour of his office, though that act, may not be strictly justifiable by law.*

There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by the direction of a public servant acting in good faith under colour of his office, though that direction may not be strictly justifiable by law.

There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities.

Extent to which the right may be exercised:--T*he right to Private defence in no case extends to the inflicting of more harm that it is necessary to inflict for the purpose of defence.*

Explanation 1: - A person is not deprived of the right of private defence against an act done, or attempted to be done, by a public servant, as such, unless he knows or has reason to believe, that the person doing the act is such public servant.

Explanation 2: - A person is not deprived of the right of private defence against an act done, or attempted to be done, by the direction of a public servant, unless he knows, or has reason to believe, that the person doing the act is acting by such direction, or unless such person states the authority under which he acts, or if he has authority in writing, unless he produces such authority if demanded.

100. When the right of private defence of the body extends to causing death: *The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely:--*

First-Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;

Secondly-Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;

Thirdly-An assault with the intention of committing rape;

Fourthly- An assault with the intention of gratifying unnatural lust;

Fifthly- An assault with the intention of kidnapping or abducting;

Sixthly- An assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.

Section102. Commencement and continuance of the right of private defence of the body:- *The right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed; and it continues as long as such apprehension of danger to the body continues.*

103. When the right of private defence of property extends to causing death:- *The right of private defence of property extends, under the restrictions mentioned in Section 99, to the voluntary causing of death or of any other harm to the wrong-doer, if the offence, the committing of which, or the attempting to*

commit which, occasions the exercise of the right, be an offence of any of the descriptions herein after enumerated, namely;

First-Robbery;

Secondly-House-breaking by night;

Thirdly-Mischief by fire committed on any building, tent or vessel, which building, tent or vessel is used as a human dwelling, or as a place for the custody of property;

Fourthly- Theft, mischief or house-trespass, under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised.

105. Commencement and continuance of the right of private defence of property:- *The Right of private defence of property commences when a reasonable apprehension of danger to the property commences.*

The right of private defence of property against theft continues till the offender has effected his retreat with the property or either the assistance of the public authorities is obtained, or the property has been recovered.

The right of private defence of property against robbery continues as long as the offender causes or attempts to cause to any person death or hurt or wrongful restraint of as long as the fear of instant death or of instant hurt or of instant personal restraint continues.

The right of private defence of property against criminal trespass or mischief continues as long as the offender continues in the commission of criminal trespass or mischief.

The right of private defence of property against house-breaking by night continues as long as the house-trespass which has been begun by such house-breaking continues.

14. The plain reading of section 99 quoted above shows that there is no right of private defence against an act which does not reasonably cause the apprehension of death or a grievous hurt. There is also no right of private defence in cases in which there is time to have recourse to the protection of the public authorities.

15. In the present matter the appellant Raj Kumar has stated that he and his cousin reached in their orchard then they found that Prabhu Dayal was collecting woods from his orchard, he objected then Prabhu Dayal started abusing him, on it he (Raj Kumar) assaulted Prabhu Dayal with stick, thereafter Prabhu Dayal ran away towards his house abusing him. Appellant also went to his house. Thereafter deceased Ram Saran, Satish and six to seven other persons about after one hour reached his (Raj Kumar's) house. Ram Saran was armed with country made pistol. He (Raj Kumar) was collecting the paddy which were drying outside the house. They all challenged him and also said that set his house at ablaze. He entered into his house and closed the door. He also raised noise in order to save himself at the same time Satish instigated Ram Saran to enter his (Raj Kumar's) house and kill him. On it he picked up his father's licensed gun and as soon as Ram Saran aimed upon him with country made pistol, he (Raj Kumar) fired upon Ram Saran.

16. As per version of appellant Raj Kumar the persons of complainant side who reached there were six to seven in number. Among them Ram Saran was armed with country made pistol. D.W.2 who has been examined as defence witness

to prove the theory of private defence has stated that on the date of incident at about 04:00 - 04:30 hours Ram Saran was killed and he witnessed the incident as he was coming back from his shop at that time. He was about 40 paces away from the house of the appellant Raj Kumar, on the way he heard a noise coming from the house of Raj Kumar. Raj Kumar was crying for the help and saying that they would kill him. When he reached at the house of Raj Kumar, he heard that Satish was asking, to enter into the house of Raj Kumar and kill him. He has further stated that he saw that Ram Saran was standing on the eastern wall of the house of Raj Kumar. Ram Saran was standing on the Kachcha wall (made of soil). He has further stated that Ram Saran took aim towards eastern side, thereafter he heard the sound of fire and saw that Ram Saran fell down on the ground. He reached there, then Ram Sewak asked not to go there as Ram Saran had died. He has further stated that he saw Satish and six to seven other people accompanying Satish while running. He has further stated that he saw a country made pistol in the hands of Satish and rest six to seven persons were armed with Lathis (sticks) and bhalas (spears). In his cross examination this witness has stated that he neither saw Prabhu Dayal nor Ramesh at the spot. When he was asked why he did not stop Ram Saran from firing with country made pistol, he said he was at a great distance so he could not say anything. Further when he was asked in the cross examination by the prosecution why you have not told all these facts to the Investigating Officer or any other person, then he could not give any satisfactory answer. He has also stated that the dead-body of Ram Saran remained lying there at the platform up to the time when police came. He further stated that he did not know when police came there. He came back to his house after six to seven minutes of the incident. He has also stated in his cross-examination that he did not tell anybody about the incident except one constable who came to his house to take "Bidi'. He has also stated in the cross-examination that he did not met Raj Kumar after the incident till date i.e. the date of recording of evidence. He has also stated that he did not tell about the manner of commission of incident even to the family members of the appellant. From the reading of statement of this witness it appears that he was not present at the spot and he did not see anything because he has stated that he saw a country made pistol in the hands of Satish and lathis and spear in the hands of other six to seven persons, but there is no mention about fire arm in the hands of Satish and lathis and Bhalas (spears) in the hands of six to seven other persons by the appellant Raj Kumar in his statement made under Section 313 of Cr.P.C.

17. Further more another appellant Raj Kishore, who is the real cousin of appellant Raj Kumar has not stated anything about the exercise of right of private defence or to say he has stated nothing about the exercise of right of private defence by the appellant Raj Kumar. No country made pistol was recovered from the dead body or near the dead body of the deceased. The appellant did not receive any kind of injury to his person and no damage was caused to his property. In the site-plan Exhibit Ka-12 another main gate opening towards northern side of the house of appellant Raj Kumar has been shown and there were number of rooms inside his house. The appellant Raj Kumar had full opportunity to escape from that gate to take recourse of law for saving himself and his property, if there was any danger. Without receiving

any bruise on person of himself or the near or dear one or any damage to property he fired upon the deceased. The evidence and circumstances narrated and the evidence available on record does not establish or point out that appellant Raj Kumar acted in exercise of right of private defence.

18. The case law ***Rasikbhai Ram Singh Rana and another Vs. State of Gujarat and others*** (Supra) is of no help to the appellant Raj Kumar because in that case accused suffered injuries, but in the present matter there no injury has been alleged or found on the person of the appellant.

19. The case law ***Madan Mohan Pandey Vs. State of U.P.*** (supra) is also of no help to the appellant because in this matter the Hon'ble Apex Court held that "where the accused has not received any injuries and the injuries received by some of defence witness were simple, the accused must be said to have exceeded his right of private defence when he had fired six shots indiscriminately, killing one and injuring six injuries on the others". In the present matter no injury of any kind was sustained by appellant or any other family member or any damage caused to the property.

20. In the case of **Rizan and another Vs. State of Chhatisgarh (supra)** the Hon'ble Apex Court has held that *"it is true that the burden of an accused person to establish the plea of self-defence is not as onerous as the one which lies on the prosecution and that, while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross-examination of the prosecution witness or by adducing defence evidence. The accused need not prove the existence of the right of private defence beyond reasonable doubt. It is enough for him to show as in a civil case that the preponderance of probabilities is in favour of his plea."*

21. Learned *Amicus Curiae* for the appellant Raj Kumar citing this case law argued that appellant Raj Kumar has to create a doubt and he has not to establish the circumstances relating to right of private defence beyond reasonable doubt. Hence the theory of right of private defence should be believed. The contention of learned *Amicus Curiae* is not acceptable because the appellant was not even able to prove the circumstances leading to exercise of right of private defence upto the level of preponderance of probabilities in his favour. Rest of the case laws cited for the appellant are also not in support of the appellant because the circumstances on the record does not establish even by preponderance of probabilities that the appellant Raj Kumar acted in exercise of right of private defence.

22. Hon'ble the Apex Court in the case of **Jangir Singh Vs. State of Punjab 2019(1) CCSC 185 (SC)** has held as under:-

"10. Before proceeding any further, it is essential to putforth things that are to be considered by the Courts, while giving benefit of right to private defence to the accused, as per Exception II to Section 300 of IPC, to determine the quantum of this right. This Court in the case of Vidhya Singh v. State of Madhya Pradesh, observed that−

"7. The right of self−defence is a very valuable right. It has a social purpose.

That right should not be construed narrowly."

Further, in the case of James Martin v. State of Kerala, following observations were made by this Court:-

"18. Situations have to be judged from the subjective point of view of the accused concerned (1971) 3 SCC 244 2 (2004) 2 SCC 203 in the surrounding excitement and confusion of the moment, confronted with a situation of peril and not by any microscopic and pedantic scrutiny. In adjudging the question as to whether more force than was necessary was used in the prevailing circumstances on the spot, it would be inappropriate, as held by this Court, to adopt tests by detached objectivity which would be so natural in a court room, or that which would seem absolutely necessary to a perfectly cool bystander. The person facing a reasonable apprehension of threat to himself cannot be expected to modulate his defence step by step with any arithmetical exactitude of only that much which is required in the thinking of a man in ordinary times or under normal circumstances."

Similarly, in the case of Darshan Singh v. State of Punjab, this Court went further and gave few parameters to adjudge the exercise of right to private defence in following terms:-

" 56. In order to find out whether the right of private defence is available or not, the injuries received by the accused, the imminence of threat to his safety, the injuries caused by the accused and the circumstances whether the accused had time to have recourse to public authorities are all relevant factors to be considered."

11. Further, it is a settled law that the right to private defence cannot be claimed by the accused, if disproportionate harm has been caused, while defending himself or any other person. However, if the accused has not caused disproportionate harm, then the benefit of Exception II to Section 300 of IPC can be given to the accused. This proposition has been well explained in the case of ***Bhanwar Singh v. State of Madhya Pradesh, (2008) 16 SCC 657 : 2008 (3) CCSC 1394 (SC),*** wherein this Court made the following observations:-

"50. The plea of private defence has been brought up by the appellants. For this plea to succeed in totality, it must be proved that there existed a right to private defence in favour of the accused, and that this right extended to causing death. Hence, if the court were to reject this plea, there are two possible ways in which this may be done. On one hand, it may be held that there existed a right to private defence of the body. However, more harm than necessary was caused or, alternatively, this right did not extend to causing death. Such a ruling may result in the application of Section 300, Exception 2, which states that culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence. The other situation is where, on appreciation of facts, the right of private defence is held not to exist at all. (emphasis supplied)"

12. Now, to consider the question as to whether the exercise of right of private defence by the appellant−accused was legitimate or not, it is undisputed that the fateful incident at the hands of appellant was pursuant to an altercation with the deceased for around 15 minutes, in the

presence of other colleagues. Both the deceased and the appellant−accused were altercating face−to− face and standing at a distance of 10 feet from each other. This shows that they could see the facial expressions of each other clearly and comprehend the apprehending circumstances accordingly. Taking note of the fact that owing to the imminent danger perceived by the appellant from the aiming of rifle at him by the deceased, he fired at the deceased and killed him. This, in our opinion comes within the ambit of right to private defence, however, it clearly traverses beyond the legitimate exercise of the same. The appellant−accused chose to shoot on a vital part of the body i.e., chest to safeguard himself from the imminent threat. However, the accused could have avoided the vital part of the deceased. But, we do not find absence of good faith in exercise of right of private defence. However, having regard to the situs of the injury (i.e. the chest of the deceased), it is clear that the accused has exceeded the power given to him in law and has caused the death of the deceased against whom he exercised right of private defence without premeditation. Thus, offence committed by the accused−appellant will fall under Section 304 Part I of the IPC.

13. The law on this aspect of causing disproportionate harm and exceeding right to private defence is amply clear. In cases of disproportionate harm leading to death of the aggressor, sentence under Section 304 Part I is the appropriate sentence. This has been done by this Court in catena of cases.

14. In the case of Udaikumar Pandharinath Jadhav Alias Munna v. State of Maharashtra, this Court acquitted the accused from charges under Section 302 IPC and modified the conviction to Section 304 Part I of IPC, as per the following observations:-

"5. We observe from the evidence that the deceased was not only a karate expert but also armed with a knife and it is not surprising that the appellant apprehended injury at his hands. We are therefore of the opinion that the best that can be said for the prosecution at this stage is that the appellant had exceeded the right of private defence. We therefore partly allow the appeal, acquit the appellant of the charge under Section 302 IPC and modify his conviction to one under Section 304(1) IPC in the background that the fatal injury caused on the chest had penetrated deep into the body. We also impose a sentence of 7 years' rigorous imprisonment on the appellant; the other part of the sentence to remain as it is."

15. Further, in the case of Trilok Singh v. State (Delhi Administration), this Court made observations regarding modification of conviction from Section 302 IPC to Section 304 Part I IPC and the same is as follows:-

"6. We have gone through the entire evidence of PW 24 and PW 25. The evidence of PW 24 is to the effect that he saw the accused and the deceased were quarreling and he went to the house and informed PW 25. But the question is whether he could go to the extent of causing the death. No doubt in a situation like this it cannot be expected that the accused has to modulate his right of self−defence. But when he went to his house and brought a knife and caused the death it cannot be said that he did not exceed the right of private defence. We cannot give the benefit to the appellant

under Section 100 IPC and the act committed by him only attracts exception to Section 300 IPC. Therefore the offence committed by him could be one under Section 304 Part I IPC. (emphasis supplied)".

16. Similar view was taken by this Court in *Pathubha Govindji Rathod v. State of Gujarat, (2015) 4 SCC 363 at Para 15, 17-18: 2015 92) CCSC 836 (SC)*, wherein it was ruled that the accused exceeded his right to private defence. Thus, appeal was partly allowed, conviction under Section 302 was set aside and the accused was convicted under Section 304 Part I of the IPC."

To sum up in the present matter appellant Raj Kumar has not alleged that any injury was caused to his person or any other member of his family or damage to his properety by the complainant side. No country made pistol was recovered from the spot or near the dead body of the deceased Ram Saran as it was alleged that he was armed with country made pistol and tried to kill the appellant. There is major contradiction on the point that six to seven persons came at his house and exhorted Ram Saran to kill Raj Kumar. Raj Kumar did not say that these six to seven people were armed with deadly-weapons like sticks (lathis) and spears (Bhalas), except country made pistol in the hand of Ram Saran. The DW 2 examined as defence witness has stated that six to seven persons were armed with weapons, he has indicated that Satish was armed with country made pistol and other six to seven people were armed with spears (Bhalas) and lathis (sticks). The evidence of D.W.2 is not worthy of credence. Hence the theory of right of private defence is not acceptable the prosecution witness specially P.W.1, 5 and 8 have proved the facts and no major contradictions have been found in their testimony. It makes no difference that P.W.2 & 5 are relatives of the deceased. Medical evidence is in corroboration what has been stated by the prosecution witness. Much emphasis has been given by the *Amicus Curiae* on the point that injury No.2 of the deceased has not been explained by the prosecution and medical witness has stated that this injury would come only after fall from a height, so this should be considered in the light of right of private defence that deceased was standing on the wall and he fell down from that place and suffered injury No.2. This contention of *Amicus Curiae* has no force in our opinion because some times the bone is fractured even by the weight of his own body, if a person fell down from a certain angle. Hence it is established that appellant fired upon the deceased with intention to kill him and he died, so he has rightly been held guilty and punished under Section 302 of I.P.C.

23. Now comes the case of appellant No.2-Raj Kishore. His learned counsel has challenged the judgment only to the extent that his act travels only up to the offence defined under Section 325 of I.P.C. and not under Section 302 of I.P.C.. He has further submitted that no prior meeting of minds between the appellants was there, so he should be punished only under Section 325 of I.P.C. and not under Section 302 of I.P.C.

24. In the case of **Jaspal Vs. State of Uttar Pradesh 2020 (110) ACC 119** the Hon'ble Supreme Court has held that *"to establish a case under Section 34 of I.P.C. prosecution has to prove prior meeting of minds which may be determined from the conduct of the offenders unfolding itself during the course of action and the*

declaration made by them just before mounting the attack and it can also be developed at the spur of the moment, but there must be pre-arrangement or premeditation concert."

25. In ***Jasdeep Singh alias Jassu Vs. State of Punjab 2022 Live Law (SC) 19*** dated 07.01.2012 the Hon'ble Apex Court held as under:-

"28. The existence of common intention is obviously the duty of the prosecution to prove. However, a court has to analyse and assess the evidence before implicating a person under Section 34 IPC. A mere common intention per se may not attract Section 34 IPC, sans an action in furtherance. There may also be cases where a person despite being an active participant in forming a common intention to commit a crime, may actually withdraw from it later. Of course, this is also one of the facts for the consideration of the court. Further, the fact that all accused charged with an offence read with Section 34 IPC are present at the commission of the crime, without dissuading themselves or others might well be a relevant circumstance, provided a prior common intention is duly proved. Once again, this is an aspect which is required to be looked into by the court on the evidence placed before it. It may not be required on the part of the defence to specifically raise such a plea in a case where adequate evidence is available before the court."

26. In the present mater it has been stated in the F.I.R. that when the complainant side reached their (appellants) house to make a complaint about the destruction of paddy-crop by their cattle both the appellants got enraged and went inside their houses and came back with their respective weapons and appellant Ram Kishore assaulted Prabhu Dayal with lathi (stick) and appellant Raj Kumar fired upon Ram Saran, deceased. Admittedly both the appellants are cousins and they live in separate houses which are adjacent. As per the evidence available on record they both went inside their houses and came out armed with their respective weapons from their houses. There is nothing on record to suggest that they planned with each other to kill the deceased Ram Saran, meaning to say that no meeting of minds between appellant Raj Kumar and Raj Kishore has been established. In these circumstances both the appellants would be liable for their individual act and appellant Raj Kishore cannot be held guilty and convicted under Section 302 of I.P.C. with the help of section 34 of I.P.C. Raj Kishore assaulted Prabhu Dayal with lathi (stick) causing injury which amount to an offence under Section 325 of I.P.C. and he is liable to that extent only.

27. Hence to sum up the conviction of appellant No.1 Raj Kumar under Section 302 of I.P.C. only, for life imprisonment is hereby confirmed. However the grievous injury to Prabhu Dayal is concerned that was caused by Raj Kishore-appellant No.2, hence Raj Kumar-appellant No.1 is not liable for conviction under Section 325 of I.P.C. Hence his conviction under Section 325 read with section 34 of I.P.C. is set-aside.

28. The appellant No.1 Raj Kumar is in jail, hence he shall serve the sentence awarded by the trial court and modified by this Court under Section 302 I.P.C. only.

29. The gunshot injury causing death of the deceased Ram Saran was caused by Raj Kumar only and there was no prior

meeting of minds between Raj Kumar and Raj Kishore, hence Raj Kishore is not liable for conviction U/s 302 I.P.C read with Section 34 I.P.C. Raj Kishore caused injury to Prabhu Dayal and that act travels upto the extent of offence defined under Section 325 I.P.C., Hence, the conviction of appellant Raj Kishore under Section 325 of I.P.C. is confirmed, but conviction of Raj Kishore under Section 302 read with Section 34 of I.P.C. is hereby set aside.

30. The appeal of appellants is partly allowed.

31. Let the convict Raj Kishore-appellant No.2 convicted in Sessions Trial No.144 of 1982 arising out of Crime No.926 of 1981, Police Station Kotwali, District Hardoi be released from the concerned jail, upon completion of sentence awarded and deposition of fine imposed under section 325 I.P.C. if not required in any other case.

32. Appellant No.2-Raj Kishore is directed to file personal bond and two sureties each in the like amount to the satisfaction of the court concerned in compliance with Section 437-A of the Code of Criminal Procedure, 1973 for his acquittal under Section 302 I.P.C. by this Court.

33. Sri Jaipal Singh, learned *Amicus Curiae* for the appellant No.1 Raj Kumar shall be paid fee in accordance with the rules of the Court.

34. Let a copy of this order alongwith original record be transmitted to the trial court concerned forthwith for necessary information and further action.

(2022)03ILR A183

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.03.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MRS. SAROJ YADAV, J.

Criminal Misc. Writ Petition No. 4732 of 2007

Abhai Kumar Tripathi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Amrendra K Bajpai

Counsel for the Respondents:
C.S.C., Ajai Kumar, Ashok K Pandey, Pankaj Patel

A. Administrative Law - It is alleged that the Successor-in-Office has grossly misused his position and discretion by granting sanction of prosecution contrary to the Order issued by the Predecessor-in-Office. It is a settled principle of law that sanctioning authority should exercise its authority and discretion independently under the authority of his Own and not under the directions given by some other authority. (Para 7)

Petition Allowed. (E-10)

List of Cases cited:

1. St. of H.P. Vs Nishant Sareen (2010) 14 SCC 527

2. Gopikant Choudhary Vs St. of Bihar & ors. (2009) 9 Supreme Court Cases 53

3. Mansukhlal Vithaldas Chauhan Vs St. of Guj.(1997) 7 Supreme Court Cases 622

4. R.S. Nayak Vs A.R. Antulay (1984) 2 Supreme Court Cases 183

(Delivered by Hon'ble Mrs. Saroj Yadav, J.)

1. This writ petition has been filed by the petitioner praying the following reliefs:

"(a) Issue a writ, order or direction in the nature of certiorari to quash the impugned order of sanction of prosecution dated 18.06.2007, passed against the petitioner, by the opposite party no. 2, contained as Annexure No. 1 to this writ petition.

(b) Issue a writ, order or direction in the nature of certiorari to quash the Govt. Order dated 15.05.2007 by which the opposite party no. 1 has directed the opposite party no. 2/competent authority to grant sanction for prosecution against individuals in Investigation Case No. 12/2000 and which finally resulted in passing of impugned order."

2. Heard Shri A.K. Bajpai, assisted by Ms. Tejaswani Bajpai, learned counsel for the petitioner and Shri Ajai Kumar, learned counsel for the respondent nos. 1 and 2.

3. Learned counsel for the petitioner submitted that in Investigation Case No.12 of 2000 sanction for prosecution was previously refused by the Opposite Party No. 2 vide order dated 27.03.2006. Thereafter, the Opposite Party No. 2-Successor-in-Office had no authority in law to supersede or review the order passed by the Predecessor-in-Office. He further submitted that impugned order dated 18.06.2007 is contrary to law as on its face, which indicates that same has been passed on the direction of the Opposite Party No. 1. The subsequent authority i.e. Successor-in-Office did not even had the courage to distinguish his view from the Predecessor-in-Office. The Successor-in-Office has grossly misused his position and discretion by granting sanction of prosecution contrary to the Order dated 27.03.2006 issued by the Predecessor-in-Office. Learned counsel for the petitioner relied upon the following case laws:-

(i) State of H.P. Versus Nishant Sareen, (2010) 14 SCC 527;

(ii) Gopikant Choudhary Versus State of Bihar and others, (2009) 9 Supreme Court Cases 53;

(iii) Mansukhlal Vithaldas Chauhan Versus State of Gujarat, (1997) 7 Supreme Court Cases 622;

(iv) R.S. Nayak Versus A.R. Antulay, (1984) 2 Supreme Court Cases 183.

4. To the contrary, learned counsel for the opposite party nos. 1 and 2 opposed the prayer made by the learned counsel for the petitioner but could not dispute the facts and arguments placed by the learned counsel for the petitioner. Counter affidavit has been filed by the opposite party, wherein it has been stated that the petitioner, the then Manager (Gramodyog), Office of U.P. Khadi & Village Industries Board, Kanpur misused his Office and was in collusion with Mr. Firoz Alam, the Secretary of M/s Sani Gramodyog Sansthan, Jajmau, Kanpur. The petitioner fully knowing that Mr. Firoz Alam, the Secretary of the above said Sansthan has filed forged and fabricated papers of Guarantor Raja Hasan and Babu relating to land and he has even not constructed the workshop. The Economic Offences Wing (E.O.W) found the petitioner guilty for illegalities and the State Government vide Order No. 553/59-1-2007 dated 15.05.2007 sent the directions relating to permission for granting prosecution sanction with reference to Criminal Investigation No. 12/2000 and in pursuance of the State Government's order prosecution sanction has been given vide Order No. 2105-10

dated 18.06.2007.Therefore, the present writ petition may be dismissed.

5. Considered the arguments of rival sides and perused the record and the case law cited.

6. It is not denied in the counter affidavit that previously Predecessor-in-Office had refused the prosecution sanction vide order dated 27.03.2006 and subsequently Successor-in-Office had granted prosecution sanction vide impugned order dated 18.06.2007. In the counter affidavit, it has been categorically stated that in pursuance of the State Government's order prosecution sanction has been given vide Order No. 2105-10 dated 18.06.2007.

7. It is settled principle of law that sanctioning authority should exercise its authority and discretion independently under the authority of his own Office and not under the directions given by some other authority. In ***Mansukhlal Vithaldas Chauhan Versus State of Gujarat (Supra),*** the Hon'ble Apex Court held the sanction order to be bad for the reason that sanction was issued by the authority under the directions of the High Court.

8. In ***Gopikant Choudhary Versus State of Bihar and others (Supra)***, the Hon'ble Apex Court while setting aside the subsequent sanction order after refusal once has observed as under:-

"We find from the file that was produced that there has been no application of mind when the subsequent order was passed in the year 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. It is also apparent that the alleged excess amount said to have been paid on account of non-performance of the duty by the appellant is to the tune of Rs. 2750/- and, therefore, under the Rules of Business, the file pertaining to sanction would have been finally dealt with by the Law Minister and, in fact, he had done so. In this view of the matter, neither was there any necessity for the authorities concerned to place the file before the Chief Minister nor had the Chief Minister any occasion to reconsider the matter and pass fresh order sanctioning prosecution particularly when taking into account the loss sustained to the exchequer to the tune of Rs.2750. That apart, the person concerned has already retired in the year 1994 and it is unthinkable that for a loss of Rs.2750 the State would pursue the proceedings against such person. In this view of the matter, we set aside the impugned order of sanction dated 10.12.1997 passed by the Chief Minister for prosecuting the appellant."

9. Again in ***State of H.P. Versus Nishant Sareen (Supra)***, the Hon'ble Apex Court rehashed the same principle as laid down in ***Gopikant Choudhary Versus State of Bihar and others (Supra)***, and made impermissible the subsequent sanction on the same material.

10. In the counter affidavit filed on behalf of the respondent no. 2, it has not been mentioned that any fresh material was brought on record by the Investigating Agency and that was considered and prosecution sanction was granted by the Successor-in-Office. Even in the impugned order dated 18.06.2007 there is no mention that any fresh material was submitted or

considered by the sanctioning authority. Hence the present writ petition deserves to be allowed.

11. In the result, the present writ petition succeeds and the same stands ***allowed.*** The impugned order of sanction of prosecution dated 18.06.2007, passed against the petitioner, by the opposite party no. 2,, is hereby quashed.

12. No order as to costs.

(2022)03ILR A186
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 11.03.2022

BEFORE

THE HON'BLE AJAI KUMAR SRIVASTAVA-I, J.

Criminal Revision No. 229 of 2011

Dammar & Anr. ...Revisionists
Versus
State of U.P. ...Opposite Party

Counsel for the Revisionists:
K.K. Singh, Arvind Kumar Singh

Counsel for the Opposite Party:
Govt. Advocate

(A) Criminal Law - Revision - Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 - Section 198-A(2) - Where any person, after being evicted under this section, re-occupies the land or any part thereof without lawful authority, he shall be punishable with imprisonment for a term which may extend to two years but which shall not be less than three months and also with fine which may extend to three thousand rupees - Probation of Offenders Act, 1958 - Sections 4 - Power of court to release certain offenders on probation of good conduct , Section 11 - Courts competent to make order under the Act, appeal and revision and powers of courts in appeal and revision .(Para -9,10,11)

Revisionist no.1(died) and Revisionist no.2 (survive) convicted and sentenced under section 198 -A(2) of U.P.Z.A. & L.R. Act - Trial Court as well as appellate Court recorded a cogent finding of fact - Plot No. 309/0.63 hectare initially allotted to allottee - handed over the possession - allottee was dispossessed by revisionists - finding of fact based on testimony of PW-2 (Lekhpal) - not a person of criminal antecedents .(Para - 8)

HELD: -No illegality, irregularity or impropriety in the impugned judgment. Conviction of revisionist no. 2 recorded by Divisional Magistrate upheld by appellate court deserves to be maintained. Sentence modified to the extent that instead of sentencing the revisionist no. 2 to the jail, he shall get the benefit of Section 4 of the Probation of Offenders Act. No ground

Criminal Revision dismissed. (E-7)

List of Cases cited:-

1. Subhash Chand & ors. Vs St. of U.P. (2015 Law Suit (All) 1343)

2. St. of Mah. Vs Jagmohan Singh Kuldip Singh Anand & ors. (2004) 7 SCC 659

3. Jagat Pal Singh & ors. Vs St. of Har., AIR 2000 SC 3622

(Delivered by Hon'ble Ajai Kumar Srivastava-I, J.)

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

2. The instant Criminal Revision has been filed against the judgement and order dated 04.05.2011 passed by Sessions Judge, Hardoi in Criminal Appeal No.114 of 2010, Dammar and another vs. State of U.P. and judgment and order dated 31.07.2010

passed by U.P. Zila Adhikari, Hardoi in Case No.128 of 2009, State vs. Dammar and another, arising out of Case Crime No.263 of 2009, under Section 198A(2) U.P.Z.A & L.R. Act, Police Station Sandi, District Hardoi whereby the appellate Court has upheld the conviction of three months imprisonment along with fine of Rs.1500/-.

3. From the perusal of the report dated 04.01.2022 furnished by the learned Chief Judicial Magistrate, Hardoi, it transpires that the revisionist no.1 in this case, namely Dammar has died.

4. In view of the aforesaid, the instant revision has abated in respect of the revisionist no.1, Dammar.

5. Accordingly, this revision is surviving only in respect of revisionist no.2, Gobardhan.

6. Learned counsel for the revisionist no.2 has submitted that the finding recorded by learned trial Court regarding the conviction of revisionist no.2, under Section 198A(2) U.P.Z.A. & L.R. Act is against the weight of evidence, which is illegal and not sustainable in the eye of law because there was a civil dispute pending between the parties. Therefore, the impugned order of conviction is liable to be set aside.

7. Per contra, learned A.G.A. has submitted that the finding of conviction by learned trial Court has been recorded on the basis of proper analysis and appreciation of evidence. Therefore, the same cannot be termed illegal or perverse and no interference by this Court in exercise of its revisional jurisdiction is warranted.

8. Having heard learned counsel for the parties and upon perusal of the record, it transpires that the learned trial Court as well as appellate Court has recorded a cogent finding of fact that Plot No.309/0.63 hectare was initially allotted to Shripal, who was handed over the possession of the same. Thereafter, Shripal, allottee was dispossessed by the present revisionists, Dammar & Gobardhan. The finding of the said fact is based on testimony of PW-2, Jitendra, Lekhpal of the area concerned. As such no illegality or perversity is decipherable from order of Sessions Judge, Hardoi dated 04.05.2011 and order dated 31.07.2010 passed by U.P. Zila Adhikari, Hardoi. Therefore, there is no ground to interfere with the finding of conviction under Section 198A(2) U.P.Z.A & L.R. Act.

9. Section 198A(2) U.P.Z.A & L.R. Act provides as under:-

"198-A.....
1.....
(2) Where any person, after being evicted under this section, re-occupies the land or any part thereof without lawful authority, he shall be punishable with imprisonment for a term which may extend to two years but which shall not be less than three months and also with fine which may extend to three thousand rupees:
Provided that the court convicting the accused may, while passing the sentence, direct that the whole or such portion of the fine that may be recovered as the court considers proper be paid to the allottee or lessee, as the case may be, as damages for use and occupation."

10. Having regard to the aforesaid provision and also keeping in view the fact that there is noting on record to show that the revisionist no.2, Gobardhan has been a previous convict or a person who has criminal antecedents. It is useful to quote

Sections 4 of Probation of Offenders Act, 1958:-

"4. (1) When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the court may direct, and in the meantime to keep the peace and be of good behaviour:

Provided that the court shall not direct such release of an offender unless it is satisfied that the offender or his surety, if any, has a fixed place of abode or regular occupation in the place over which the court exercises jurisdiction or in which the offender is likely to live during the period for which he enters into the bond.

(2) Before making any order under sub-section (1) is made, the court shall take into consideration the report, if any, of the probation officer concerned in relation to the case.

(3) When an order under sub-section (1), the court may, if it is of opinion that in the interests of the offender and of the public it is expedient so to do, in addition pass a supervision order directing that the offender shall remain under the supervision of a probation officer named in the order during such period, not being less than one year, as may be specified therein, and may in such supervision order or impose such conditions as it deems necessary for the due supervision of the offender.

(4) The court making a supervision order under sub-section (3) shall require the offender, before he is released, to enter into a bond, with or without sureties, to observe the conditions specified in such order and such additional conditions with respect to residence, abstention from intoxicants or any other matter as the court may, having regard to the particular circumstances, consider fit to impose for preventing a repetition of the same offence or a commission of other offences by the offender.

(5) The court making a supervision order under sub-section (3) shall explain to the offender the terms and conditions of the order and shall forthwith furnish one copy of the supervision order to each of the offenders, the sureties, if any, and the probation officer concerned."

11. It is also relevant to quote Section 11 of Probation of Offenders Act, 1958, which reads as under:-

"11. Courts competent to make order under the Act, appeal and revision and powers of courts in appeal and revision.--

"(1) Notwithstanding anything contained in the Code or any other law, an order under this Act, may be made by any court empowered to try and sentence the offender to imprisonment and also by the High Court or any other court when the case comes before it on appeal or in revision.

(2) Notwithstanding anything contained in the Code, where an order under section 3 or section 4 is made by any court trying the offender (other than a High Court), an appeal shall lie to the court to

which appeals ordinarily lie from the sentences of the former court.

(3) In any case where any person under twenty-one years of age is found guilty of having committed an offence and the court by which he is found guilty declines to deal with him under section 3 or section 4, and passes against him any sentence of imprisonment with or without fine from which no appeal lies or is preferred, then, notwithstanding anything contained in the Code or any other law, the court to which appeals ordinarily lie from the sentences of the former court may, either of its own motion or on an application made to it by the convicted person or the probation officer, call for and examine the record of the case and pass such order thereon as it thinks fit.

(4) When an order has been made under section 3 or section 4 in respect of an offender, the Appellate Court or the High Court in the exercise of its power of revision may set aside such order and in lieu thereof pass sentence on such offender according to law: Provided that the Appellate Court or the High Court in revision shall not inflict a greater punishment than might have been inflicted by the court by which the offender was found guilty."

12. This Court in the case of **Subhash Chand & others Vs. State of U.P. (2015 Law Suit (All) 1343) ,** has emphatically laid down the need to apply the law of probation and give benefit of the beneficial legislation to accused persons in appropriate cases. This court issued following directions to all trial courts and appellate courts:-

30. "It appears that the aforesaid beneficial legislation has been lost sight of and even the Judges have practically forgotten this provision of law. Thus, before parting with the case, this Court feels that I will be failing in discharge of my duties, if a word of caution is not written for the trial courts and the appellante courts. The Registrar General of this Court is directed to circulate copy of this Judgement to all the District Judges of U.P., who shall in turn ensure circulation of the copy of this order amongst all the judicial officers working under him and shall ensure strict compliance of this Judgement. The District Judges in the State are also directed to call for reports every months from all the courts, i.e. trial courts and appellate courts dealing with such matters and to state as to in how many cases the benefit of the aforesaid provisions have been granted to the accused. The District Judges are also directed to monitor such cases personally in each monthly meeting. The District Judges concerned shall send monthly statement to the Registrar General as to in how many cases the trial court/appellate court has granted the benefit of the aforesaid beneficial legislation to the accused. A copy of this order be placed before the Registrar General for immediate compliance."

13. The Hon'ble Apex Court in **State of Maharashtra Vs. Jagmohan Singh Kuldip Singh Anand & others (2004) 7 SCC 659** has extended the benefit of Probation of Offenders Act, 1958 to the appellants, and observed as under:-

"The learned counsel appearing for the accused submitted that the accident is of the year 1990. The parties are educated and neighbors. The learned counsel, therefore, prayed that benefit of the Probation of Offenders Act, 1958 may be granted to the accused. The prayer made on behalf of the accused seems to be

reasonable. The accident is more than ten years old. The dispute was between the neighbors over a trivial issue of claiming of drainage. The accident took place in a fit of anger. All the parties educated and also distantly related. The accident is not such as to direct the accused to undergo sentence of imprisonment. In our opinion, it is a fit case in which the accused should be released on probation by directing them to execute a bond of one year for good behaviour."

14. Similarly, in **Jagat Pal Singh & others Vs. State of Haryana, AIR 2000 SC 3622,** the Hon'ble Apex Court has given the benefit of probation while upholding the conviction of accused persons under Sections 323, 452, 506 IPC and has released the accused persons on executing a bond before the Magistrate for maintaining good behaviour and peace for the period of six months.

15. In the light of the above discussions, I find no illegality, irregularity or impropriety in the impugned judgment. Thus, the conviction of the revisionist no.2, Gobardhan recorded by the District Magistrate, Hardoi, vide order dated 31.07.2010 passed in Case No.120 of 2009, State vs. Dammar and another, under Section 198A(2) U.P.Z.A & L.R. Act; upheld by the learned appellate court vide order dated 04.05.2011, passed in Criminal Appeal No.114 of 2010, Dammar and another vs. State of U.P., deserve to be maintained. However, sentence, as discussed above, needs to be modified.

16. The upshot of aforesaid discussion is that the conviction of the revisionist no.2, Gobardhan for the offence under Section 198A(2) U.P.Z.A & L.R. Act is upheld however, the sentence is modified to the extent that instead of sentencing the revisionist no.2, Gobardhan, to the jail, he shall get the benefit of Section 4 of the Probation of Offenders Act. Further, the revisionist no.2, Gobardhan shall file two sureties to the satisfaction of the court concerned coupled with personal bonds to the effect that he shall not commit any offence and shall be of good behaviour and shall maintain peace during the period of three months. The bonds aforesaid be filed by the revisionists within eight weeks.

17. In case of breach of any of the above conditions, he shall be taken into custody and shall have to undergo sentence awarded to him.

18. With the above modification, the instant revision is **dismissed.**

19. A copy of this order be communicated to the trial Court concerned for necessary information and compliance through e-mail/fax.

(2022)03ILR A190
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 11.03.2022

BEFORE

THE HON'BLE AJAI KUMAR SRIVASTAVA-I, J.

Criminal Revision No. 252 of 2011

Ram Prakash Pandey ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Shashi Kant Dwivedi, Ram Chandra Dwivedi

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law - Revision - Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 - Section 198-A(2) - Where any person, after being evicted under this section, re-occupies the land or any part thereof without lawful authority, he shall be punishable with imprisonment for a term which may extend to two years but which shall not be less than three months and also with fine which may extend to three thousand rupees - Probation of Offenders Act, 1958 - Sections 4 - Power of court to release certain offen(Para - 6,7,8)

Revisionist convicted and sentenced under section 198 -A(2) of U.P.Z.A. & L.R. Act - Trial Court as well as appellate Court recorded finding of fact - Plot No.458/0.253 hectare initially allotted to allottee - handed over the possession - allottee was dispossessed by revisionist - finding of fact duly supported by evidence of PW-2 , Lekhpal of the area concerned - not a person of criminal antecedents. (Para - 5,7)

HELD:-No illegality, irregularity or impropriety in the impugned judgment. Conviction of revisionist recorded by Sub Divisional Magistrate upheld by appellate court deserves to be maintained. Sentence modified to the extent that instead of sentencing the revisionist to the jail, he shall get the benefit of Section 4 of the Probation of Offenders Act. No ground to interfere with the finding of conviction under Section 198A(2) U.P.Z.A & L.R. Act.(Para - 5,12)

Criminal Revision dismissed. (E-7)

List of Cases cited:-

1. Subhash Chand & ors. Vs St. of U.P. (2015 Law Suit (All) 1343)

2. St. of Mah. Vs Jagmohan Singh Kuldip Singh Anand & ors. (2004) 7 SCC 659

3. Jagat Pal Singh & ors. Vs St. of Har., AIR 2000 SC 3622

(Delivered by Hon'ble Ajai Kumar Srivastava-I, J.)

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

2. This criminal revision has been preferred against the judgment and order dated 22.4.2011 passed by the Additional Sessions Judge, Court No.3, Hardoi in Criminal Appeal No.42 of 2010 and the judgment and order dated 3.3.2010 passed by the S.D.M., Bilgram, Hardoi in Case No.39/4104 of 2002, Case Crime No.263/2002 thereby convicting the sentencing the revisionist under Section 198-A(2) of U.P.Z.A. & L.R. Act for three months imprisonment and fine of Rs.1,500/-.

3. Learned counsel for the revisionist has submitted that the finding recorded by learned trial Court regarding the conviction of revisionist, under Section 198A(2) U.P.Z.A. & L.R. Act is against the weight of evidence, which is illegal and not sustainable in the eye of law because there was a civil dispute pending between the parties. Therefore, the impugned order of conviction is liable to be set aside.

4. Per contra, learned A.G.A. has submitted that the finding of conviction by learned trial Court has been recorded on the basis of proper analysis and appreciation of evidence. Therefore, the same cannot be termed illegal or perverse and no interference by this Court in exercise of its revisional jurisdiction is warranted.

5. Having heard learned counsel for the parties and upon perusal of the record, it transpires that the learned trial Court as well as appellate Court has clearly recorded a finding of fact that Plot No.458/0.253 hectare was initially allotted to Harishankar, who was handed over the possession of the same. Thereafter,

Harishankar, allottee was dispossessed by the present revisionist, Ram Prakash Pandey. The finding of the said fact is duly supported by the evidence of PW-2, Mahendra Kumar, Lekhpal of the area concerned. As such no illegality or perversity is decipherable from order of Additional Sessions Judge, Court No.3, Hardoi dated 22.04.2011 and order dated 3.3.2010 passed by the S.D.M., Bilgram, Hardoi. Therefore, there is no ground to interfere with the finding of conviction under Section 198A(2) U.P.Z.A & L.R. Act.

6. Section 198A(2) U.P.Z.A & L.R. Act provides as under:-

"198-A.....

1.....

(2) Where any person, after being evicted under this section, re-occupies the land or any part thereof without lawful authority, he shall be punishable with imprisonment for a term which may extend to two years but which shall not be less than three months and also with fine which may extend to three thousand rupees:

Provided that the court convicting the accused may, while passing the sentence, direct that the whole or such portion of the fine that may be recovered as the court considers proper be paid to the allottee or lessee, as the case may be, as damages for use and occupation."

7. Having regard to the aforesaid provision and also keeping in view the fact that there is noting on record to show that the revisionist has been a previous convict or a person who has criminal antecedents. It is useful to quote Sections 4 of Probation of Offenders Act, 1958:-

"4. (1) When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the court may direct, and in the meantime to keep the peace and be of good behaviour:

Provided that the court shall not direct such release of an offender unless it is satisfied that the offender or his surety, if any, has a fixed place of abode or regular occupation in the place over which the court exercises jurisdiction or in which the offender is likely to live during the period for which he enters into the bond.

(2) Before making any order under sub-section (1) is made, the court shall take into consideration the report, if any, of the probation officer concerned in relation to the case.

(3) When an order under sub-section (1), the court may, if it is of opinion that in the interests of the offender and of the public it is expedient so to do, in addition pass a supervision order directing that the offender shall remain under the supervision of a probation officer named in the order during such period, not being less than one year, as may be specified therein, and may in such supervision order or impose such conditions as it deems necessary for the due supervision of the offender.

(4) The court making a supervision order under sub-section (3)

shall require the offender, before he is released, to enter into a bond, with or without sureties, to observe the conditions specified in such order and such additional conditions with respect to residence, abstention from intoxicants or any other matter as the court may, having regard to the particular circumstances, consider fit to impose for preventing a repetition of the same offence or a commission of other offences by the offender.

(5) The court making a supervision order under sub-section (3) shall explain to the offender the terms and conditions of the order and shall forthwith furnish one copy of the supervision order to each of the offenders, the sureties, if any, and the probation officer concerned."

8. It is also relevant to quote Section 11 of Probation of Offenders Act, 1958, which reads as under:-

"11. Courts competent to make order under the Act, appeal and revision and powers of courts in appeal and revision.--

"(1) Notwithstanding anything contained in the Code or any other law, an order under this Act, may be made by any court empowered to try and sentence the offender to imprisonment and also by the High Court or any other court when the case comes before it on appeal or in revision.

(2) Notwithstanding anything contained in the Code, where an order under section 3 or section 4 is made by any court trying the offender (other than a High Court), an appeal shall lie to the court to which appeals ordinarily lie from the sentences of the former court.

(3) In any case where any person under twenty-one years of age is found guilty of having committed an offence and the court by which he is found guilty declines to deal with him under section 3 or section 4, and passes against him any sentence of imprisonment with or without fine from which no appeal lies or is preferred, then, notwithstanding anything contained in the Code or any other law, the court to which appeals ordinarily lie from the sentences of the former court may, either of its own motion or on an application made to it by the convicted person or the probation officer, call for and examine the record of the case and pass such order thereon as it thinks fit.

(4) When an order has been made under section 3 or section 4 in respect of an offender, the Appellate Court or the High Court in the exercise of its power of revision may set aside such order and in lieu thereof pass sentence on such offender according to law: Provided that the Appellate Court or the High Court in revision shall not inflict a greater punishment than might have been inflicted by the court by which the offender was found guilty."

9. This Court in the case of **Subhash Chand & others Vs. State of U.P. (2015 Law Suit (All) 1343)** , has emphatically laid down the need to apply the law of probation and give benefit of the beneficial legislation to accused persons in appropriate cases. This court issued following directions to all trial courts and appellate courts:-

30. "It appears that the aforesaid beneficial legislation has been lost sight of and even the Judges have practically forgotten this provision of law. Thus, before parting with the case, this Court feels that I will be failing in discharge of my duties, if a word of caution is not written for the trial courts and the appellante courts. The

Registrar General of this Court is directed to circulate copy of this Judgement to all the District Judges of U.P., who shall in turn ensure circulation of the copy of this order amongst all the judicial officers working under him and shall ensure strict compliance of this Judgement. The District Judges in the State are also directed to call for reports every months from all the courts, i.e. trial courts and appellate courts dealing with such matters and to state as to in how many cases the benefit of the aforesaid provisions have been granted to the accused. The District Judges are also directed to monitor such cases personally in each monthly meeting. The District Judges concerned shall send monthly statement to the Registrar General as to in how many cases the trial court/appellate court has granted the benefit of the aforesaid beneficial legislation to the accused. A copy of this order be placed before the Registrar General for immediate compliance."

10. The Hon'ble Apex Court in **State of Maharashtra Vs. Jagmohan Singh Kuldip Singh Anand & others (2004) 7 SCC 659** has extended the benefit of Probation of Offenders Act, 1958 to the appellants, and observed as under:-

"The learned counsel appearing for the accused submitted that the accident is of the year 1990. The parties are educated and neighbors. The learned counsel, therefore, prayed that benefit of the Probation of Offenders Act, 1958 may be granted to the accused. The prayer made on behalf of the accused seems to be reasonable. The accident is more than ten years old. The dispute was between the neighbors over a trivial issue of claiming of drainage. The accident took place in a fit of anger. All the parties educated and also distantly related. The accident is not such as to direct the accused to undergo sentence of imprisonment. In our opinion, it is a fit case in which the accused should be released on probation by directing them to execute a bond of one year for good behaviour."

11. Similarly, in **Jagat Pal Singh & others Vs. State of Haryana, AIR 2000 SC 3622,** the Hon'ble Apex Court has given the benefit of probation while upholding the conviction of accused persons under Sections 323, 452, 506 IPC and has released the accused persons on executing a bond before the Magistrate for maintaining good behaviour and peace for the period of six months.

12. In the light of the above discussions, I find no illegality, irregularity or impropriety in the impugned judgment. Thus, the conviction of the revisionist, Ram Prakash Pandey recorded by Sub Divisional Magistrate Bilgram, Hardoi vide order dated 03.03.2010 passed in Case No.39/4104 of 2002, under Section 198 A (2) U.P.Z.A & L.R. Act; upheld by the learned appellate court vide order dated 22.04.2011, passed in Criminal Appeal No.42/10 deserves to be maintained. However, sentence, as discussed above, needs to be modified. The conviction of the revisionist, Ram Prakash Pandey for the offence under Section 198 A (2) U.P.Z.A & L.R. Act is upheld, however, the sentence is modified to the extent that instead of sentencing the revisionist, Ram Prakash Pandey, to the jail, he shall get the benefit of Section 4 of the Probation of Offenders Act. Further, the revisionist, Ram Prakash Pandey shall file two sureties to the satisfaction of the court concerned coupled with personal bonds to the effect that he shall not commit any offence and shall be

of good behaviour and shall maintain peace during the period of three months. The bonds aforesaid be filed by the revisionists within eight weeks.

13. In case of breach of any of the above conditions, he shall be taken into custody and shall have to undergo sentence awarded to him.

14. With the above modification, the instant revision is **dismissed.**

15. A copy of this order be communicated to the trial Court concerned for necessary information and compliance through e-mail/fax.

(2022)03ILR A195
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.03.2022

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Criminal Revision No. 624 of 2022

Radhey Shyam Bharti ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Ms. Pooja

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

A. Criminal Law - Code of Criminal Procedure,1973 - Section 397/401, 156(3) - Indian Electricity Act - Section 135 - challenge to-rejection of application u/s 156(3) for issuing a direction for registration of an FIR-revisionist let out some portion of his land to install a mobile tower-he used to electricity for his domestic use from the service connection of the mobile company-he also let his tenant to use the same-the act of revisionist is amount to punishable offence-vigilance team,UPPCL conducted a special checking drive against the power theft and lodged FIR agaisnt the revisionist-revisionist filed that complaint in order to put counter pressure on the officials for taking undue advantage in plural cases of theft of electricity-the process of law cannot be allowed to be abused by a person who is facing trial for theft of Electricity-The process of law can be invoked by a pricipled and really aggrieved person who approaches the court with clean hands-order passed by learned Special Judge does not suffer from any legal infirmity.(Para 1 to 25)

B. Criminal Law - Code of Criminal Procedure,1973 - Section 156 (3) - While considering the application u/s 156(3) CrPC the court is duty bound to consider the averments as alleged in the application and if the same constitute any cognizable offence, the Court has to pass an order for registration of the case and investigation, is also without force and against the law laid down by the Hon'ble Supreme Court. The Magistrate has to carefully scrutinise the evidence brought on record and has to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused and in the present case, the learned Court below has rightly done so.(Para 15)

The revision is dismissed. (E-6)

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

1. Heard Ms. Pooja, Advocate, the learned counsel for the revisionist and the learned A.G.A. appearing for the State-respondent.

2. By means of the instant revision under Section 397/401 Cr.P.C., the revisionist has challenged the legality and

validity of the order dated 21.09.2021 passed by the learned Special Judge, SC/ST (POA) Act, Sonebhadra in Criminal Misc. Case No. 194 of 2021 whereby the revisionist's application under Section 156 (3) Cr.P.C. for issuing a direction for registration of an FIR, has been rejected.

3. On 28.07.2021, the revisionist had filed an application under Section 156 (3) Cr.P.C. alleging that he is a person belonging to the Scheduled Caste. He has let out some portion of his land to a mobile communication company which has installed a mobile tower on the land and has taken an electricity service connection for the same. The revisionist uses electricity for his domestic use from the service connection of the mobile company. The revisionist has let out a building constructed on another part of the said land to one Anuj Kumar for doing some work and electricity from the service connection of the mobile company is being used for that work also.

4. The revisionist has further alleged in the application under Section 156 (3) that some employees of the electricity department asked him not to use electricity from the service connection of the mobile communication company. The revisionist has alleged that the aforesaid employees asked for a sum of Rs. 50,000/-for the electricity connection and the revisionist gave them the aforesaid amount in cash without taking any acknowledgement of receipt. After some time, the said persons visited the revisionist's home again and they demanded a further sum of Rs. 25,000/- for the connection. When the revisionist denied that he would not give any amount in excess of the amount mentioned on the receipt, they abused and threatened him. When some other persons gathered there, they went away.

5. A copy of the aforesaid application under Section 156 (3) Cr.P.C. has been filed as Annexure No. 1 to the affidavit filed in support of the revision and the same is not accompanied by a copy of an affidavit filed in support of the application. In the affidavit filed before this Court also, there is no averment that the revisionist had filed an affidavit in support of the application under Section 156 (3) Cr.P.C.

6. The learned Special Judge called for a report from the Circle Office, Obra in respect of the petitioner's application under Section 156 (3). The police reported that the revisionist had sent a letter dated 16.06.2021 through registered post upon which an enquiry was held. Upon enquiry, it transpired that the respondent Vivek Kumar was working as Sub-divisional Officer, Arvind Kumar was working as a Junior Engineer and Ashraf Ali was working as Technician Grade 2 cum Accountant in the Sub-divisional Office of U. P. Power Corporation Ltd. (hereinafter referred to as the "U.P.P.C.L.') at Obra. Vivek Kumar, S.D.O. has since been transferred. U.P.P.C.L. was carrying out a special drive against power theft and as a part of the drive, a vigilance team of U.P.P.C.L. had carried out checking in the premises of the revisionist on 14-04-2021 and had found theft of electricity being committed by him. On 15.04.2021, Case Crime No. 386 of 2021 was registered against the revisionist under Section 135 of the Indian Electricity Act in Police Station Anti Power Theft, Obera. Earlier, in the year 2015 also, the revisionist was found committing theft of electricity and the then Junior Engineer had lodged Case Crime

No. 35 of 22015 against the revisionist. Upon enquiry, prima facie the allegations levelled by the revisionist have not been found to be established and it appears that the revisionist has filed the complaint to put undue pressure on the respondents, who are the officials of U.P.P.C.L.

7. After considering the aforesaid report, on 21.09.2021 the learned Special Judge passed an order holding that it does not appear that the respondents have committed any cognizable offence and accordingly, the application under Section 156 (3) Cr.P.C. was rejected by the learned Special Judge. The revisionist has challenged the aforesaid order dated 21.09.2021 mainly on the ground that the report of the Circle Officer is wholly irrelevant for consideration of the enquiry contemplated under Section 156 (3) Cr.P.C. and the report is relevant only to the extent whether any FIR has been registered in respect of the alleged incident or not.

8. The submission of the learned counsel for the revisionist is that while considering an application under Section 156 (3) Cr.P.C., the court is duty bound to consider the averments as alleged in the application and if the same constitute any cognizable offence, the Court has to pass an order for registration of the case and investigation.

9. I have considered the submission of learned counsel for the revisionist and perused the record.

10. To understand the true purport of the provision under Section 156 (3) Cr.P.C., the same is being reproduced herein below: -

"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."

11. In **Pepsi Food Limited vs. Sub-Judicial Magistrate, 1998 (5) SCC 749**, the Hon'ble Supreme Court held as follows: -

"28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find

out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

12. In **Maksud Saiyed vs. State of Gujarat**, 2008 (5) SCC 668, the Hon'ble Supreme Court held that "where a jurisdiction is exercised on a complaint petition filed in terms of Section 156 (3) Cr.P.C. or Section Section 200 of the Code of Criminal Procedure, the Magistrate is required to apply his mind."

13. The manner in which the Court has to exercise power under Section 156 (3) Cr.P.C. has been laid down in **Priyanka Srivastava vs. State of U.P.,** 2015 (6) SCC 287, wherein the Hon'ble Supreme Court held that: -

"27. Regard being had to the aforesaid enunciation of law, it needs to be reiterated that the learned Magistrate has to remain vigilant with regard to the allegations made and the nature of allegations and not to issue directions without proper application of mind. He has also to bear in mind that sending the matter would be conducive to justice and then he may pass the requisite order. The present is a case where the accused persons are serving in high positions in the Bank. We are absolutely conscious that the position does not matter, for nobody is above the law. But, the learned Magistrate should take note of the allegations in entirety, the date of incident and whether any cognizable case is remotely made out.

...

29. At this stage it is seemly to state that power under Section 156(3) warrants application of judicial mind. A court of law is involved. It is not the police taking steps at the stage of Section 154 of the Code. A litigant at his own whim cannot invoke the authority of the Magistrate. A principled and really grieved citizen with clean hands must have free access to invoke the said power. It protects the citizens but when pervert litigations takes this route to harass their fellow citizens, efforts are to be made to scuttle and curb the same."

14. In my considered opinion, the submission made on behalf of the revisionist, that the report of the police is wholly irrelevant for consideration of the enquiry contemplated under Section 156 (3) Cr.P.C. and the report is relevant only to the extent whether any FIR has been registered in respect of the alleged incident or not, is not acceptable in view of the law laid down by the Hon'ble Supreme Court in the above mentioned cases. The Magistrate has to apply his mind to the entire material before him in order to ascertain whether commission of any cognizable offence is prima facie made out so as to warrant trial of the opposite party and he cannot direct registration of an F.I.R. merely for the reason that the police report mentions that no F.I.R. has been registered previously. The learned Court below has rightly examined the allegations made in the complaint as also the facts mentioned in the police report to ascertain whether any cognizable offence is made out or not.

15. The further submission of the learned counsel for the revisionist, that while considering the application under Section 156 (3) Cr.P.C., the Court is duty bound to consider the averments as alleged in the application and if the same constitute any cognizable offence, the Court has to pass an order for registration of the case and investigation, is also without force and against the law laid down by the Hon'ble

Supreme Court. The Magistrate has to carefully scrutinise the evidence brought on record and has to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused and in the present case, the learned Court below has rightly done so.

16. In **Priyanka Srivastava** (Supra), the Hon'ble Supreme Court was pleased to further lay down that: -

"30. In our considered opinion, a stage has come in this country where Section 156(3) CrPC applications are to be supported by an affidavit duly sworn by the applicant who seeks the invocation of the jurisdiction of the Magistrate. That apart, in an appropriate case, the learned Magistrate would be well advised to verify the truth and also can verify the veracity of the allegations. This affidavit can make the applicant more responsible. We are compelled to say so as such kind of applications are being filed in a routine manner without taking any responsibility whatsoever only to harass certain persons. That apart, it becomes more disturbing and alarming when one tries to pick up people who are passing orders under a statutory provision which can be challenged under the framework of the said Act or under Article 226 of the Constitution of India. But it cannot be done to take undue advantage in a criminal court as if somebody is determined to settle the scores.

...

35. A copy of the order passed by us be sent to the learned Chief Justices of all the High Courts by the Registry of this Court so that the High Courts would circulate the same amongst the learned Sessions Judges who, in turn, shall circulate it among the learned Magistrates so that they can remain more vigilant and diligent while exercising the power under Section 156(3) CrPC."

17. As already mentioned above, neither a copy of the affidavit filed in support of the application has been annexed by the revisionist nor has he made any averment that an affidavit had been filed in support of the application under Section 156 (3) Cr.P.C. The omission of the complainant in filing an affidavit in spite of the mandate contained in Priyanka Srivastava (Supra) prima facie indicates that the complainant deliberately did not verify the allegations made in the complaint on oath.

18. As per the averments made by the revisionist himself under Section 156 (3) Cr.P.C., he is using electricity from the service connection of a mobile communication company, which is a tenant of the complainant and he has also permitted the same to be used by his another tenant.

19. Section 135 of the Electricity Act, 2003 provides as follows: -

135. Theft of electricity.-- (1) Whoever, dishonestly,--

(a) taps, makes or causes to be made any connection with overhead, underground or underwater lines or cables, or service wires, or service facilities of a licensee or supplier, as the case may be; or

(b) tampers a meter, installs or uses a tampered meter, current reversing transformer, loop connection or any other device or method which interferes with accurate or proper registration, calibration or metering of electric current or otherwise results in a manner whereby electricity is stolen or wasted; or

(c) damages or destroys an electric meter, apparatus, equipment, or

wire or causes or allows any of them to be so damaged or destroyed as to interfere with the proper or accurate metering of electricity; or

(d) uses electricity through a tampered meter; or

(e) *uses electricity for the purpose other than for which the usage of electricity was authorised,*

so as to abstract or consume or use electricity shall be punishable with imprisonment for a term which may extend to three years or with fine or with both..."

(emphasis supplied)

20. Electricity from the service connection taken by the mobile communication company for the purpose of operating the equipments installed in the mobile communication tower is not meant to be used for any other purpose and by any other person. From the averments made in the application under Section 156 (3) Cr.P.C. itself, prima facie it appears that the revisionist is wrongly consuming the electricity from the service connection of the mobile communication copany without taking a service connection in his own name for his own use and he is also letting the electricity being used by the tenant - Anuj Kumar for some work, which act of the revisionist is illegal and it may amount to a punishable offence.

21. As has come to light from the report submitted by the police to the Court, a Case Crime No. 35 of 2015 is pending against the revisionist for theft of power and another Case Crime No. 386 of 2021 has been lodged against him under Section 135 of the Indian Electricity Act in furtherance of a checking conducted by the vigilance team of UPPCL on 14.04.2021 as a part of a sepcial dirve against power theft.

22. Taking into consideration the aforesaid facts, the learned Magistrate came to a conclusion that it appears that the revisionist has filed the application under Section 156 (3) Cr.P.C., to put pressure on the officials of U.P.P.C.L.

23. It is settled law that the revisional powers of the High Court can only be exercised to prevent the abuse of the process of law and to secure the ends of justice. The process of law can be invoked by a principled and really aggrieved person who approaches the court with clean hands. The process of law cannot be allowed to be abused by a person who is facing trial for theft of Electricity and who himself avers such facts in his application under Section 156 (3) Cr.P.C., as indicate that he is guilty of committing theft of Electricity; by making baseless allegations against the officials of a Government Corporation without any supporting material or evidence. Apparently, the revisionist has filed that complaint in order to put a counter pressure on the officials for taking undue advantage in plural cases of theft of electricity lodged against the complainant.

24. Keeping in view the facts and circumstances of the case, I am of the considered opinion that the order dated 21.09.2021 passed by the learned Special Judge, under Section 156 (3) Cr.P.C. does not suffer from any legal infirmity so as to warrant interference by this Court in exercise of its discretionary power of revision.

25. The revision lacks merits and is, accordingly, **dismissed.**

(2022)03ILR A201
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 25.02.2022

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Criminal Revision No. 801 of 2021

Anubhav Verma ...Revisionist
Versus
Principal Judge Family Court Faizabad & Ors. ...Opposite Parties

Counsel for the Revisionist:
Ashok Kumar Verma

Counsel for the Opposite Parties:
Vaibhav Srivastava

(A) Criminal Law - Family Courts Act ,1984 - Section 19(4) - Appeal - The Code of Criminal Procedure, 1973 - Section 397/401 - revision , Section125 - order for maintenance of Wives, Children and Parents - litigant while approaching the High Court for invoking its revisional jurisdiction, must place on record all the material and relevant documents and he cannot be allowed play hide and seek with the Court and this conduct of the revisionist cannot be appreciated - court has to consider the status of the parties, their respective needs, the capacity of the husband to pay having regard to his reasonable expenses for his own maintenance and of those he is obliged under the law and statutory but involuntary payments or deductions.(Para - 26,29)

Opposite party no. 2 filed application - seeking interim maintenance from revisionist - Family Court partly allowed application for interim maintenance - awarding sum of Rs.15, 000/- only to opposite party no. 2 (wife) - Rs.15, 000/- per month to opposite party no.3 (minor daughter) - revisionist did not file his affidavit of assets and liabilities - not annexed his salary slips, income tax returns and statements of his bank accounts.(Para - 2,28)

HELD:- Amount of Rs.15,000/- per month each awarded as interim maintenance to the opposite parties no. 2 and 3 does not suffer from any such illegality . No interference by Court in exercise of its revisional jurisdiction. Impugned orders do not suffer from any illegality or infirmity.(Para -31, 32)

Criminal Revision dismissed. (E-7)

List of Cases cited:-

1. Rajnesh Vs Neha , (2021) 2 SCC 324

2. Jasbir Kaur Sehgal Vs Distt. Judge, Dehradun , (1997) 7 SCC 7

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

1. Heard Mr. Ashok Kumar Verma, learned counsel for the revisionist and Mr. Vaibhav Srivastava, learned counsel for the opposite parties no.2 and 3.

2. By means of the instant revision filed under Section 19(4) of the Family Courts Act read with Section 397/401 of Code of Criminal Procedure, the revisionist has challenged the order dated 13.08.2021 passed by the Principal Judge, Family Court, Faizabad in Case No.187 of 2020 (Smt. Samiksha Saran & Another Vs. Anubhav Verma), whereby the application filed by the opposite party no. 2 seeking interim maintenance from the revisionist has been decided and as against the demand of Rs.50,000/- per month towards maintenance of the opposite party nos.2 and 3 who are the wife and the minor daughter of the revisionist, the learned Principal Judge, Family Court has directed the revisionist to pay a sum of Rs.15,000/- per month to his wife and Rs.15,000/- per month to his daughter. He has also challenged the order dated 27-09-2021,

whereby the Family Court has rejected his application "FOR REVIEW AND SET ASIDE THE INTERIM MAINTENANCE ORDER PASSED ON 13.08.2021".

3. The revisionist has contended that the Principal Judge, Family Court has not provided him a proper opportunity of hearing. After service of summons of the case, the revisionist put in appearance for the first time on 08-01-2021, on which date he was supplied copies of the application for maintenance, affidavit in support of the same and the application for interim maintenance without the affidavit as required as per the guidelines formulated by the Hon'ble Apex Court in the case of ***Rajnesh Vs. Neha , (2021) 2 SCC 324.***

4. His submission is that the opposite party no. 2 filed an affidavit dated 16-02-2021 in compliance of the aforesaid judgment, without filing any document as required in law and various contents necessarily required were not correctly stated in the affidavit. The opposite party no. 2 filed some documents on 12-08-2021, which were not relevant for adjudication of the quantum of interim maintenance. Although the revisionist sought an adjournment on 13-08-2021, the learned Principal Judge passed an order awarding interim maintenance. While passing the order of interim maintenance, the learned Principal Judge has not recorded a finding as to whether the opposite party no. 2 is legally entitled to receive interim maintenance.

5. On 04-09-2021 the revisionist filed an application before the Principal Judge, Family Court for setting aside the order dated 13-08-2021 and to provide opportunity of hearing but the same was rejected by means of an order dated 27-09-2021.

6. While challenging the aforesaid orders, the revisionist has submitted that if he is compelled to pay the interim maintenance awarded to the opposite party nos. 2 and 3, it will be very harsh and difficult for him to pay the EMI's of Rs.31,068/- payable against the Housing Loan (in the joint names of revisionist and the opposite party no. 2), which is being paid by the revisionist alone. The revisionist, being the only son of his parents, is bearing the responsibility of his younger sister who is about to get married and he has to bear the expenses of his father who has undergone a major surgery of Fistula and earlier has undergone a major bypass heart surgery in the year 2017. His mother is suffering from high blood pressure and is diabetic whose medical expenses are also borne by the revisionist.

7. The revisionist has filed a written statement in reply to the application under Section 125 Cr.P.C. and he has filed objections against the application for interim maintenance on 16-03-2021.

8. On 13-08-2021 the revisionist filed an application for adjournment of the case on the ground that he had engaged a new counsel. The said application was rejected by the Principal Judge, Family Court for the reason that there was no sufficient ground for adjournment.

9. The second and the third Provisos appended to Section 125 provide as follows:

"Provided further that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this sub-section, order such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceeding which the

Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct:

Provided also that an application for the monthly allowance for the interim maintenance and expenses for proceeding under the second proviso shall, as far as possible, be disposed of within sixty days from the date of the service of notice of the application such person."

10. Thus there is a statutory mandate that the applications for interim maintenance have to be disposed off within a period of sixty days from the date of service of notice of the application on the respondent. Moreover, engagement of a new counsel does not give a right to a party to stall the proceedings of the case. Therefore, the Family Court did not commit any illegality in rejecting the application for adjournment filed on the ground of engagement of a new Counsel.

11. The order dated 13-08-2021 passed on the application for interim maintenance also records that the parties were heard on the application for interim maintenance. The learned Principal Judge has recorded the submissions made on behalf of the revisionist that the opposite party no. 2 holds a degree of M.B.A. and she is working in a private company and is earning Rs.40,000/- to 50,000/- per month. She has her own house and two plots in Ayodhya. Since imposition of lockdown in March 2020, the revisionist is being paid 60 per cent of his salary and his job is not permanent. He does not have any agricultural land or business. He has to bear the responsibility of his old and ailing parents. He has also submitted that he continuously keeps on visiting the opposite party no. 2 and pays her the monthly expenses and he also pays the school fees of the opposite party no. 3, instalment of housing loan and mobile bill of the opposite party no. 2.

12. The learned Principal Judge, Family Court has recorded in the order that from the money order receipts filed by the revisionist it appears that he has sent a total amount of Rs.13,500/- to the opposite party no. 2 in five instalments between 05-09-2020 to 08-03-2021. The documents filed by him to prove the employment of the opposite party no. 2 relate to the year 2014 and November 2018. In her affidavit of assets of liabilities filed before the learned Principal Judge, the opposite party no. 2 has stated that earlier she was in a private job at NOIDA but presently she is not earning.

13. The Family Court has also taken into consideration the contention of the opposite party no. 2 that the revisionist's father was employed in police department and he is not financially dependent upon the revisionist. The Family Court has also recorded that the details of bank account furnished by the revisionist discloses only the amounts withdrawn and it does not contain details of the amount credited to his account which indicates that the revisionist is concealing the correct particulars of his income from the Court.

14. After taking into consideration the aforesaid facts, the Family Court has partly allowed the application for interim maintenance awarding a sum of Rs.15,000/- only to the opposite party no. 2 and Rs.15,000/- per month to the opposite party no.3 and in view of the aforesaid discussions the order does not appear to be either having been passed without giving an adequate opportunity on suffering from any illegality or infirmity.

15. Shri A. K. Verma, learned counsel for the revisionist has submitted that the learned Principal Judge, Family Court has completely ignored the direction issued by the Hon'ble Supreme Court in ***Rajnesh (Supra)***, wherein it has been held that the party claiming maintenance should be required to file a concise application for interim maintenance with limited pleadings, alongwith an Affidavit of Disclosure of Assets and Liabilities before the concerned court. On the basis of the pleadings filed by both parties and the Affidavits of Disclosure, the Court would be in a position to make an objective assessment of the approximate amount to be awarded towards maintenance at the interim stage. Keeping in mind the need for a uniform format of Affidavit of Disclosure of Assets and Liabilities to be filed in maintenance proceedings, the Hon'ble Supreme Court framed the following guidelines: -

(72.1)(a) The Affidavit of Disclosure of Assets and Liabilities annexed at Enclosures I, II and III of this judgment, as may be applicable, shall be filed by the parties in all maintenance proceedings, including pending proceedings before the concerned Family Court / District Court / Magistrate's Court, as the case may be, throughout the country;

(72.2)(b) The applicant making the claim for maintenance will be required to file a concise application accompanied with the Affidavit of Disclosure of Assets;

(72.3)(c) The respondent must submit the reply alongwith the Affidavit of Disclosure within a maximum period of four weeks. The Courts may not grant more than two opportunities for submission of the Affidavit of Disclosure of Assets and Liabilities to the respondent. If the respondent delays in filing the reply with the Affidavit, and seeks more than two adjournments for this purpose, the Court may consider exercising the power to strike off the defence of the respondent, if the conduct is found to be wilful and contumacious in delaying the proceedings.32 On the failure to file the Affidavit within the prescribed time, the Family Court may proceed to decide the application for maintenance on basis of the Affidavit filed by the applicant and the pleadings on record;

(72.4)(d) The above format may be modified by the concerned Court, if the exigencies of a case require the same. It would be left to the judicial discretion of the concerned Court, to issue necessary directions in this regard.

(72.5)(e) If apart from the information contained in the Affidavits of Disclosure, any further information is required, the concerned Court may pass appropriate orders in respect thereof.

(72.6)(f) If there is any dispute with respect to the declaration made in the Affidavit of Disclosure, the aggrieved party may seek permission of the Court to serve interrogatories, and seek production of relevant documents from the opposite party under Order XI of the CPC;

On filing of the Affidavit, the Court may invoke the provisions of Order X of the C.P.C or Section 165 of the Evidence Act 1872, if it considers it necessary to do so;

The income of one party is often not within the knowledge of the other spouse. The Court may invoke Section 106 of the Evidence Act, 1872 if necessary, since the income, assets and liabilities of the spouse are within the personal knowledge of the party concerned.

(72.7)(g) If during the course of proceedings, there is a change in the financial status of any party, or there is a

change of any relevant circumstances, or if some new information comes to light, the party may submit an amended / supplementary affidavit, which would be considered by the court at the time of final determination.

(72.8)(h) The pleadings made in the applications for maintenance and replies filed should be responsible pleadings; if false statements and misrepresentations are made, the Court may consider initiation of proceeding u/S. 340 Cr.P.C.., and for contempt of Court.

(72.9)(i) In case the parties belong to the Economically Weaker Sections ("EWS"), or are living Below the Poverty Line ("BPL"), or are casual labourers, the requirement of filing the Affidavit would be dispensed with.

(72.10)(k) The concerned Family Court / District Court / Magistrate's Court must make an endeavour to decide the I.A. for Interim Maintenance by a reasoned order, within a period of four to six months at the latest, after the Affidavits of Disclosure have been filed before the court.

(72.11) A professional Marriage Counsellor must be made available in every Family Court.

16. Shri A. K. Verma, has submitted that the opposite party no. 2 had filed only an incomplete affidavit of disclosure of income and liabilities without the requisite documents.

17. Copy of the aforesaid affidavit of the opposite party no. 2 was served upon the revisionist on 16-02-2021 itself. As per the guidelines issued by the Hon'ble Supreme Court contained in para 72.3 of the judgment in ***Rajnesh (Supra)***, it was obligatory upon the revisionist to submit his reply along with the affidavit of disclosure within a maximum period of four weeks. The Courts have been prohibited against granting more than two opportunities for submission of the affidavit of disclosure of assets and liabilities to the respondents.

18. In the present case, although a copy of the affidavit of assets and liabilities of the opposite party no. 2 were served upon the revisionist on 16-02-2021 and the period of four weeks stipulated in ***Rajnesh (Supra)*** expired on 16-03-2021, the applicant did not file his affidavit of assets and liabilities as mandated by the Hon'ble Supreme Court in the aforesaid case and the same was prepared on 26th of October 2021 i.e. after expiry of more than eight months since a copy of the affidavit of the opposite party no.2 was provided to him and after expiry of more than two months since passing of the order dated 13-08-2021 awarding interim maintenace to the opposite parties no. 2 and 3.

19. When the revisionist himself has opted not to file his affidavit of assets and liabilities before the Family Court as mandated by the Hon'ble Supreme Court in ***Rajnesh (Supra)*** and when after rejection of his application for adjournment filed on 13-08-2021, the learned counsel for the revisionist made submissions in opposition to the application for grant of interim maintenance, the order dated 13-08-2021 passed by the Principal Judge, Family Court awarding interim maintenance to the opposite party nos. 2 and 3 after taking into consideration the objections of the revisionist as well as the submissions made on his behalf, cannot be termed to have been passed without giving a proper opportunity of hearing to the revisionist.

20. On 04-09-2021 the revisionist filed an application for setting aside the

aforesaid order dated 13.08.2021 on the ground that the said order has been passed without keeping in view the order passed by ***Rajnesh (Supra)***. The application does not disclose the provisions of law under which it has been filed, apparently because the order having been passed after taking into consideration the objections filed by the revisionist against the application for interim maintenance as also the submissions made on his behalf by his learned counsel in opposition to the aforesaid claim, is not an ex-parte order and there is no provision in law which empowers the Family Court to set aside an order passed by itself on merits of the case after hearing and taking into consideration the submission made by the respective Counsel for the parties.

21. The revisionist has contended in the aforesaid application that he was not granted any opportunity to file his income certificate. He further contended that the opposite party no. 2 is enjoying a lavish life. She is more qualified than the revisionist and she is working as a teacher in Sunbeam School, Ayodhya and earning Rs.13,000/- to Rs.14,000/- per month. His old parents and unmarried sister are dependent on him and he is unable to pay Rs.30,000/- per month towards interim maintenance.

22. The aforesaid application has been rejected by the Family Court by means of the order dated 27.09.2021 by highlighting the contradictions in two affidavits-19-B and 17-B of the revisionist, in one of which he has alleged that the opposite party no. 2 is working as H.R-cum-Counsellor in Sunbeam School and her earning is Rs.12,500/- to Rs.14,000/- per month while in the other he has stated that she is employed in Duniya Online Pvt. Ltd and earns Rs.40,000/- to Rs.50,000/- per month. The Family Court has held that even if the opposite party no. 2 is earning Rs.12,500/- to Rs14,000/- per month, it would not absolve the revisionist of his liability to pay interim maintenance to the opposite party nos. 2 and 3.

23. The revisionist has filed a copy of his affidavit of assets and liabilities filed before the Family Court in which he has stated that his general monthly expenses (rent, household expenses, medical bills, transportation etc. to be Rs.35,000/- approximately). Against the entry "whether any voluntary contribution towards maintenance has been made/will be made in the future? If yes, provide details of the same". The revisionist has mentioned Rs.19,631/- per month approximately. As against the details of dependant family members he has mentioned the names of his daughter, opposite party no. 3, his father and mother and immediately afterwards where he was required to disclose "if any independent source/s of income of the dependants, including interest income, assets, pension, tax liability on any such income and any other relevant details". The revisionist has stated that his father denied disclosing his income as per the Article 21 of the Constitution of India.

24. The revisionist has not stated that his father and mother do not have any income of their own and from his statement it appears that they are in fact not financially dependent on him.

25. In his affidavit of assets and liabilities the revisionist has claimed his monthly income to be Rs. 97,765.00/- per month (in hand) but he has neither disclosed his gross income nor has he filed copies of his salary slip or income tax

return from which his gross salary can be ascertained. He has not disclosed the amount which is required to be deducted from his salary mandatorily.

26. In ***Jasbir Kaur Sehgal v. Distt. Judge, Dehradun, (1997) 7 SCC 7,*** the Hon'ble Supreme Court was pleased to lay down that "The court has to consider the status of the parties, their respective needs, the capacity of the husband to pay having regard to his reasonable expenses for his own maintenance *and of those he is obliged under the law and statutory but involuntary payments or deductions."*

(Emphasis supplied)

27. For taking into consideration income of a person for the purpose of fixing maintenance, only such deductions made from his income are to be taken into account as are mandatory. If a person willingly gets a higher amount deducted from his salary than the prescribed minimum statutory deduction, those deductions will not be taken into consideration while fixing the amount of maintenance, so as to justify award of a lower amount as maintenance.

28. Keeping in view of the aforesaid facts and conduct of the revisionist, I am satisfied that when the revisionist had been supplied with a copy of the affidavit of assets and liabilities of the opposite party no. 2 on 16-02-2021 itself, his failure to file an affidavit of his assets and liabilities in response to the same till passing of the order dated 13-08-2021 passed by the Principal Judge, Family Court awarding interim maintenance to the opposite party nos. 2 and 3 cannot be assailed on the ground that no proper opportunity of hearing was granted to the revisionist. The revisionist has filed the application for setting aside the orders dated 13-08-2021 on 04-09-2021 and he did not file his affidavit of assets and liabilities even with this application and he has filed it as late as on 26-10-2021. Even while filing a copy of the affidavit of his assets and liabilities before this court, he has not annexed his salary slips, income tax returns and statements of his bank accounts.

29. A litigant while approaching the High Court for invoking its revisional jurisdiction, must place on record all the material and relevant documents and he cannot be allowed play hide and seek with the Court and this conduct of the revisionist cannot be appreciated.

30. The contention of the revisionist that he has to take care of his parents and sister and for this reason he cannot pay interim maintenance to his wife and daughter cannot be appreciated, more particularly when he has not categorically stated that his parents have no income of their own and they as well as his sister are financially dependent on him. His contention that if he is made to pay the amount of interim maintenance to his wife and daughter, he will not be able to pay the EMI of the housing loan is also not without any force, as providing maintenance to his wife and daughter is the statutory obligation of the revisionist. Keeping in view the fact that the revisionist has stated his in hand monthly income to be Rs.97,765/- and he has not disclosed his gross income, the total amount of 30,000/- per month awarded as interim maintenance to the opposite party nos. 2 and 3 cannot be said to be excessive.

31. By means of the order dated 13-08-2021, the Family Court has merely made an interim arrangement for the

maintenance of the opposite parties no. 2 and 3, who are none other than the wife and daughter of the revisionist, which shall obviously be open to be revised when the Family Court decides the Application under Section 125 Cr. P. C. finally. The revisionist himself has pleaded that he keeps on visiting the opposite party no. 2 and pays her the monthly expenses and he is voluntarily paying Rs.19,631/- per month to the opposite party no. 3. In such a factual situation, no reasonable person of ordinary prudence can accept that a person who is voluntarily paying such amounts to his wife and daughter, will be aggrieved by the award of Rs.15,000/- each as interim maintenance to his wife and daughter. The amount of Rs.15,000/- per month each awarded as interim maintenance to the opposite parties no. 2 and 3 does not appear to be suffering from any such illegality as warrants an interference by this Court in exercise of its revisional jurisdiction.

32. In view the aforesaid facts, I am of the view that the impugned orders dated 13.08.2021 and 27.09.2021 passed by the Principal Judge, Family Court, Faizabad in Case No.187 of 2020 do not suffer from any illegality or infirmity. The revision filed against the aforesaid orders lacks merit and it is accordingly dismissed.

(2022)03ILR A208
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.02.2022 & 25.02.2022

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Revision No. 1430 of 2021

Sachin @ Sachin Bhartiya (Minor)
...Revisionist

Versus

State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Yadavendra Dwivedi, Sri Dhirendra Kumar Srivastava, Sri Hari Krishna Singh

Counsel for the Opposite Parties:
A.G.A., Sri Vineet Vikram, Sri Vinod Kumar Pandey

(A) Criminal Law - Revision - Indian Penal Code, 1860 - Sections 452, 392, 364, 376-D & 506 - The Protection of Children From Sexual Offences Act, 2012 - Section 5G, 6 - The Code of Criminal Procedure, 1973 - Section 161 , 164 - Juvenile Justice (care and protection of children) Act , 2015 - Section 18(1)(g) - maximum three years institutional incarceration permissible for a juvenile - juvenile has right to be released on bail where a similarly circumstanced adult offender had been extended that liberty . (Para - 17,25)

Revisionist applied for bail before Juvenile Justice Board - rejected - preferred an appeal under Section 101 of the Act - dismissed - filed present criminal revision - revisionist already undergone half of the imprisonment/ institutional incarceration - co-accused already granted bail - revisionist have identical role. (Para - 18,20,25)

HELD:-Once the co-accused has been admitted to bail, who is adult, no justification to additionally test the case of the revisionist with reference to the requirements of the proviso to sub Section (1) of Section 12 of the Act. Both the Courts below passed the impugned judgment and orders in cursory manner without placing due reliance on the report submitted by the District Probation Officer. Impugned orders cannot be sustained. Liable to be set aside and reversed. Revisionist may be released on bail.(Para - 25,28)

Criminal Revision allowed. (E-7)

List of Cases cited:-

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

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

3. Dharmendra (Juvenile) Vs St. of U.P. & ors. , 2018 (7) ADJ 864

4. Japani Sahoo Vs Chandra Sekhar Mohanty, (2007) 7 SCC 394

5. Shiv Kumar @ Sadhu Vs St. of U.P., 2010 (68) ACC 616(LB)

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

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

1. List has been revised.

2. Despite notice issue to opposite party No.2, which has been served personally upon him, no one has put in appearance on his behalf nor any counter affidavit has been filed.

3. Sri Dhirendra Kumar Srivastava, Advocate assisted by Sri Hari Krishna Singh, learned counsel for the revisionist and Sri Vaibhav Aanad, learned A.G.A. for the State are present.

4. Learned counsel for the revisionist submits that he may be permitted to correct the date of the rejection order.

5. Sri Vaibhav Aanad, learned A.G.A. has no objection to the prayer made by learned counsel for the revisionist.

6. Learned counsel for the revisionist is directed to correct the date of rejection order in the memo of application.

7. This revision is directed against the judgment and order dated 01.03.2021 passed by Additional District and Sessions Judge/Special Judge, POCSO Act, Allahabad dismissing Criminal Appeal No. 04 of 2021 (C.N.R. No. UPAD01-002208-2021) (Sachin @ Sachin Bhartiya Versus State of U.P.) and affirming the orders dated 20.11.2020 and 15.01.2021 passed by Juvenile Justice Board, Prayagraj refusing the bail plea to the revisionist in Case No. 45 of 2020 (State Vs. Sachin @ Sachin Bhartiya), arising out of Case Crime No. 01/2020, under Sections 452, 392, 364, 376-D, 506 I.P.C. and Section 5G, 6 of the POCSO Act, Police Station Bahariya, District Allahabad.

8. Heard Sri Yadavendra Dwivedi, learned counsel for the revisionist and Sri Vaibhav Aanad, learned A.G.A. for the State and perused the record.

9. The prosecution case, as per the version of the FIR is that when the informant was getting threshed the hey-ricks, his daughter Km. Mahima aged about 14 years, was alone in the house and finding her alone, Sachin Shivshankar, on 30.12.2019 at around 7.00 P.M. sneaked into his house and stolen Rs. 10,000/- and anklet weighing 10 tolas, kept in the box and while his daugher prevented them from doing so, they gagged her mouth and their two aides Krishna Kumar and Dharmendra Kumar, who were waiting outside the house, they all kidnapped her and outraged her modesty and they all threatened him that they would done him to death and on 01.01.2020 at around 12.30 PM, they all barged into his house threatened him.

10. Learned counsel for the revisionist further submits that the revisionist is

innocent and he has been falsely implicated in the present case.

11. Learned counsel for the revisionist further submits that the version of the F.I.R. and the statement of the prosecutrix demonstrates that there was consent of the prosecutrix and she went along with the revisionist and she was in love with the revisionist but on the pressure of the family members, who recovered the prosecutrix and put pressure upon her, she changed her statement.

12. Learned counsel for the revisionist further submits that the prosecutrix was medically examined by the doctor of District Women Hospital, Allahabad and the X-ray of the prosecutrix was got conducted wherein her age was opined to about 18 years and as per medico legal examination report, no violence was observed by the doctor.

13. Learned counsel for the revisionist further submits that the evidence collected by the Investigating Officr, the chain of the incident is not complete and the prosecution itself failed to prove the alleged place of incident.

14. Learned counsel for the revisionist further submits that there is contradiction in the version of the FIR and statement of the prosecutrix recorded under Section 161 Cr.P.C. and under Section 164 Cr.P.C.

15. Learned counsel for the revisionist further submits that the revisionist is minor, whereas the victim is major and able to understanding her well being.

16. Learned counsel for the revisionist further submits that the revisionist is juvenile and there is no apprehension of reasoned ground for believing that the release of the revisionist is likely to bring him in association with any known criminals or expose him to mental, physical or psychological danger or his release would defeat the ends of justice. He further submits that except this the revisionist has no previous criminal history. The father of the revisionist is giving his undertaking that after release of the revisionist on bail, he will keep him under his custody and look after him properly. Further, the revisionist undertakes that he will not tamper the evidence and he will always cooperate the trial proceedings. There was no report regarding any previous antecedents of family or background of the revisionist. There is no chance of revisionist's re-indulgence to bring him into association with known criminals.

17. Learned counsel for the revisionist further submits that it is not in dispute that the revisionist is a juvenile as he has already been declared juvenile by Juvenile Justice Board, Prayagraj vide order dated 31.01.2020. The revisionist was a juvenile aged 16 years, 6 months and 27 days on the date of occurrence. He is in jail since 05.01.2020 in connection with the present crime and has completed more than half of the sentence out of the maximum three years institutional incarceration permissible for a juvenile, under Section 18(1)(g) of the Act. It is submitted with much emphasis that co-accused Krishna Kumar, who is adult and similarly circumstanced as the revisionist, has been admitted to bail by this Court vide order dated 18.08.2021 passed in Criminal Misc. Bail Application No. 6371 of 2021. Learned counsel for the revisionist further submits that the co-accused Dharmendra Kumar Saroj has also been granted bail by this Hon'ble Court

vide order dated 10.06.2021 passed in Criminal Misc. Bail Application No. 2941 of 2020. It is argued that the revisionist being a minor, cannot be held in institutional incarceration any further once co-accused, similarly circumstanced, has been admitted to bail. Further submission is that the case of the revisionist is not on worse footing than that of the co-accused, therefore on principles of parity also the revisionist be released on bail.

18. Learned counsel for the revisionist further submits that thereafter the revisionist applied for bail before the Juvenile Justice Board, Prayagraj upon which a report from the District Probation Officer was called for. The bail application was rejected vide order dated 20.11.2020 and 15.01.2021, being aggrieved, the revisionist preferred an appeal under Section 101 of the Act, which was also dismissed vide order dated 01.03.2021. Hence the present criminal revision has been filed before this Hon'ble Court mainly on the following amongst other grounds:

(i) That the bail application of the revisionist was rejected by the court below in a very cursory and arbitrary manner.

(ii) That the revisionist, who is juvenile, is wholly innocent and has been falsely implicated by the first informant in the present case.

(iii) That the courts below have not appreciated the report of the District Probation Officer in its right perspective.

(iv) That the impugned judgment and orders passed by the learned courts below are apparently illegal, contrary to law and based on erroneous assumption of facts and law.

(v) That there was absolutely no material on record to hold that the release of the Juvenile would likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or his release would defeat the ends of justice, yet the courts below have illegally, arbitrary and on surmises refused the bail of juvenile.

(vi) That the courts have erred in law in not considering the true import of Section 12 of the Act, 2015 and thus, the impugned orders passed by the courts below suffer from manifest error of law apparent on the face of record.

(vii) That the courts below have acted quite illegally and with material irregularity in not properly considering the case of juvenile in proper and correct perspective which makes the impugned orders passed by the courts below non est and bad in law.

(viii) That bare perusal of the impugned orders demonstrate that the same have been passed on flimsy grounds which have occasioned gross miscarriage of justice.

19. Several other submissions in order to demonstrate the falsity of the allegations made against the revisionist 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 revisionist 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 in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

20. Learned counsel for the revisionist has further argued that the revisionist has

already undergone half of the imprisonment/institutional incarceration and has placed reliance of Hon'ble Apex Court judgment in the case of **Kamal Vs. State of Haryana, 2004 (13) SCC 526** and submitted that the Hon'ble Apex Court was pleased to observe in paragraph no. 2 of the judgment as under :-

"2. This is a case in which the appellant has been convicted u/s 304-B of the India 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, Faridabad."

21. Learned counsel for the revisionist has also placed reliance of Hon'ble Apex Court judgment in the case of **Takht Singh Vs. State of Madhya Pradesh, 2001 (10) SCC 463,** and submitted that the Hon'ble Apex Court was pleased to observe in paragraph no. 2 of the judgment as under:-

"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 year. 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."

22. Learned AGA has opposed the revisionist's case with the submission that the release of the revisionist on bail would bring him into association of some known criminals, besides, exposing him to moral, physical and psychological danger. It is submitted that his release would defeat the ends of justice, considering that he is involved in a heinous offence.

23. Learned counsel for the revisionist thereafter filed the rejoinder affidavit and has denied the averments made in the counter affidavit and has reiterated the grounds mentioned in the revision.

23. This Court has carefully considered the rival submissions of the parties and perused the impugned orders. The juvenile is clearly is about 16 years of age and does not fall into that special category of a juvenile between the age of 16 and 18 years whose case may be viewed differently, in case, they are found to be of a mature mind and persons well understanding the consequences of their actions. The provisions relating to bail for a juvenile are carried in Section 12 of the Act, which reads as under:

"(1) When any person, who is apparently a child and is alleged to have

committed a bailable or non-bailable offence, is apprehended or detained by the police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person:

Provided that such person shall not be so released if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or the person's release would defeat the ends of justice, and the Board shall record the reasons for denying the bail and circumstances that led to such a decision.

(2) When such person having been apprehended is not released on bail under subsection (1) by the officer-in-charge of the police station, such officer shall cause the person to be kept only in an observation home in such manner as may be prescribed until the person can be brought before a Board.

(3) When such person is not released on bail under sub-section (1) by the Board, it shall make an order sending him to an observation home or a place of safety, as the case may be, for such period during the pendency of the inquiry regarding the person, as may be specified in the order.

(4) When a child in conflict with law is unable to fulfil the conditions of bail order within seven days of the bail order, such child shall be produced before the Board for modification of the conditions of bail."

25. This Court has, in particular, looked into the role of the various accused and finds that the aforesaid co-accused who has already been granted bail by this Court, and the revisionist have identical role. Once the aforesaid co-accused has been admitted to bail, who is adult, there seems no justification to additionally test the case of the revisionist with reference to the requirements of the proviso to sub Section (1) of Section 12 of the Act. In this connection, I had occasion to consider the question about the right of a juvenile to be released on bail where a similarly circumstanced adult offender had been extended that liberty. In the case of **Dharmendra (Juvenile) vs. State of U.P. and others, [2018 (7) ADJ 864],** the High Court was pleased to observe as under:

"10. The matter can be looked at from another vantage. In case the revisionist were an adult and stood charged of the offence that he faces with a weak circumstantial evidence of last seen and confession to the police, in all probability, it would have entitled him to bail pending trial. If on the kind of evidence forthcoming an adult would be entitled to bail, denying bail to a child in conflict with law may be denying the juvenile/ child in conflict with law the equal protection of laws guaranteed under Article 14 of the Constitution.

11. The rule in Section 12(1) of the Act is in favour of bail always to a juvenile/ child in conflict with law except when the case falls into one or the other categories denial contemplated by the proviso. It is not the rule about bail in Section 12 of the Act that in case a child in conflict with law is brought before the Board or Court, his case is not to be seen on merits prima facie about his complicity at all for the purpose granting him bail; and all that has been done is to see if his case falls is one or the other exceptions,

where he can be denied bail. The rule in Section 12 sanctioning bail universally to every child in conflict with law presupposes that there is a prima facie case against him in the assessment of the Board or the Court based on the evidence placed at that stage. It is where a case against a child in conflict with law is prima facie made out that the rule in Section 12(1) of the Act that sanctions bail as a rule, except the three categories contemplated by the proviso comes into play. It is certainly not the rule, and, in the opinion of the Court cannot be so, that a case on materials and evidence collected not being made out against a child at all, his case has to be tested on the three parameters where bail may be denied presuming that a prima facie case is constructively there. Thus, it would always have to be seen whether a case prima facie on merits against a child in conflict with law is there on the basis of material produced by the prosecution against him. If it is found that a prima facie case on the basis of material produced by the prosecution is there that would have led to a denial of a bail to an adult offender, in that case also the Rule in Section 12(1) of the Act mandates that bail is to be granted to a juvenile/ child in conflict with law except where his case falls into any of the three disentitling categories contemplated by the proviso.

12. In the opinion of this Court, therefore, the perception that merits of the case on the basis of prima facie evidence is absolutely irrelevant to a juvenile's bail plea under the Act would not be in conformity with the law. The catena of decisions that speak about merits of the case or the charge against a juvenile being irrelevant, proceed on facts and not an assumption that a case on merits is made out, and, not where the case is not at all made out prima facie. It is not that a child alleged to be in conflict with law against whom there is not iota of evidence to connect him to the crime would still have bail denied to him because his case may be placed in or the other disentitling categories under the proviso to Section 12(1) of the Act. If this kind of a construction were to be adopted it might expose the provisions of Section 12(1) of the Act to challenge on ground of violating the guarantee of equal protection of laws enshrined in Article 14 of the Constitution. It is an enduring principle that a construction that lends a statute to challenge about its constitutionality should be eschewed and one that saves and upholds its vires is to be adopted. In this context the guidance of their Lordships of the Hon'ble Supreme Court in ***Japani Sahoo vs. Chandra Sekhar Mohanty, (2007) 7 SCC 394*** *may be referred to:-*

"51. The matter can be looked at from different angle also. Once it is accepted (and there is no dispute about it) that it is not within the domain of the complainant or prosecuting agency to take cognizance of an offence or to issue process and the only thing the former can do is to file a complaint or initiate proceedings in accordance with law. If that action of initiation of proceedings has been taken within the period of limitation, the complainant is not responsible for any delay on the part of the Court or Magistrate in issuing process or taking cognizance of an offence. Now, if he is sought to be penalized because of the omission, default or inaction on the part of the Court or Magistrate, the provision of law may have to be tested on the touchstone of Article 14 of the Constitution. It can possibly be urged that such a provision is totally arbitrary, irrational and unreasonable. It is settled law that a Court of Law would interpret a provision which

would help sustaining the validity of law by applying the doctrine of reasonable construction rather than making it vulnerable and unconstitutional by adopting rule of 'litera legis'. Connecting the provision of limitation in Section 468 of the Code with issuing of process or taking of cognizance by the Court may make it unsustainable and ultra vires Article 14 of the Constitution."

26. This Court in the case of **Shiv Kumar alias Sadhu Vs. State of U.P. 2010 (68) ACC 616(LB)** was pleased to observe that the gravity of the offence is not relevant consideration for refusing grant of bail to the juvenile.

27. In the present case there appears to be no distinguishing feature from the case of the said co-accused, who is adult offender circumstanced identically as the revisionist. There is no justification to hold the revisionist not entitled to the liberty of bail. It is also taken note of by this Court that the revisionist has by now done more than half of institutional incarceration. The maximum period for which a juvenile can be incarcerated in whatever form of detention, is three years, going by the provisions of Section 18(1)(g) of the Act. Both the courts below have passed the impugned judgment and orders in cursory manner without placing due reliance on the report submitted by the District Probation Officer as well as facts and circumstances of the case. This Court, thus, finds that the impugned orders cannot be sustained and are liable to be set aside and reversed.

28. 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 in the absence of any convincing material to indicate the possibility of tampering with the evidence and in view of the larger mandate of the Article 21 of the Constitution of India and the dictum of Apex Court in the case of **Dataram Singh vs. State of UP and another, (2018) 3 SCC 22** and the view taken by the Hon'ble Court in the cases of **Kamal Vs. State of Haryana (supra), Takht Singh Vs. State of Madhya Pradesh (supra), Dharmendra (Juvenile) vs. State of U.P. and others (supra), Japani Sahoo vs. Chandra Sekhar Mohanty (supra) and Shiv Kumar alias Sadhu Vs. State of U.P. (supra)**, this Court is of the view that the present criminal revision may be allowed and the revisionist may be released on bail.

29. In the result, this revision succeeds and is allowed. The impugned judgment and order dated 01.03.2021 passed by Additional District and Sessions Judge/Special Judge, POCSO Act, Allahabad and the orders dated 20.11.2020 and 15.01.2021 passed by Juvenile Justice Board, Prayagraj are hereby set aside and reversed. The bail application of the revisionist stands allowed.

30. Let the revisionist, **Sachin @ Sachin Bhartiya** through his natural guardian/father Nand Lal be released on bail in Case No. 45 of 2020 (State Vs. Sachin @ Sachin Bhartiya), arising out of Case Crime No. 01/2020, under Sections 452, 392, 364, 376-D, 506 I.P.C. and Section 5G, 6 of the POCSO Act, Police Station Bahariya, District Allahabad upon his natural guardian/father Nand Lal furnishing a personal bond with two solvent sureties of his relatives each in the like amount to the satisfaction of the

Juvenile Justice Board, Prayagraj subject to the following conditions:

(i) That the natural guardian/father, Nand Lal of the revisionist will furnish an undertaking that upon release on bail the juvenile will not be permitted to come into contact or association with any known criminal or allowed to be exposed to any moral, physical or psychological danger and further that the natural guardian will ensure that the juvenile will not repeat the offence.

(ii) The revisionist and his father Nand Lal will report to the District Probation Officer on the first Wednesday of every calendar month commencing with the first Wednesday of April, 2022 and if during any calendar month the first Wednesday falls on a holiday, then on the next following working day.

(iii) The District Probation Officer will keep strict vigil on the activities of the revisionist and regularly draw up his social investigation report that would be submitted to the Juvenile Justice Board concerned on such periodical basis as the Juvenile Justice Board may determine.

(iv) The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad or the certified copy issued by the Registry of the High Court, Allahabad.

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

(vi) 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.

31. However, considering the peculiar facts and circumstances of the case, the court below is directed to make every possible endeavour to conclude the trial of the aforesaid case within a period of four months from today without granting unnecessary adjournments to either of the parties.

Hon'ble Shamim Ahmed,J.

(In Re : Criminal Misc. Correction Application No. 9 of 2022)

1. Heard Shri Hari Krishna Singh, the learned counsel for the revisionist, the learned A.G.A. for the State and perused the record.

2. This application has been filed on behalf of revisionist seeking correction in the order dated 21.02.2022 passed by this Court.

3. The correction application is allowed.

4. In the third line of second paragraph on the first page of the order dated 21.02.2022 the word, **'nor any'** be readover as **'although'** and after the word, **'counter affidavit has been filed',** the word, **'by Shri Vinod Kumar Pandey, Advocate'** be readover.

(2022)03ILR A216
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.03.2022

BEFORE

THE HON'BLE SAMIT GOPAL, J.

Criminal Revision No. 2223 of 2016

Hari Om ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Surendra Kumar Tripathi, Sri Arvind Kumar Dixit

Counsel for the Opposite Parties:
G.A., Sri Brij Bihari Yadav

A. Criminal Law - Code of Criminal Procedure,1973 - Section 397/401 - Negotiable Instrument Act-Sections 138 & 147-cheque dishonour-insufficient funds-notice sent-failure to repay-complaint-conviction-appeal against conviction-appellate court confirmed the conviction-revision-mediation between the parties becomes successful-Even though parties have arrived at settlement after the appellate court upheld the conviction, yet keeping in view the spirit of seciton 147 of the NI Act, offence u/s 138 can be compounded-Section 147 of the Act starts with non-obstante clause and is an affirmative enactment and as such has an overriding effect on Section 320 CrPC-An offence of dishonour of cheque is the compensatory aspect of the remedy which should be given priority over punitive aspect-order of conviction is set aside.(Para 1 to 22)

B. With regard to the progression of litigation in cheque bouncing cases, the Learned Attorney General has urged to frame guidelines for a graded scheme of imposing costs on parties who unduly delay compounding of the offence.It was submitted tht the requirement of deposit of the costs will act as a deterrant for delayed composition,since at present, free and easy compounding of offences at any stage, however belated, gives an incentive to the drawer of the cheque to delay settling the cases for years. At the stage of first or second hearing compounding may be allowed without imposing any costs, at the subsequent stage, the accused will pay 10% of the cheque amount, Similarly before Session Court or High Court, accused pays 15% of the cheque amount and finally before the Supreme court, the figure would increase to 20% of the cheque amount. (Para 10)

The revision is allowed. (E-6)

List of Cases cited:

1. Damodar S. Prabhu Vs Sayed Babalal H.(2010) 5 SCC 663

2. Rajendra Vs Nand Lal CRLA No.s 1214-1215 of 2019(arising out of SLP No. 2990-2991/2019)

3. K.M. Ibrahim Vs K.P. Mohammed (2010) 1 SCC 798

4. Meters & Instruments P.Ltd. Vs Kanchan Mehta (2018) 1 SCC 560

5. Vinay Devanna Nayak Vs Ryot Seva Sahkari Bank Ltd.(2008) 2 SCC 305

6. Municipal Corp.,Indore Vs Ratnaprabha (1976) 4 SCC 622

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

1. Matter taken up in the revised list. No one appears on behalf of the revisionist to press this revision. Sri Brij Bihari Yadav, learned counsel for the opposite party no.2 is also not present.

2. Sri Sanjay Kumar Singh, learned State counsel is present.

3. This revision is of year 2016. This Court, therefore, deems it fit to proceed in the matter on the basis of the record with the assistance of the learned State counsel.

4. The present criminal revision under Section 397/401 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "Cr.P.C.") has been filed before this Court with the following prayers:

"It is, therefore, most respectfully prayed that this Hon'ble Court may be pleased to allow the present revision and set-aside the judgment and order dated 23.7.2016 passed by Sri Prabhakar Rao, H.J.S., Additional Sessions Judge, Court No.12, Agra in Criminal Appeal No.74 of

2012 (Hari Om Vs. Hari Shankar Yadav) arising out of judgment and order dated 24.2.2012 passed by Sri Ishtiyak Ali, A.C.J.M, Court No.7, Agra in Complaint Case no.1371 of 2011 (Hari Shankar Yadav Vs. Hari Om), u/s 138 N.I. Act, P.S. Tajganj, District Agra and acquit the accused revisionist throughout in the interest of justice.

It is further prayed that this Hon'ble Court may kindly be pleased to enlarge the revisionist on bail and realisation of fine may also be stayed during the pendency of this revision before this Hon'ble Court.

And/or be pleased to pass such other and further order which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

5. A complaint dated 21.09.2010 was filed by the opposite party no.2 against the revisionist with the allegation that he had given a cheque no.129112 dated 10.07.2010 for Rs.35,000/- to him which was returned unpaid with the endorsement "funds insufficient" by the Bank after which a notice dated 26.08.2010 asking for payment of the same was sent and on failure to repay, the said complaint was filed. In the said matter, the trial court convicted the revisionist vide its judgment and order dated 24.02.2012 under Section 138 Negotiable Instrument Act to one year rigorous imprisonment and a fine of Rs.10,000/-. In the event of non-deposit of fine, six months simple imprisonment was imposed on the accused.

6. Being aggrieved with the judgment and order of conviction, the accused preferred Criminal Appeal No.74 of 2012 which was decided vide judgment and order dated 23.07.2016 passed by Additional Sessions Judge, Court No.12, Agra by which the judgment and order dated 24.02.2012 of the trial court was affirmed. Subsequently the present revision has been filed before this Court with the prayers as quoted above.

7. The matter was referred to the Mediation Centre of this Court vide order dated 16.8.2016 for making an effort between the parties for settling their disputes amicably.

8. As per the office report dated 10.03.2022, a report from the Mediation Centre of this Court is on record which states that mediation between the parties is successful.

9. From perusal of the report of Mediation Centre of this Court, it appears that in pursuance of the said order the mediation proceedings were taken up which ended in a settlement dated 20.1.2017 between the parties and the Mediation succeeded. The parties have settled their grievances and even the dispute arising out in the present matter.

10. The question that arises for consideration is as to whether at this stage of the proceedings when the revisionist has already been convicted by the trial court and his conviction has been upheld by the Appellate Court, the offence under Section 138 of NI Act can be compounded. The issue is no longer res integra. In **Damodar S. Prabhu v. Sayed Babalal H. : (2010) 5 SCC 663**, the Apex Court while laying down guidelines as to the levy of costs depending upon stage of the compromise arrived at between the parties, held that conviction of an accused in proceedings under Section 138 of NI Act can be set aside even at appellate stage and the accused can be acquitted on the basis of a

compromise with the complainant. It is held in para 21 as follows:

"21. With regard to the progression of litigation in cheque bouncing cases, the learned Attorney General has urged this Court to frame guidelines for a graded scheme of imposing costs on parties who unduly delay compounding of the offence. It was submitted that the requirement of deposit of the costs will act as a deterrent for delayed composition, since at present, free and easy compounding of offences at any stage, however belated, gives an incentive to the drawer of the cheque to delay settling the cases for years. An application for compounding made after several years not only results in the system being burdened but the complainant is also deprived of effective justice. In view of this submission, we direct that the following guidelines be followed :

THE GUIDELINES

(i) In the circumstances, it is proposed as follows:

(a) That directions can be given that the Writ of Summons be suitably modified making it clear to the accused that he could make an application for compounding of the offences at the first or second hearing of the case and that if such an application is made, compounding may be allowed by the court without imposing any costs on the accused.

(b) If the accused does not make an application for compounding as aforesaid, then if an application for compounding is made before the Magistrate at a subsequent stage, compounding can be allowed subject to the condition that the accused will be required to pay 10% of the cheque amount to be deposited as a condition for compounding with the Legal Services Authority, or such authority as the Court deems fit.

(c) Similarly, if the application for compounding is made before the Sessions Court or a High Court in revision or appeal, such compounding may be allowed on the condition that the accused pays 15% of the cheque amount by way of costs.

(d) Finally, if the application for compounding is made before the Supreme Court, the figure would increase to 20% of the cheque amount."

11. In **Rajendra v. Nand Lal (Criminal Appeal Nos. 1214-1215 of 2019 arising out of SLP (Crl) Nos. 2990-2991/2019)** decided on August 06, 2019), the Apex Court observed that in appropriate cases costs can be waived.

12. In **K.M. Ibrahim v. K.P. Mohammed : (2010) 1 SCC 798,** the Apex Court observed that Section 147 of NI Act does not bar the parties from compounding an offence under Section 138 even at appellate stage of the proceedings.

13. In the case of **Meters and Instruments Private Limited v. Kanchan Mehta : (2018) 1 SCC 560** the Apex Court in para 18, has been held as follows:

i) Offence under Section 138 of the Act is primarily a civil wrong. Burden of proof is on accused in view presumption under Section 139 but the standard of such proof is "preponderance of probabilities". The same has to be normally tried summarily as per provisions of summary trial under the Cr.P.C. but with such variation as may be appropriate to proceedings under Chapter XVII of the Act. Thus read, principle of Section 258 Cr.P.C.

will apply and the Court can close the proceedings and discharge the accused on satisfaction that the cheque amount with assessed costs and interest is paid and if there is no reason to proceed with the punitive aspect.

(ii) The object of the provision being primarily compensatory, punitive element being mainly with the object of enforcing the compensatory element, compounding at the initial stage has to be encouraged but is not debarred at later stage subject to appropriate compensation as may be found acceptable to the parties or the Court.

(iii) Though compounding requires consent of both parties, even in absence of such consent, the Court, in the interests of justice, on being satisfied that the complainant has been duly compensated, can in its discretion close the proceedings and discharge the accused.

(iv) Procedure for trial of cases under Chapter XVII of the Act has normally to be summary. The discretion of the Magistrate under second proviso to Section 143, to hold that it was undesirable to try the case summarily as sentence of more than one year may have to be passed, is to be exercised after considering the further fact that apart from the sentence of imprisonment, the Court has jurisdiction under Section 357(3) Cr.P.C. to award suitable compensation with default sentence under Section 64 IPC and with further powers of recovery under Section 431 Cr.P.C. With this approach, prison sentence of more than one year may not be required in all cases.

(v) Since evidence of the complaint can be given on affidavit, subject to the Court summoning the person giving affidavit and examining him and the bank's slip being prima facie evidence of the dishonor of cheque, it is unnecessary for the Magistrate to record any further preliminary evidence. Such affidavit evidence can be read as evidence at all stages of trial or other proceedings. The manner of examination of the person giving affidavit can be as per Section 264 Cr.P.C. The scheme is to follow summary procedure except where exercise of power under second proviso to Section 143 becomes necessary, where sentence of one year may have to be awarded and compensation under Section 357(3) is considered inadequate, having regard to the amount of the cheque, the financial capacity and the conduct of the accused or any other circumstances.

14. In the case of **Vinay Devanna Nayak v. Ryot Seva Sahkari Bank Limited : (2008) 2 SCC 305** the Apex Court has held as under:

"18. Taking into consideration even the said provision (Section 147) and the primary object underlying Section 138, in our judgment, there is no reason to refuse compromise between the parties. We, therefore, dispose of the appeal on the basis of the settlement arrived at between the appellant and the respondent.

19. For the foregoing reasons the appeal deserves to be allowed and is accordingly allowed by holding that since the matter has been compromised between the parties and the amount of Rs. 45,000/- has been paid by the appellant towards full and final settlement to the respondent-bank towards its dues, the appellant is entitled to acquittal. The order of conviction and sentence recorded by all courts is set aside and he is acquitted of the charge levelled against him."

15. The offences under the N.I. Act can be compounded at any stage of the

proceedings. In the case of **Vinay Devanna Nayak (supra)** the Apex Court held as follows:

"17. As observed by this Court in Electronics Trade & Technology Development Corpn. Ltd. v. Indian Technologists & Engineers (Electronics) (P) Ltd. [(1996) 2 SCC 739 : 1996 SCC (Cri) 454] the object of bringing Section 138 in the statute book is to inculcate faith in the efficacy of banking operations and credibility in transacting business on negotiable instruments. The provision is intended to prevent dishonesty on the part of the drawer of negotiable instruments in issuing cheques without sufficient funds or with a view to inducing the payee or holder in due course to act upon it. It thus seeks to promote the efficacy of bank operations and ensures credibility in transacting business through cheques. In such matters, therefore, normally compounding of offences should not be denied. Presumably, Parliament also realised this aspect and inserted Section 147 by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 (Act 55 of 2002). The said section reads thus:

"147. Offences to be compoundable.?Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence punishable under this Act shall be compoundable."

16. Section 147 of NI Act begins with a non - obstante clause. The provision shall prevail despite anything to the contrary in any other or different statute. A dispute in the nature of complaint under section 138 of N.I. Act, can be settled by way of compromise irrespective of any other legislation including Cr.P.C. in general and section 320(1)(2) or (6) of the Cr.P.C. in particular. The scheme of section 320 Cr.P.C. deals mainly with procedural aspects; but it simultaneously crystallizes certain enforceable rights and obligation. Hence, this provision has an element of substantive legislation and therefore, it can be said that the scheme of section 320 does not lay down only procedure; but still, the status of the scheme remains under a general law of procedure and as per the accepted proposition of law, the special law would prevail over general law. The observations of the Apex Court in the case of **Municipal Corporation, Indore v. Ratnaprabha : (1976) 4 SCC 622** is as follows:

"4. As has been stated, clause (b) of Section 138 of the Act provides that the annual value of any building shall "notwithstanding anything contained in any other law for the time being in force" be deemed to be the gross annual rent for which the building might "reasonably at the time of the assessment be expected to be let from year to year". While therefore the requirement of the law is that the reasonable letting value should determine the annual value of the building, it has also been specifically provided that this would be so "notwithstanding anything contained in any other law for the time being in force". It appears to us that it would be a proper interpretation of the provisions of clause (b) of Section 138 of the Act to hold that in a case where the standard rent of a building has been fixed under Section 7 of the Madhya Pradesh Accommodation Control Act, and there is nothing to show that there has been fraud or collusion, that would be its reasonable letting value, but, where this is not so, and the building has never been let out and is being used in a manner where the question of fixing its standard rent does not arise, it would be

permissible to fix its reasonable rent without regard to the provisions of the Madhya Pradesh Accommodation Control Act, 1961. This view will, in our opinion, give proper effect to the non-obstante clause in clause (b), with due regard to its other provision that the letting value should be "reasonable"."

17. A 'special law' means a provision of law, which is not applicable generally but which applies to a particular or specific subject or class of subjects. Section 41 of the Indian Penal Code, 1860 stands on the same footing and defines the phrase "special law". A special law or a statute is applicable to a particular subject, then the same would prevail over a general law with regard to the very subject. This is the accepted principle in the field of interpretation of statute.

18. Section 147 of N.I. Act starts with a non - obstante clause and is an affirmative enactment and as such has an overriding effect on Section 320 Cr.P.C.

19. An offence of dishonour of cheque is the compensatory aspect of the remedy which should be given priority over the punitive aspect.

20. Having regard to the aforesaid position of law, even though the parties have arrived at a settlement after the Appellate Court had upheld the conviction of the petitioner, yet keeping in view the spirit of Section 147 of the NI Act, the offence under Section 138 of the Act can be compounded. Therefore, this is a fit case where cost is required to be waived while compounding the offence. Since the parties have settled their disputes, it is in the fitness of things to close it at this stage itself as the conditions of settlement are mutually accepted between them. The dispute is an inter-se dispute between the parties and by entering into a settlement they have closed the dispute which had arisen between them.

21. From perusal of the records and the law laid down by the Apex Court on the subject matter, the present case is a good case for exercising powers by this Court to allow the present revision.

22. The present revision is allowed. The conviction and sentence under Section 138 of the N.I. Act stands annulled as this Court intends. The revisionist is acquitted on account of compounding of the offence with the complainant/person affected before the mediation centre of this Court.

23. The judgment and order dated 23.7.2016 passed by Sri Prabhakar Rao, H.J.S., Additional Sessions Judge, Court No.12, Agra in Criminal Appeal No.74 of 2012 (Hari Om Vs. Hari Shankar Yadav) and judgment and order dated 24.2.2012 passed by Sri Ishtiyak Ali, A.C.J.M, Court No.7, Agra in Complaint Case no.1371 of 2011 (Hari Shankar Yadav Vs. Hari Om), u/s 138 N.I. Act, P.S. Tajganj, District Agra are hereby set-aside.

24. Office is directed to communicate this order to the concerned court within two weeks from today.

(2022)03ILR A222
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.02.2022

BEFORE

THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Criminal Revision No. 4476 of 2019

Sujeet Patel @ Golu (Juvenile)
...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Praveen Kumar Srivastava, Sri Sanjay Kumar Yadav, Sri Shri Ram Yadav

Counsel for the Opposite Parties:
A.G.A., Sri Rajendra Singh, Sri Sarvagya Singh, Sri Shiv Bahadur Singh

A. Criminal Law - Code of Criminal Procedure,1973-Section 397/401 - Indian Penal Code,1860-Sections 302, 201, 394, 411 & Juvenile Justice(Care and Protection of Children) Act, 2015-section 12-application-rejection-grant of bail to juvenile-juvenile is entitled to the benefit of the provisions of the Act-U/s 12 -While deciding bail of a delinquent offender between the age group of 16-18 years in addition to the ground provided u/s 12, his mental, physical capacity, ability to understand the gravity of that heinous offence, including his participation in the crime and the circumstances wherein he has committed the heinous offence could also be taken into consideration-In the Instant case, accused murdered his maternal grand father, committed loot, mutilated his body and threw away it to conceal the identity-the D.P.O. report is not favourable to the child in conflict with law-he keeps bad company and his friendship is with persons older than his age and also not co-operative with his neighbours-Moreso, He has bad habit of drugging-Hence, his bail righlty been rejected by the Juvenile Justice Board and appeal by the Appellate Court-The revisionist is not entiltled for bail.(Para 1 to 14)

B. The prayer for bail may be rejected if there appear reasonable grounds for believing that the release of the juvenile is likely to bring him into the association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice-gravity of the offence should be taken as an obstacle to refuse bail to a delinquent juvenile. (Para 12)

The revision is dismissed. (E-6)

List of Cases cited:

1. Dr. Subramaniam Swami Vs Raju (2014) 86 ACC 637

2. Pradeep Kumar Vishwakarma Vs St. (2019) 109 ACC 73, CRLA No. 3526 of 2018

3. Ankur (minor) Vs St. CRLA No. 2909 of 2017, AHC

4. Rohit(minor) Vs St. (2019) 107 ACC 247, CRLR No. 310 of 2018

5. Lalit @ Chena Vs St. of U.P., CRLR No. 737 of 2020, AHC

6. Mohd. Najmuddin (minor) Vs St. of U.P., CRLR No. 1800 of 2020, AHC

7. Kanchan Sonkar (minor) Vs St. of U.P., CRLR No. 1266 of 2020, AHC

8. Ezij @ Bikanu Vs St. of U.P. (2006) ACC 731, AHC

9. Satya Deo @ Bhura Vs St. of U.P. (2020) 10 SCC Pg 555

10. Radhika (juvenile) Vs St. of U.P. CRLA No. 4418 of 2019

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

1. Heard learned counsel for the revisionist, learned counsel for the opposite party no.2/complainant, learned AGA for the State and perused the material brought on record.

2. This criminal revision has been filed on behalf of child in conflict with law through his father, the natural guardian against the judgment and order dated 04.11.2019 passed in Criminal Appeal No.142 of 2019, arising out of Case Crime No.1 of 2019, under sections 302, 201, 394, 411, IPC, Police Station Lohata, District Varanasi.

3. In brief the facts are that complainant Arun Kumar, lodged an FIR

on 01.01.2019 at 14:41 O'clock that he received an information on mobile of his father from another mobile that a mutilated unknown dead body is lying near Kishaur Bridge, which is unidentifiable. On this information he reached near Kishaur Bridge and saw the dead body which was of Prem Chandra Singh, his uncle (elder brother of his father), who was residing at Parmanandpur, Police Station Shivpur. It appears that his uncle was brutally murdered and dead body thrown near Kishaur Bridge to conceal it. The skull of the dead body was badly mutilated and legs were tied. During investigation the name of revisionist-accused came in the light. He alongwith two other co-accused were arrested by the police on 14.01.2019 and from the possession of the revisionist-accused the Aadhar Card, A.T.M. Card of deceased, Rs.700/- cash and one bunch of keys and some looted articles (ornaments) and one mobile phone were recovered from his possession and at his instance one iron rod, which was used in the crime was also recovered.

4. The prosecution version is that the deceased was maternal grandfather (Chachera Nana) of the revisionist-accused and was a retired pharmacist. On 31.12.2018 he was alone at his house. At 8.30 P.M., the revisionist-accused with his two friends went to the house of the deceased on the pretext that his friend is ill. As deceased knew the revisionist (child in conflict with law) he opened the door and all the three entered into the house and when deceased was examining and giving medicines to his friend, the revisionist-accused hit on his head from behind with an iron rod. Deceased fell down then all the three accused wrapped him in a bed sheet and inflicted several blows with iron rod. Thereafter they committed loot in the house of the deceased and also took in possession the keys of the house. After committing loot they put the dead body of the deceased in the Alto Car of the deceased, parked in the porch of the house and driving the vehicle they came at Kishaur Bridge and threw away the dead body there.

5. The revisionist (child in conflict with law) was declared a juvenile on the basis of high school certificate, in which his date of birth is recorded as 11.08.2002 and on the date of incident his age was 16 years, 4 months and 20 days. The Juvenile Justice Board conducted the preliminary assessment with regard to his mental and physical capacity to commit the offence, ability to understand the consequence of the offence and the circumstances in which he allegedly committed the offence and vide order dated 16.09.2019, transferred his case for trial to the children court (POCSO court). The trial of the revisionist-accused is pending before that court. Bail application of the revisionist (Juvenile) moved before the Juvenile Justice Board was rejected on 02.09.2019 and a criminal appeal was preferred against the aforesaid order, has been dismissed on 04.11.2019 by the Special Judge (POSCO Act)/Additional Session Judge, Court No.10, Varanasi.

6. Learned counsel for the revisionist submitted that Juvenile Justice Board called a report from D.P.O. and has observed that as per conclusion of the inquiry the child is involved with other persons and have friendship with the persons older than his age. The learned counsel for the revisionist submitted that the D.P.O. report does not disclose that after release the revisionist may come with association of known or unknown criminals, but the Juvenile Justice Board has rejected the bail application of the revisionist on the ground of serious

nature of offence as well as on the ground that his release is likely to bring him into association with a gang or bad persons. Learned counsel for the revisionist also contended that the revisionist filed an appeal against the aforesaid order on the ground that revisionist has no criminal history and detained since 14.01.2019. There is no direct evidence and case is based on circumstantial evidence. Nothing has been recovered from the possession of revisionist and there is no possibility of his association with know or unknown criminals if released on bail, but the appellate court has not considered the aforesaid grounds and illegally and arbitrarily rejected the appeal on the ground of nature of the offence. Learned counsel for the revisionist further contended that as per section 12 of the Juvenile Justice Act, 2015 a juvenile shall be released on bail, except the following three grounds:-

"(i) If there appear reasonable ground for believing that the release is likely to bring him into association with any unknown or known criminals. or

(ii) that it will expose him to moral, physical or physiological danger. or

(iii) that his release would defeat the ends of justice."

He also contended that the grounds taken by both the courts below do not come under the purview of the above three exceptions mentioned in section 12 of the Juvenile Justice Act. Both the courts below rejected the bail of the revisionist on the ground of seriousness of the offence, which is not sustainable in the eye of law, as per the law laid down by Hon'ble Apex Court as well as the High Court. He placed reliance on the following citations on this points:-

"(i) Dr. Subramaniam Swami Vs. Raju, 2014 (86) ACC 637.

(ii) Pradeed Kumar Vishwakarma Vs. State, (2019) 109 ACC 73, Criminal Appeal No.3526 of 2018.

(iii) Ankur (minor) Vs. State, Criminal Revision No.2909 of 2017, Allahabad High Court, decided on 24.04.2018.

(iv) Rohit (minor) Vs. State, 2019 (107) ACC 247, Criminal Revision No.310 of 2018.

(v) Criminal Revision No.737 of 2020 (Lalit @ Chena Vs. State of U.P.), Allahabad High Court, decided on 03.12.2020.

(vi) Criminal Revision No.1800 of 2020 (Mohd. Najmuddin (Minor) Vs. State of U.P.), Allahabad High Court, decided on 04.05.2021.

(vii) Criminal Revision No.1266 of 2020 (Kanchan Sonkar (minor) Vs. State of U.P.), Allahabad High Court, deided on 01.12.2020.

(viii) Ezij @ Bikanu Vs. State of U.P., 2006 (Supplementary) ACC 731, Allahabad High Court."

Learned counsel for the revisionist further contended that maximum period for which revisionist-accused can be sentenced is three years. He is detained since 14.01.2019 and there is no hope of early disposal of trial. On the aforesaid grounds the learned counsel for the revisionist submitted that he may be released on bail.

7. Learned counsel also placed reliance on citation of Satya Deo @ Bhura Vs. State of U.P. (2020) 10 SCC page 555. In this case the Hon'ble Supreme Court while upholding conviction set-aside the sentence of life imprisonment and remanded the matter to the Board for passing appropriate order/direction under section 15 of the Act.

8. Learned AGA and learned counsel for the opposite party no.2 (complainant)

vehemently opposed the prayer and submitted that the offence is of a heinous nature, as defined in section 2 (33). The learned counsel placing reliance on a judgment passed in Criminal Appeal No.4418 of 2019 *(Radhika (juvenile) Vs. State of U.P.),* decided 05.08.2019, submitted that while deciding bail of juvenile between the age group of 16-18 years, who is an accused of a heinous offence his mental, physical capacity, ability to understand the gravity of the offence are also to be considered. Learned counsel also contended that as the offence is of heinous nature maximum three years sentence is also not applicable. It is further contended that revisionist-accused has committed the brutal murder with intention of loot and also committed the loot. He is close relation of deceased and has committed betrayal of trust of relation. The murder has been committed in gruesome manner breaking the skull and face of the deceased in pieces and body thrown away by taking it from the car of the deceased to conceal the identity. Learned counsel also contended that the D.P.O. report is also adverse to the revisionist-accused. It is mentioned in it that his company is not good and his friendship is with the persons to older than his age. On the basis of D.P.O. report the learned court below had held that if he is released on bail then he may come in association with any gang or bad persons. It is also contended that trial is going on and cross examination of the witness is proceeding. There is no infirmity, illegality or perversity in the finding recorded by the courts below, hence the revision is liable to be dismissed. The revisionist is not entitled for bail.

9. The allegations against the revisionist-accused is that he committed the murder of his maternal grand father (Chachera Nana) committed loot in his house, mutilated his body and threw away it to conceal the identity. Looted articles is alleged to have been recovered from his possession also and at his instance the weapon used in the offence (iron rod) has also been recovered. The age of the revisionist-accused on the date of incident was 16 years, 4 months and 20 days. So he is in age group of 16-18 years. His trial has been referred to the POCSO Court by the Juvenile Justice Board, under the provision of section 18(3) of the Act, 2015.

10. According to D.P.O. report the company of the child is not good. He was studying in Class-12 at Vikash Inter College, Permanandpur, Varanasi. Earlier he was a private student. Most of his friends are educated but older than his age. The behavior of the neighbours with the child was not cooperative. He has bad habit of drugging. In the column of other remarks it is specifically mentioned that his company is not good.

11. As the revisionist is an accused of heinous offence and in between the age group of 16-18 years, the provisions of section 18(1) and 18(2) are not applicable. The board after preliminary assessment has transferred the case for trial to the children court (POCSO court) under the provisions of section 18(3) of the Act. The limit of maximum three years stay at special home will also not be applicable. Section 21 will apply, which provides as follows:-

"21. No child in conflict with law shall be sentenced to death or for life imprisonment without the possibility of release, for any such offene, either under the provisions of this Act or under the provisions of the Indian Penal Code or any other law for the time being in force."

12. This Court in Criminal Appeal No.4418 of 2019 *(Radhika (juvenile) Vs. State of U.P.)*, decided 05.08.2019, in para no.32 has made the following observations:-

"[32] This in fact is a dichotomy, whereby a juvenile delinquent is being released on bail except those above three conditions provided under Section 12(Proviso) of the Act, that too as a matter of right. On the other hand, they shall be tried as adults and could be awarded any sentence as per the discretion of the court provided under the law, except the life sentence and death sentence. This dichotomous situation could be resolved by taking the recourse of "object" of the legislation and Para 4 of the Statement of object and reasons, clearly mandates that the enactment of Juvenile Justice Act, 2000 was ill-equipped to tackle child offenders between the age group of 16-18 years and involved in heinous offences, like, murder, gang rape, solitary-rape, bride burning etc. and to resolve this impasse, the court holds that for the purposes of bail to the adolescent offender between the age group of 16-18 years, involved in the heinous offence like murder, solitary-rape, gang-rape, bride burning, drug trafficking, the beneficial legislation for the purposes of bail under Section 12 of the Act shall not apply in its present shape and format. It would be no more as a matter of right to such delinquent minor, who is involved in heinous offences. It is not possible to furnish exhaustive list of such offences but it definitely connotes the same meaning as defined in Section 2(33) of the Act. While deciding the bail of such delinquent offender ranging between the age group of 16-18 years would be discretionary upon the court, which shall in addition to those grounds provided under Section 12(Proviso) of the Act, also take into account with regard to his mental, physical capacity, ability to understand the gravity of that heinous offence, including their respective participation in the crime and the circumstances wherein he/they has/have allegedly committed that particular grave and serious offence. All these factors too are determinative factors while adjudicating the bail applications of juvenile offenders in the age group of 16-18 years, else it would be a mockery of legislation and the object of the present legislation would reduce to naught."

The aforesaid view is a reasoned one and I am also in agreement with it. While deciding the bail application of a delinquent offender between the age group of 16-18 years in addition to the ground provided under section 12 (proviso of the act), his mental, physical capacity, ability to understand the gravity of that heinous offence, including his participation in the crime and the circumstances wherein he has committed the heinous offence could also be taken into consideration.

13. In this case the D.P.O. report is also not favorable to the revisionist (child in conflict with law). It is clearly stated in it that his company is not good and his friendship is with persons older than his age. He has also bad habit of drugging. Hence the finding of the Juvenile Justice Board that there appears reasonable ground to believe that his release is liable to bring him into association with any known criminal, cannot be said to be un-reasoned and perverse. Considering his participation in the crime and the circumstances in which he has committed the heinous offence and also taking into account his mental, physical capacity and also ability to understand the gravity of the offence, his release on bail will defeat the ends of

justice. His bail application has rightly been rejected by the Juvenile Justice Board and appeal by the appellate court. Both the courts below have not committed any legal error in rejecting the bail application. There is no perversity or illegality in the findings recorded by the learned courts below. The revisionist (child in conflict with law) is not entitled for bail. Revision is liable to be dismissed. For speedy trial, direction may be issued.

14. Accordingly, the revision is hereby **dismissed.**

15. The trial court is directed to expedite the trial and conclude it, preferably within one year from the date of production of this order placed before it, without granting any unnecessary adjournments,.

(2022)03ILR A228
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.03.2022

BEFORE

THE HON'BLE J.J. MUNIR, J.

S.C.C. Revision No. 125 of 2014

Govind Saran ...Revisionist
Versus
Km. Shubhi Mishra ...Opposite Party

Counsel for the Revisionist:
Sri Ashutosh Srivastava

Counsel for the Opposite Party:
Ms. Babita Upadhyay, Sri Pradeep Kumar, Sri Sanjeev Kumar Gaur

A. Tenancy Law – UP Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 – Transfer of Property Act, 1882 – U.O.I. 106 – Notice to quit – Termination of tenancy – Validity – Classification of notices into seven category, marked as 'A' to 'J', made by the Supreme Court in Abdul Jalil's case, was overruled by the larger Bench in Dharam Raj Sahu's case – Consequence – Held, there is no prescribed form or language which alone would qualify for a valid notice under Section 106 of the Act of 1882 – Notice has to be liberally construed and read as a whole in order to find out the intention of the landlord or the lessor. (Para 20, 22 and 23)

B. Tenancy law – Transfer of Property Act, 1882 – Secton 114 – Tenant's entitlement to be relieved of liability from eviction on deposit of arrears of rent and cost of suit – No written lease for specific period – Effect – Held, the question of forfeiture generally arises if there is a written lease carrying terms that entitle the lessor to re-enter, if violated by the tenant and the lease is for a specific duration or perpetual in nature. The entire gamut of provisions of Sections 111, 112, 113 and 114 of the Act of 1882 would not apply in the case of a tenancy that is month-to-month, which can be terminated by a notice simplicitor under Section 106 of the Act of 1882, without the question of forfeiture at all figuring –High Court granted six months time to vacate the demised shop. (Para 26)

Revision dismissed. (E-1)

List of Cases cited :-

1. Abdul Jalil Vs Haji Abdul Jalil; AIR 1974 All 402

2. Atkinson Vs Bradley; (1885) ILR 7 All 899 (FB)

3. B.R. Trading Company & anr. Vs Dharam Raj Sahu & ors.; 2007 SCC OnLine All 885

4. Vinod Kumar & ors. Vs Arya Samaj Mandir; 2016 SCC OnLine All 2938

(Delivered by Hon'ble J.J. Munir, J.)

1. This is a tenant's revision under Section 25 of the Provincial Small Cause Courts Act, 1887 (for short "the Act of

1887"), questioning a decree for ejectment, besides recovery of arrears of rent and *mesne* profits.

2. S.C.C. Suit No.15 of 2012 was instituted on behalf of the plaintiff-landlady, Km. Shubhi Mishra, then a minor aged about 16 years through her father, Dr. Pramod Kumar Mishra, acting as her next friend. This suit was instituted before the District Judge of Pilibhit sitting as the Judge, Small Cause Court, against the defendant-tenant, Govind Saran, seeking the defendant's ejectment from a shop situate in Mohalla Desh Nagar, District Hospital Road, Pilibhit, details whereof are given at the foot of the plaint, giving rise to the suit. Besides ejectment, a decree for recovery of a sum of Rs.41,433/- as arrears of rent was also sought. A further decree for recovery of *mesne* profits in the sum of Rs.2000/- with effect from the date of determination of the tenancy until the date of the suit, worked out at the rate of Rs.250/- per day, besides Rs.1500/- as costs of the notice, was also claimed. Apart from the aforesaid items of the claim, a decree for recovery of *mesne* profits at the rate last mentioned was claimed for the period *pendente lite* and future.

3. The suit was instituted on behalf of the plaintiff-landlady (for short, 'the plaintiff') alleging that the shop in question, which shall hereinafter be referred to as the 'demised shop', was let out on her behalf by her father to the defendant-revisionist (for short, 'the defendant') in the year 2008 for a period of eleven months. The rate of rent was Rs.5500/- per month. The tenancy was month-to-month, commencing on the first day of each English calendar month. The provisions of The Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (for short "U.P. Act No. 13 of 1972") did not govern the tenancy. The defendant committed default in payment of rent w.e.f. February, 2012 and continued to do so, extending false promises to pay. He avoided paying the due rent on one pretext or the other that he came up with. Despite repeat demands to pay his outstanding rent, the defendant did not comply. In the circumstances, the plaintiff caused a notice under Section 106 of the Transfer of Property Act, 1882 (for short, "the Act of 1882") to be issued to the defendant on 13.08.2012, calling upon the defendant to pay the entire arrears of rent and determining the tenancy on expiry of a period of thirty days of the receipt of notice. The defendant was also called upon to vacate the demised shop and hand over possession thereof on the expiry of the notice period. The notice was dispatched at the correct residential address of the defendant as well as his business address by registered post. The notice was duly served upon the defendant personally on 16.08.2012. The defendant's tenancy stood determined w.e.f. 16.09.2012. Despite termination of his tenancy, the defendant did not vacate the demised shop or remit the arrears of rent. It was asserted that the defendant owed the plaintiff a sum of Rs.41,433/- in arrears of rent from 01.02.2012 till 16.09.2012. A sum of Rs.2000/- was claimed to be due towards *mesne* profits from 17.09.2012 till the date of institution of the suit, worked out at the rate of Rs.250/- per day, besides Rs.1500/- on account of fee and expenses of the notice served.

4. The suit was instituted on 24.09.2012 and a summons returnable on 24.11.2012 was issued to the defendant.

5. A written statement was filed on behalf of the defendant, admitting himself

to be a tenant in the demised shop at the rate of Rs.5500/- per month. It was, however, pleaded that rent in the year 2007 was Rs.4500/- per month, but in deference to wishes of the plaintiff's father, the rent was enhanced to Rs.5500/-. It was claimed that until 30.06.2012, rent was paid to the plaintiff's father, who despite demand, did not issue any receipt. The plaintiff's father would ward off his obligations and never issued any receipt. The defendant on 05.08.2012, along with his son, went to the plaintiff's father in order to pay rent for the period 01.07.2012 to 31.07.2021 and demanded a receipt thereof. The plaintiff's father refused to issue a receipt. He asked the defendant to deposit rent by cheque in lieu of cash. The defendant and his son thereupon issued a cheque on 05.08.2012, favouring the plaintiff's father, signed by himself and his son and handed it over to the payee. The plaintiff's father thereupon instructed the defendant that in future, he should pay rent by cheque. In compliance with those instructions, the defendant handed over to the plaintiff's father Cheque No.779463 worth Rs.5500/- on 03.09.2012, Cheque No.779464 worth Rs.11,000/-, being the accumulated rent for two months on 18.11.2012, Cheque No.774650 worth Rs.11,000/- on 17.01.2013, which was in liquidation of his liability up to 31.12.2012. On 01.02.2013, when the defendant went over to the plaintiff's father to pay him rent for the month of January, 2013, he avoided receiving it and told the defendant that he would accept rent in some wholesome figure in future.

6. It is the defendant's case that he received envelopes from Mr. B.S. Ashok, Advocate by registered post and speed post, but upon opening the envelopes, each of them were found to carry blank papers with nothing scripted on it. The next day, the defendant went to the city in connection with some personal work and upon his return, sent a letter dated 14.09.2012 by registered post to Mr. B.S. Ashok, Advocate, informing him that he had received an envelope from the learned Advocate carrying blank papers. The defendant also requested the addressee to let him know the purpose of it all, and not to misuse the same.

7. The defendant claims to have come to know about the suit upon publication of summons in the newspaper. Prior to publication, he had no knowledge about the pending suit. It is asserted that from 01.01.2013 to 31.03.2013, rent has been deposited in Court through tenders for the purpose. Any kind of default was denied and it is the defendant's further case that provisions of U.P. Act No. 13 of 1972 apply to the demised shop. Service of notice under Section 106 of the Act of 1882 was denied. The notice filed along with the plaint is said to be bogus, which was not served upon the defendant at all. It did not terminate his tenancy and, therefore, no decree of eviction etc. could be passed on its basis.

8. After exchange of pleadings, the Trial Court framed the following issues (Translated into English from Hindi):

"(1) Whether the plaintiff and the defendant bear the relationship of landlord and tenant relating to the shop in dispute?

(2) Whether the suit is not barred by the provisions of U.P. Act No. 13 of 1972?

(3) Whether the notice dated 13.08.2012 served upon the plaintiff is illegal and void?

(4) Whether the defendant has committed default in the payment of settled rent? If yes, its effect?

(5) To what relief is the plaintiff entitled?"

9. The plaintiff, in support of her case, filed documentary e*vide*nce that includes a copy of the notice dated 13.08.2012, AD Card, the postal receipt, the statement of account of the plaintiff's father duly certified. For her oral e*vide*nce, an affidavit sworn by Pramod Kumar Mishra, the plaintiff's father was filed under Order XVII Rule 4 CPC. He testified himself as PW-1 and was cross-examined.

10. The defendant filed documentary e*vide*nce, being *challans* dated 02.09.2013, 29.03.2013 and 04.08.2013; still more dated 29.03.2013, 04.05.2013 and 01.06.2013. Besides, photostat copies of four cheques were also filed. The detail of documentary e*vide*nce finds its enumeration in the summary thereof set out in the judgment of the Trial Court, which need not be scripted for every detail of it. The defendant examined himself as a witness in support of his case and filed his affidavit. He testified in the witness-box as DW-1, where he was cross-examined.

11. Issue No.1 was decided on admission, holding the relationship of landlord and tenant well established between parties. About Issue No.2, the Trial Court held that since the monthly rent was Rs.5500/-, a figure that is not in dispute, which exceeds Rs.2000/- per month, the building is exempt from the operation of U.P. Act No.13 of 1972 by virtue of Section 2(g) thereof. Returning its finding on Issue No.3, it was held by the Trial Court that the notice to quit was valid and effectively determined the defendant's tenancy. As regards Issue No.4, it was held that the defendant committed default in the payment of monthly rent, rendering him liable to eviction. So far as Issue No.5 goes, it was opined that deposit of a sum of Rs.33,000/- towards rent, that was remitted by cheques, issued by the defendant, was well established. Also, money that was deposited by tenders in Court was also opined to be established. The said sum of money was directed to be adjusted against the plaintiff's claim for arrears of rent and *mesne* profits. The suit was decreed for eviction as well as arrears of rent and *mesne* profits, after adjusting the sum of money towards rent and *mesne* profits that was remitted through cheque or deposit by tender in Court. Also, w.e.f. 17.09.2012 till delivery of possession, the tenant was ordered to pay *mesne* profits at the rate of Rs.250/- per day.

12. This revision was entertained on 13.03.2014 and notice pending admission was issued. By an interim stay order, the defendant's eviction was stayed, subject to deposit of the entire decretal amount within a period of one month from the date of the stay order. Subsequently, after appearance of parties, the revision was admitted to hearing *vide* order dated 21.07.2014 and the lower court records were summoned.

13. Heard learned Counsel for the defendant and Mr. Pradeep Kumar, Senior Advocate, assisted by Ms. Babita Upadhyay, learned Counsel for the plaintiff.

14. The only point, that has been pressed in support of this revision by the learned Counsel for the defendant, is about validity of the notice to quit dated 13.08.2012, that was subject matter of Issue No.3 before the Trial Judge. The learned Counsel for the defendant has assailed the notice on three counts, to wit, the fact that the notice was never served and in its stead, a registered cover carrying blank papers was sent to the defendant on behalf of the plaintiff; secondly, the language of the

notice does not effect a determination of the tenancy or work as a notice to quit within the meaning of Section 106 of the Act of 1882, as applicable to the State of Uttar Pradesh; and thirdly, the defendant having deposited rent beyond the month of December, 2012 through tender in Court at the hearing of the suit, including accrued interest and full costs, is entitled to be relieved of his liability against forfeiture under Section 114 of the Act of 1882. In short, on the last score, it is submitted that a notice to quit under Section 106 of the Act of 1882 would not entitle the plaintiff to evict the defendant, once he has complied with the provisions of Section 114 last mentioned.

15. Mr. Pradeep Kumar, learned Senior Advocate appearing for the plaintiff, on the other hand, has refuted these submissions and urged that a valid notice to quit was served, that effectively determines the tenancy, which is for a residential purpose. He submits that the U.P. Act No.13 of 1972 does not apply, and, therefore, all that is required is a notice to quit under Section 106 of the Act of 1882 without reference to any case of forfeiture on account of default, or a violation of the other terms of the lease.

16. This Court has keenly considered the submissions advanced on behalf of both sides and perused the record.

17. So far as the first part of the challenge to the notice determining the defendant's tenancy is concerned, it proceeds on a purely factual premise that the notice to quit dated 13.08.2012 is a non-existent document, where a registered cover was served upon the defendant carrying blank sheets with no contents scripted. This document, sent by registered post on behalf of the plaintiff by her Counsel, purporting to be a notice under Section 106 of the Act of 1882, is a non-existent document, which would not work to determine the defendant's tenancy. The learned Trial Judge has examined the matter in considerable detail and has opined that the defendant does not dispute the fact that the registered cover, purporting to carry the notice to quit, was served upon him, but says that it carried blank papers. The learned Trial Judge has opined that in the face of this plea, the minimum e*vide*ntial burden which the defendant had to shoulder was to produce the registered cover that he received in original along with the blank sheets, that he says were placed there. He has neither filed the registered cover that he received admittedly nor the blank sheets, which he claims to bear the contents thereof. In the face of an allegation of this kind sans e*vide*nce led by the defendant, the Trial Judge has refused to accept the defendant's case about service of blank sheets in a registered cover that the defendant duly received. It appears to be part of the reasoning that no prompt action was taken upon receipt of the aforesaid registered cover, which the defendant alleged carried blank papers, and a reply was given by the defendant to the plaintiff's Counsel on 14.09.2012, though the notice was served on 16.08.2012. Apparently, the long lapse of time has been inferred to generate an afterthought with the defendant on the foot of sound reasoning that a person, served with blank papers from a person who is an Advocate through registered cover, would promptly react.

18. The case that the addressee left station shortly after receiving the notice, causing the delay, has not been accepted by the Trial Judge. There is nothing perverse

about the reasoning that the Trial Judge has adopted to disbelieve the defendant's case on this score. The finding on this part of the issue, that the defendant assails, is a pure finding of fact regarding which the Trial Court has recorded a reasonable opinion on the e*vide*nce available. There is absolutely no reason for this Court to take a different view in exercise of our revisional jurisdiction under Section 25 of the Act of 1887.

19. The language of the notice dated 13.08.2012 under Section 106 of the Act of 1882, served upon the defendant on behalf of the plaintiff, in the material part, reads:

"4- That you have committed a default in the payment of rent and my client now does not want you to continue as her tenant. Your tenancy shall be terminated immediately after the expiry of the period of 30 days of the receipt of this notice. You are already called upon to pay all the arrears of rent within month from the receipt of this notice.

5- That you are hereby called upon to pay the entire arrears of rent as aforesaid and hand over the possession of the shop after the expiry of the period of this notice to my client failing which my client shall be compelled to file a suit in a competent court of law for ejectmen and arrears of rent and in that event you will be further liable for the damages @ Rs.250/- per day and costs of the suit Which Pleas NOTE."

20. Learned Counsel for the defendants submits that this does not qualify as a valid notice to quit and for the purpose, has placed reliance upon the decision of a Division Bench of this Court in **Abdul Jalil v. Haji Abdul Jalil, AIR 1974 All 402**. In the said decision, their Lordships of the Division Bench have classified notices into seven categories, marked by Alphabets A to G, enumerated in Paragraph No.10 of the report and dealt with in Paragraphs Nos.11 to 20. In the specified categories, enumerated in **Abdul Jalil** *(supra)*, notices worded like those in Categories D and G alone have been held invalid, while all others were held valid. The effective words of a notice in Categories D and G read:

"D. Your tenancy is terminated with effect from today and you are required to vacate the premises on the expiry of thirty days from the date of service of this notice on you.

G. You are required to vacate the premises on the expiry of thirty days from the date of receipt of this notice."

21. Notice in Category D was held invalid because it effects a termination of the tenancy *in presenti* and allows the tenant to stay in the premises for thirty days before vacating the same reducing him to the status of "a licencee or a tenant on sufferance which is in contravention of the law", to employ the words of their Lordships. Likewise, in Category G, the notice was held invalid, because it simply carries a demand for possession without purporting to determine the tenancy expressly or by necessary implication. It has been opined that in the absence of a clear and explicit intimation to the tenant that if he continues in the premises beyond the specified period, he will become a trespasser, the notice to quit would not work to determine the tenancy. This follows a old Full Bench decision of this Court in **Atkinson v. Bradley, (1885) ILR 7 All 899 (FB).**

22. A perusal of the notice to quit involved here would show that it does not effect a termination of tenancy in presenti,

permitting the tenant to stay in the demised shop for thirty days as a matter of grace or on licence or at sufferance. Clearly, the notice says in Paragraph No.4 that "tenancy shall be terminated immediately after the expiry of the period of 30 days of the receipt of this notice". This notice, for the worst, would fall in Category E enumerated in **Abdul Jalil**, and more specifically, in Category C, both of which have been held to be notices bringing about a valid determination of tenancy. Quite apart, though nothing has been brought to the notice of this Court during the course of hearing, that the principles in **Abdul Jalil** regarding the validity of various categories of notices, have been overruled by a Larger Bench, or by their Lordships of the Supreme Court, the perspective of the law regarding the validity of a notice has fairly changed to lean in favour of the view that what matters is the intention of the landlord to determine the lease, where Section 106 of the Act of 1882 governs the rights of parties. It is not so much about the words employed as it is about the intent. In this connection, reference may be made to the decision of this Court in **B.R. Trading Company and another v. Dharam Raj Sahu and others, 2007 SCC OnLine All 885.**

23. This Court, while examining the precise words to be employed in order to qualify as a valid notice under Section 106 of the Act of 1882, remarked that there is no prescribed form or language which alone would qualify for a valid notice under Section 106 of the Act of 1882. It was held that the notice, as aforesaid has to be liberally construed and read as a whole in order to find out the intention of the landlord or the lessor. The Court expressed this opinion after a survey of high authority, including decisions of the Supreme Court and the comments of Sir D.F. Mulla in his Commentary on the Act of 1882, 4th Edition. In **B.R. Trading Company**, it has been held:

"19. There is no prescribed form or language in which a notice under section 106 of the Act has to be given. In such circumstances, the notice has to be liberally construed and has to be read as a whole. All that is necessary is that the notice should express clearly the intention to terminate the tenancy. The language of the notice is immaterial and in such a case the word "terminate' may not be used at all.

20. This is what was observed by this Court in Tikka Ram *(supra)*:

"The short answer to this argument is that the plaint does contain this averment. In para. 4, the respondent alleged that he had served a notice on the appellant that the tenancy was no longer acceptable to him and had further demanded (in the notice) that the appellant should vacate the premises on the expiry of 30 days from the service of notice. Mr. Chaturvedi contended that this was not enough, and the notice should have expressly stated that the tenancy was being terminated. I cannot agree. No particular words have been prescribed under section 106 of the Act of 1882 as amended by the U.P. Legislature, which merely pro*vide*s that "a lease..... shall be terminable on the part of either lessor or lessee by one month's notice." Section 111 (h) of the same Act pro*vide*s that "a lease of immovable property determines....(h) on the expiry of a notice to determine the lease, or to quit or of intention to quit, the property leased, duly given by one party to another."

D.F. Mulla in his commentary on the Act of 1882, 4th edition, has observed, ".....the notice to quit must indicate in substance and with reasonable clarity an

intention on the part of the person giving it to determine the existing tenancy at a certain time." (p. 619). The same author has observed, a liberal construction is therefore put on a notice to quit in order that it should not be defeated by inaccuracies either in the description of the premises or the name of the tenant, or the date of expiry of notice. The author's observation is based on authorities cited in the footnote on this page.

Thus the crucial test is (1) whether the language of the notice indicates a clear intention to terminate the tenancy, and (2) whether the date of determination of the tenancy is certain.

Applying these principles and tests to the notice in the present case, I think it is a valid notice of termination. If a landlord writes to the tenant, "I am no longer willing to continue this tenancy, you are therefore given notice that you should vacate the premises on the expiry of one month which is the time limit prescribed by law failing which I shall file a suit for your ejectment," this indicates a clear intention to terminate the tenancy on the expiry of the period of one month."

(emphasis supplied)

21. The Supreme Court in Mangilal v. Sugan Chand Rathi (deceased) [AIR 1965 SC 101.] , while commenting on the language used in the notice sent under section 106 of the Act observed:

"On April 11, 1959 the plaintiffs served a notice on the defendant bringing to his notice the fact of his being in arrears of rent for 12 months and requiring him to remit to them Rs. 1,020/- within one month from the date of service of notice and stating that on his failure to do so, a suit for ejectment would be filed against him. In addition to this the notice called upon the defendant to vacate the premises by April, 30, 1959 upon two grounds.

.....The requirement of section 106 of the Act of 1882 is that a lease from month to month can be terminated only after giving fifteen days' notice expiring with the end of a month of the tenancy either by the landlord to the tenant or by the tenant to the landlord. Such a notice is essential for bringing to an end the relationship of landlord and tenant. Unless the relationship is validly terminated the landlord does not get the right to obtain possession of the premises by evicting the tenant.

.....Now, the learned Additional Solicitor General states that the notice of April, 1959 may be a good notice for the purposes of section 4 (a) of the Accommodation Act but it is not a good notice for the purposes of section 106 of the Act of 1882 for two reasons; in the first place it does not purport to determine the tenancy and in the second place the notice falls short of the period of 15 days specified in section 106 of the Act of 1882. The High Court has, however, treated this as a composite notice under section 4 (a) of the Accommodation Act and section 106 of the Act of 1882 and in our opinion rightly. It has to be observed that the plaintiffs, after requiring the defendant to pay the rental arrears due up to the end of March, 1959 within one month from the date of service of the notice, proceeded to say "failing which suit for ejectment will be filed". These recitals clearly indicate the intention of the landlord to terminate the tenancy of the defendant under the relevant provisions of both the Acts."

(emphasis supplied)

22. This Court in Suraj Prasad v. Smt. Kusumlata Sinha [AIR 1973 Alld. 198.] , also while considering the

requirements of the notice under section 106 of the Act observed:

"The third objection to the validity of the notice was that it did not meet the requirement of section 106 of the Act of 1882 as amended by U.P. Civil Law 1954 as it was not a thirty days notice of termination of tenancy. In fact at one stage the learned Counsel strenuously argued that the tenancy has not at all been terminated and there is nothing in the notice terminating the tenancy but merely calling upon the tenant to vacate the premises leased would not amount to terminating the tenancy. The learned Counsel referred to an old Full Bench decision of this Court in the case of Bardley v. Atkinson [(1885) ILR 7 All 899 (FB).] . Much water has flown down the bridge since the Full Bench decided that case and I need not encumber this judgment by referring to the numerous cases in which the Full Bench decision in (1885) ILR 7 All. 899 (FB) has been considered and explained. A notice calling upon the tenant to vacate the leased premises would always amount to a notice terminating the tenancy. Under clause (h) of section 111 of the Act of 1882 a lease of immovable property determines on the expiration of a notice to determine the lease or to quit, or of intention to quit, the property leased, duly given by one party to the other. Whether the lessor has given a notice expressing an intention that the lease will stand terminated or he by the notice calls upon the lessee to quit, that is, to leave, the legal consequence of both would be that the lease would stand determined. The provisions of section 106 of the Act of 1882 lay down the manner in which such a notice is to be served and fixes the time before which it has to be given. In Ram Chandra v. Lala Duli Chand [AIR 1958 All 729.] , a notice calling upon the tenant to vacate the premises let out has been held to be a notice which successfully determines the tenancy." (emphasis supplied)

23. In Sita Ram v. Moti Lal [AIR 1976 All. 70.] , similar observations were made by this Court:

"Coming to the second contention, the notice sent by the plaintiff terminating the tenancy of the defendant is contained in paper No. Ext. 1. In this notice, the plaintiff claimed Rs. 920/- after adjusting Rs. 111/- sent by the defendant by money order and Rs. 54/- paid by the defendant towards taxes, at the rate of Rs. 15/- per mensum, and in the end, the plaintiff asked the defendant to vacate the premises in dispute on the expiry of 30 days from the receipt of the notice and give its possession to the plaintiff. The plaintiff added that on the expiry of that period, the plaintiff would take legal action for the recovery of the balance and possession of the house in a proper Court and the defendant would be held responsible for the expenses. In this notice, the plaintiff has expressed in unambiguous and unequivocal terms that the defendant should vacate the house and give its possession to the plaintiff on the expiry of thirty days after the receipt of the notice.

In the present case, as I have noted above, there is a clear indication in the notice of ejectment that in default by the defendant, the plaintiff would take legal proceedings regarding the ejectment of the defendant in a proper law Court. .....The notice of ejectment served by the plaintiff on the defendant was perfectly valid and the contention advanced by the appellant to the contrary must be rejected." (emphasis supplied)

24. The observations made by Supreme Court in Bhagabandas Agarwalla v. Bhagwandas Kanu [AIR 1977 SC 1120 : 1977 (3) ALR 40 (Sum) (SC).] , are also relevant:

"The only question which arises for determination in this appeal is whether the notice to quit given by the appellant to the respondents was invalid as not being in conformity with the requirements of section 106 of the Act of 1882. The notice to quit, so far as material, was in the following terms:

"You are hereby informed by this notice that you will vacate the said house for our possession within the month of October, 1962 otherwise you will be treated as trespassers from 1st November in respect of the said house."

.....

Now, it is settled law that a notice to quit must be construed not with a desire to find faults in it, which would render it defective, but it must be construed ut res magis valeat quam pereat. "The validity of a notice to quit" as pointed out by Lord Justice Lindley, L.J. in Side-botham v. Holland [(1895) 1 QB 378.] , "ought not to turn on the splitting of a straw". It must not be read in a hyper critical manner, nor must its interpretation be affected by pedagogic pendantism or over refined subtlety, but it must be construed in a common sense way. See Harihar Banerji v. Ramsashi Roy [45 Ind App 222 : AIR 1918 PC 102.] . The notice to quit in the present case must be judged for its validity in the light of this well recognised principle of interpretation."

(emphasis supplied)

25. In Budh Sen v. Smt. Rahiman [1979 (5) ALR 299 : AIR 1978 Alld. 549.] , the language used in the notice sent under section 106 of the Act was very much similar to the language used in the notice sent in the present case. This Court observed that the tenancy was terminated on the expiry of thirty days and the relevant observations are as follows:

"In the notice the appellant has already expressed an intention that he did not wish the respondent to continue in possession of the premises after the expiry of the period of one month. It is true that in notice in question it has not been stated that the tenancy of the defendant-respondent was being terminated. However, if an intention to terminate the tenancy can be clearly discerned by construing the words used in the notice as a whole, the mere fact that the expression that tenancy was being terminated is not used, would not render the notice invalid. The language which has been used in the notice given by the appellant to the respondent, does unmistakably e*vide*nced an intention on the part of the plaintiff-appellant not to continue the tenancy of the respondent. The notice would validly terminate the tenancy of the respondent." (emphasis supplied)

26. In Pyare Lal v. IIIrd Additional District Judge, Allahabad [1980 ALJ 643.] , this Court again observed:

"As I have mentioned above, the notice under consideration clearly requires the tenant to vacate and deliver up possession to the lessor within thirty days of the notice, failing which, it states, the lessor would be constrained to file a suit for the ejectment of the petitioner. Such a notice is similar to the notice contemplated under illustration F mentioned in the case of **Abdul Jalil** [1974 ALJ 381.] . It accords with requirements of section 106 of the T.P. Act as regards the period. It will hence validly determine the tenancy on the expiry of the period of the notice under section 111 (h)."

27. In Smt. Sushila Devi v. Mahohar Lal [1985 (11) ALR 213.] , the notice sent under section 106 of the Act read as follows:

".....In default of payment of rent during the period aforesaid after occupation of the shop for a period of full 30 days you vacate the shop and put it in possession of

plaintiff;.....on expiry of the said period your status would be that of a trespasser only and you will be liable to ejectment and damages for use and occupation at the rate of Rs. 10 per day....."

28. This Court observed that the aforesaid notice terminated the tenancy in accordance with the provisions of section 106 of the Act.

29. The aforesaid decisions clearly holds that the crucial test is to find out from the notice whether the language used expresses a clear intention of terminating the tenancy after the expiry of thirty days and in such a case, the absence of the word "terminate' in the notice is not conclusive. The decisions also hold that if the landlord clearly expresses, in the notice, an intention that he does not desire the tenant to continue in possession of the premises after the expiry of one month and asks the tenant to handover the vacant possession of the property after the expiry of the aforesaid period failing which he would file a suit for ejectment then in that case it would be a notice which determines the tenancy after 30 days even though it may not be mentioned in the said notice that "the tenancy shall be terminated on the expiry of the period of one month".

30. In the present case, as pointed out above, the notice clearly mentions that it was not acceptable to the landlord to permit the tenant to continue in occupation of the premises and that he was required to handover the vacant possession immediately after the expiry of 30 days from the date of receipt of the said notice sent to him under section 106 of the Act and that in the event he failed to handover the possession on the expiry of the said period, the landlord would file a suit for ejectment."

24. In view of what the law is about a valid notice under Section 106 of the Act of 1882 and what this Court has remarked above about the notice here, this Court finds that the notice to quit effectively determines the defendant's tenancy, and there is absolutely no flaw in its language that may vitiate the said notice. The notice to quit well effectuates its statutory purpose.

25. The third limb of challenge to the validity of the notice is founded on the principle that the defendant having tendered in Court at the hearing of the suit, all arrears of rent together with interest thereon and full costs of the suit, the defendant is entitled to be relieved of his liability from eviction under Section 114 of the Act of 1882.

26. This Court does not intend to go into the details of how much the arrears of rent were and if the deposit claimed to be made at the hearing of the suit under Section 114 of the Act last mentioned is sufficient to relieve the defendant of his liability from eviction. The moot point is whether in a suit instituted on the basis of a notice *simplicitor* to terminate a tenancy under Section 106 of the Act of 1882, the provisions of Section 114 providing for relief against the eviction, upon deposit of certain outstandings, would be available to the defendant. This question has engaged attention of this Court in **B.R. Trading Company** *(supra)* and in another decision in **Vinod Kumar and others v. Arya Samaj Mandir, 2016 SCC OnLine All 2938.** The principle is that if the notice to quit comes by on account of forfeiture of the lease for violating an express condition thereof, which pro*vide*s for a right to the lessor to re-enter, a notice under Section 111(g) of the Act of 1882 may issue, and if that be the case, a suit based on a notice forfeiting the lease may attract the

provisions of Section 114 of the Act of 1882, providing a *locus poententiae* to the tenant against forfeiture. It has been opined in **Vinod Kumar** that in a case where there is no written lease and the tenancy is governed by oral compact, the provisions relating to forfeiture would not come into play. The question of forfeiture generally arises if there is a written lease carrying terms that entitle the lessor to re-enter, if violated by the tenant and the lease is for a specific duration or perpetual in nature. The entire gamut of provisions of Sections 111, 112, 113 and 114 of the Act of 1882 would not apply in the case of a tenancy that is month-to-month, which can be terminated by a notice *simplicitor* under Section 106 of the Act of 1882, without the question of forfeiture at all figuring.

27. Nothing has been brought to the notice of the Court here to show that there was a lease for a specified period in writing, carrying a term about forfeiture and re-entery. There is also nothing to show that for the violation of such a term, any kind of a forfeiture clause was invoked, though the plaintiff's case is that the tenancy commenced sometime in the year 2008 for a period of eleven months; but, there is no written deed of lease on record to evidence its terms. The defendant, more or less, is *ad idem* on this point and says that the the tenancy commenced in the year 2007 at the rate of Rs.4500/- per month, that was later on enhanced to Rs.5500/-. There is no document to show on record, even that initial deed of lease for eleven months to indicate what the terms were. Assuming it was there, the subsequent acceptance of rent on behalf of the plaintiff by her father, after eleven months, would convert the tenancy into one from month to month by operation of law. The tenancy is about a shop, which could be validly terminated any time by a thirty days' notice without assignment of any reason. This position is evident from the provisions of Section 106 of the Act of 1882, as amended in U.P. by U.P. Act No. 24 of 1954. The tenant's case that U.P. Act No.13 of 1972 governs the demised shop has been negatived by the Trial Judge for very valid reasons, the admitted rent being well above a figure of Rs.2000/-. Thus, the tenancy, in the opinion of this Court, has been validly terminated by a simple notice to quit under Section 106 of the Act of 1882.

28. The case urged by the plaintiff about default in payment of rent is absolutely irrelevant, because a landlord is not required to prove default, where in a tenancy not regulated by the provisions of U.P. Act No.13 of 1972, he/ she decides to determine it by a notice *simplicitor* under Section 106 of the Act of 1882. This Court must remark that the allegations about default, somewhat in the context of relief of eviction, have confounded matters for a while before the Trial Court. The question of default need not be examined at all, so far as relief of eviction is concerned. That question is relevant for the purpose of quantifying of arrears of rent due and/ or *mesne* profits post determination of the tenancy, until delivery of possession.

29. No other point was pressed.

30. In the result, this revision fails and is hereby **dismissed with costs**. The interim stay order dated 13.03.2014 is hereby **vacated.**

31. The defendants is granted **six months' time** to vacate the demised shop, subject to the condition that he deposits within a month the entire arrears of rent and *mesne* profits, besides all other sums of

money due under the impugned decree with the Trial Court and also furnishes an undertaking that he will handover peaceful possession of the demised shop to the plaintiff on expiry of six months of date. In the event of default, the decree will become executable forthwith.

(2022)03ILR A240
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.02.2022

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Matters U/A 227 No. 34244 of 2019

Narain Das ...Petitioner
Versus
Prescribed Authority Civil Judge S.D. Lucknow & Ors. ...Respondents

Counsel for the Petitioner:
Vijay Krishna Srivastava, Ashish Chaturvedi, Pratichi Chaturvedi, Vijay Krishna Srivastava

Counsel for the Respondents:
Anurag Srivastava

A. Practice & Procedure - The Court has perused the amendment application and find that the observations made by the learned trial court regarding the fact that it would not be just and proper to allow such amendment application at such belated stage to be rightly rejected. (Para 22)

Petition Rejected. (E-10)

List of Cases cited:

1. Sajjan Kumar Vs Ram Kishan 2005 (13) SCC 89

2. Usha Devi Vs Rijwan Ahmad & ors. 2008 (3) SCC 717

3. Ramesh Kumar Agarwal Vs Rajmala Exports Pvt. Ltd. & ors. 2012 (5) SCC 337

4. Baldev Singh & ors. Vs Manohar Singh 2006 (6) SCC 498 *(distinguished)*

5. Surendra Kumar Sharma Vs Makhan Singh 2009 (27) LCD 1483

6. Sampath Kumar Vs Ayyakannu & anr. 2002 (7) SCC 559

7. Modi Spinning & Weaving Mills Co. Ltd.VsLadha Ram & Co. 1976 (4) SCC 320

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.)

1. Heard learned counsel for the petitioner and Sri Anurag Srivastava, learned counsel for the respondent.

2. This petition has been filed praying for quashing of the order dated 16.11.2019 passed by the Prescribed Authority i.e. Civil Judge (Senior Division), Mohanlalganj, Lucknow, in P.A. Case No.57 of 2015: *Smt. Ram Kumari and Another Vs. Narain Dass.*

3. By the order impugned, the application for amendment Paper no. C-44 of the written statement moved by the petitioner who is the respondent/ tenant has been rejected.

4. It has been submitted by learned counsel for the petitioner that the petitioner is the tenant of a shop situated in ground floor of a building facing Gungay Nawab Park (Ram Krishna Park), Aminabad, Lucknow, on a monthly rent of Rs.2,000/-. Sri Rajeev Agarwal the respondent no.3 is the landlord of the property in question. One Mukund Lal filed a Suit for eviction against the petitioner alleging himself to be the landlord. The said Suit was registered

as S.C.C. Suit no.67 of 1990: *Mukund Lal Agarwal Vs. Narain Das*, and allowed on 19.12.1992. The petitioner preferred a S.C.C. Revision No.07 of 1993. The Revision was allowed on 04.09.1993 holding that there was no relationship of landlord and tenant between Mukund Lal Agarwal and the petitioner.

5. Against the order passed by the Revisional Court, Mukund Lal Agarwal filed a Writ Petition No.158 (Rent Control) of 1993 before this Court. During the pendency of the writ petition, Mukund Lal Agarwal died. He had bequeathed the property in dispute in favour of Smt. Ram Kumari. On the basis of a Will, Smt. Ram Kumari moved an application for substitution in the Writ Petition No.158 (Rent Control) of 1993 which was allowed. Smt. Ram Kumari was substituted in place of the original petitioner. The writ petition was dismissed by this Court by a detailed order dated 11.2.2013. The Court enhanced the rent from Rs.200/- per month to Rs.2,000/- per month, which was to be given to the landlords Smt. Ram Kumari and Rajeev Agarwal by the tenant with effect from 2014 and in case rent was not paid to the landlords, Smt. Ram Kumari and Rajeev Agarwal, they could jointly file a Suit for eviction against the tenant on grounds of non-payment of rent.

The respondent nos.2 and 3 i.e. Smt. Ram Kumari and Sri Rajeev Agarwal did not file any Suit for eviction on the ground of arrears of payment of rent. They however jointly filed a Release application under Section 21 (1) (a) of the U.P. Act No.13 of 1972 for release of shop in question as it was needed by the daughters-in-law of Smt. Ram Kumari i.e. for the wife of Sri Rajeev Agarwal and wife of Sri Sandeep Agarwal, her two sons. The petitioner filed a written statement denying any need of the plaintiffs on the basis of vague averments made in the release application. When the matter was ripe for hearing and the counsel was preparing the case for arguments, it came to the knowledge of the petitioners that in pursuance of judgment passed in Writ Petition No.158 (Rent Control) of 1993, Smt. Ram Kumari and Sri Rajeev Agarwal had been recognized as landlords although the Court had not expressed any opinion with regard to the title of the shop in question.

6. It has been submitted by Sri Vijay Krishna Srivastava that at no point of time the petitioner had recognized the respondent no.2 as his landlady. The petitioner was paying the rent only to the respondent no.3 Rajeev Agarwal, who was the landlord therefore the application for release under Section 21 (1)(a) was not maintainable on behalf of Smt. Ram Kumari and an application for amendment was therefore moved for permission to amend the written statement to add paragraph-22A and 22B after the existing paragraph-22 of the written statement. The application for amendment was objected to by the respondent nos. 2 and 3. The trial court wrongly rejected the application for amendment by the impugned order. In doing so, the High Court's order was ignored by the trial court. The High Court had observed that Smt. Ram Kumari and Sri Rajeev Agarwal were at liberty to file a fresh Suit on any ground which is available to them which meant that Suit could only have been filed under Section 20 of the Rent Control Act and not under Section 21 by way of a release application before the Prescribed Authority. Smt. Ram Kumari had not been recognized as landlady, she could not pray for release of bonafide shop

in favour of her daughters-in-law to establish them in business.

7. Learned counsel for the petitioner has argued that trial court has ignored the observations made by the Supreme Court in the case of *Sajjan Kumar Vs. Ram Kishan 2005 (13) SCC 89*, wherein the Supreme Court had observed that amendment even at the final stage of litigation could be allowed, if it was necessary for the purpose of deciding the real question in controversy between the parties. Refusal to permit amendment was likely to create needless complications at stage of Execution, more so when error in question had been pointed out in written statement. It held that the amendment should have been allowed.

8. Learned counsel for the petitioner has placed reliance upon *Usha Devi Vs. Rijwan Ahmad and others* 2008 (3) SCC 717, wherein it was observed that merit of the proposed amendment was not to be seen by the trial court while deciding the application for amendment.

9. Learned Counsel for the petitioner has further placed reliance upon *Ramesh Kumar Agarwal Vs. Rajmala Exports Private Limited and others* reported in 2012 (5) SCC 337, where the Supreme Court had observed that the learned trial court should not ordinarily refuse bonafide, legitimate, honest and necessary amendments and should never permit malafide and dishonest amendments. Though the amendments proposed cannot be claimed as a matter of right but the Courts while deciding such prayers should not adopt a hypertechnical approach. Normally, amendments are allowed in the pleadings to avoid multiplicity of litigation.

10. Learned counsel for the petitioner has also placed reliance upon several other judgments i.e. *Baldev Singh and others Vs. Manohar Singh* 2006 (6) SCC 498; *Surendra Kumar Sharma Vs. Makhan Singh* 2009 (27) LCD 1483; and *Sampath Kumar Vs. Ayyakannu and another* 2002 (7) SCC 559.

11. It has been argued by learned counsel for the petitioner that the proposed amendment will not change the nature of the case in any manner. Learned trial court committed an error in law while rejecting the application for amendment made by the tenant.

12. Sri Anurag Srivastava, learned counsel for the respondent nos.2 and 3, has referred to his counter affidavit filed on 31.01.2020. It has been submitted that application for release made under Section 21 (1)(a) of the Act of 1972 on 09.09.2015 is still pending before the trial court even after seven years. The matter had been heard by the trial court and had been fixed for final arguments on 27.01.2020, whereafter the petitioner had moved the amendment application. By means of the said amendment application, the petitioner had tried to dispute right of the respondent no.2 to file the release application as she was not recognized as the landlady but rent was being given to Sri Rajeev Agarwal the respondent no.3 and he alone was recognized by the petitioner as landlord of the property in question. The reason for the amendment proposed to be made was to remove the very basis of moving the release application and was malafide and dishonest in nature going against the very observations made by the High Court in its judgment and order dated 11.12.2013 in Writ Petition No.158 (Rent Control) of 1993.

13. Sri Anurag Srivastava, learned counsel for the respondent, has taken this Court through the entire judgment rendered by this Court earlier on 11.12.2013, and has submitted that this Court had recognized Smt. Ram Kumari as the landlady along with her son Sri Rajeev Agarwal as landlord, therefore, it was directed by this Court that rent was to be given to both jointly. The petitioner had moved a Review Application No.26 of 2014 praying for review of the order dated 11.12.2013 which was also rejected by the Court on 15.01.2014. The Review Application was made on a different ground altogether as is evident from perusal of annexure-7 to the writ petition which is a copy of the order dated 15.01.2014 passed by this Court on the Review Application. The petitioner did not protest against the observations made by the High Court nor filed any review/ modification/ correction application in the earlier Writ Petition No.158 (Rent Control) of 1993 praying for the Court to modify its order and to remove the name of Smt. Ram Kumari as the landlady. In the written statement filed before the Prescribed Authority, the petitioner had recognized Smt. Ram Kumari as landlady. Later on, by means of the proposed amendment, a dispute was tried to be created with regard to Smt. Ram Kumari only because the petitioner wanted to remove the basis of filing the release application by the landlady expressing a bonafide need of the shop in question to establish her two daughters-in-law. Learned trial court has rightly rejected the application by the order impugned and this Court should not interfere in such an order.

14. This Court has considered the order impugned dated 16.11.2019 which mentions the fact of the tenant filing the application Paper No.C-44 and also the objections filed by the landlord to such amendment application. The Court had perused this Court's earlier order dated 11.12.2013 and has mentioned the same also in the order and thereafter rejected the same on grounds that it had been moved with extreme delay at the time when evidence had been led by both the parties and their case had been fixed for arguments. Also, it has been observed by the trial court that whatever the tenant wished to bring on record by means of the proposed amendment was already there as mention of the judgement and order dated 11.12.2013 had been made by the petitioner in his written statement itself. The facts as mentioned in the High Court's order could not be denied by him.

15. This Court finds no good ground to show interference in such an order which has considered all the facts as also the papers available in the file.

16. In so far as the first judgment cited by learned counsel for the petitioner is concerned, this Court has gone through the judgment rendered in *Sajjan Kumar Vs. Ram Kishan*, where the proposed amendment were with respect to the correct description of the Suit property in the plaint and, therefore, the Supreme Court had observed that such amendment should be permitted even though filed with delay as non amendment of the pleading and failure to describe the Suit property in question correctly would create needless complication at the stage of execution in the event of success of plaintiff in the Suit.

17. The second judgment relied upon by the learned counsel for the petitioner is *Usha Devi Vs. Rijwan Ahamad and others*, wherein the Supreme Court was considering the amendment petition having

been filed after framing of issues and observed that Proviso to Order 6 Rule 17 which bars delayed amendment of pleadings is referable to the stage after commencement of trial. In this case also there was error in describing the property in plaint schedule. The defendants filed the written statement raising the question of wrong description. No rejoinder was filed to the written statement by the plaintiff. Issues were framed on the basis of pleadings. The proceedings in the Suit lingered and the plaintiff filed a Misc. Application alleging breach of interim injunction. An amendment application was later on filed by the plaintiffs stating that due to inadvertence the said land was wrongly described in the plaint schedule and the mistake is liable to be corrected. The amendment application was rejected by the learned trial court giving finding of lack of due diligence. The Supreme Court held that in view of the error of description of property in plaint, the defendant had to suffer injunction against their own property. In such a case ends of justice would be met by allowing the proposed amendment subject to payment of cost by the plaintiff.

18. In *Ramesh Kumar Agarwal Vs. Rajmala Exports Private Limited* 2012 (5) SCC 337, a Suit was filed for specific performance of agreement for sale of immovable property, pleading that the entire consideration under the agreement had been paid. The amendment application was filed immediately after filing of the Suit and before commencement of trial, seeking to explain how and in what manner such payment of consideration was made by the plaintiff giving details of the payments. The Court observed that the proposed amendment would not alter the cause of action nor it would cause any inconsistency in the case of the plaintiff or prejudice the appellant/ defendant.

19. In *Baldev Singh and others Vs. Manohar Singh and another*, the Supreme Court was considering the amendment of written statement by the defendants and how it was different from amendment of plaint and it observed in paragraph 15 and 16 that inconsistent pleas can be raised by the defendants in the written statement although the same may not be permissible in the case of the plaintiff. It relied upon the judgement rendered by it earlier in *Modi Spinning and Weaving Mills Company Ltd. Vs. Ladha Ram and Company* 1976 (4) SCC 320, where the Supreme Court had held that inconsistent or alternative pleas can be made in the written statement.

The Judgement in *Baldev Singh* (supra) cannot be made applicable to the case of the petitioner wherein the petitioner clearly admitted in the written statement itself that it recognized Smt. Ram Kumari as landlord on the basis of a judgment rendered by this Court in Writ Petition No.158 (Rent Control) of 1993.

20. In *Surendra Kumar Sharma Vs. Makhan Singh*, the Supreme Court has observed that even if the prayer for amendment was a belated one, then also the question that needs to be decided is whether by allowing the amendment the real controversy between the parties may be resolved. Under Order 6 Rule 17 of the C.P.C. wide powers and unfettered discretion have been conferred on the Court to allow amendment of the pleadings to a party in such a manner and on such terms as it appears to the Court just and proper.

21. In *Sampath Kumar Vs. Ayyakannu and another*, the Supreme Court had observed that amendment can be allowed at any stage and the question of delay in moving amendment application should be decided not by calculating the period from the date of institution of Suit alone but by reference to the stage to which the hearing of the Suit had proceeded. Pre-trial amendment are allowed very liberally than those which are sought to be made after commencement of trial or after conclusion thereof.

22. This Court has perused the amendment application and finds that the observations made by the learned trial court regarding the fact that it would not be just and proper to allow such amendment application at such belated stage to be rightly rejected and a judicious exercise of its power.

23. This Court having perused the said judgments of the Supreme Court finds no observations therein which would be in favour of the petitioner.

24. The petition stands ***dismissed*** as devoid of merits.

(2022)03ILR A245
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.03.2022

BEFORE

THE HON'BLE ABDUL MOIN, J.

Writ C No. 1313 of 2022

Sarfaraj Ahmad & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Pawan Kumar Pandey, Sharad Pathak

Counsel for the Respondents:
C.S.C., Ajeya Mishra, Yogendra Kumar Mishra

A. Civil Law - Societies Registration Act, 1860 - Section 4 B - correctness of the list of members of the General Body of the society - Documents to be examined - No bar in the Registrar going through other documents, apart from the documents, as mentioned in Section 4 B of the Act, 1860 in order to examine the correctness of the list of members (Para 18)

Whenever a list is submitted or there is any change in the list of members and any objection is raised or otherwise, Registrar has to prima facie satisfy himself that change has been made in accordance with provisions of bye-laws and prima facie genuine - Registrar has to examine the correctness of the list of members on the basis of the register of members, minutes book, cash book, receipt book of membership fee and bank pass book of the society - documents which are required to be examined by the Registrar have been indicated but the legislature in its wisdom has not used the word "only" so as to preclude the Registrar from going into other documents that may be relevant for arriving at a finding pertaining to the correctness of the list - Registrar may also examine agenda, minutes of meeting and other relevant steps taken by Society - while making the inquiry u/s 4 B of the Act, 1860, the Registrar is not supposed to act as a post office rather is supposed to act administratively by applying his mind on the facts and documents placed before him - inquiry made by the Registrar is not final inasmuch as the aggrieved party can always take up the matter before a competent Court. (Para 17, 18)

Twenty eight petitioners were inducted as members by the society - list of the members was submitted in the office of the Registrar for registration but instead of it being registered/admitted objections were invited - Various objections were raised by various persons to the induction of the petitioners as members - By the impugned order petitioners

were not found to be validly inducted members - Impugned order challenged on the ground that the Registrar has exceeded his jurisdiction in examining more documents than prescribed as u/s 4-B & no opportunity of hearing had been given - *Held* - No infirmity committed by the Registrar in having gone beyond the documents as contemplated under Section 4 B of the Act, 1860. (Para 19)

B. Civil Law - Societies Registration Act, 1860 - Section 4 B - opportunity of hearing prior to holding membership to be invalid - Held - in the instant case, the list of members was never admitted rather from day one, the objections were filed against the list of members - once the list of members was never accepted by the Registrar, as such it cannot be said that the petitioners acquired any vested right for being given an opportunity of hearing. - The society, of which the petitioners claims themselves to be a members, was duly represented and had also been heard by the competent authority prior to passing the impugned order (Para 19)

Dismissed. (E-5)

List of Cases cited:

1. Sarvendra Veer Vikram Singh & ors. Vs St. of U.P & ors. 2017 (8) ADJ 671

2. Shiv Narain Agarwal & ors. Vs St. of U.P & ors. Misc. Single No. 16656 of 2021 decided on 06.08.2021

3. Shitla Prasad Tiwari & ors. Vs St. of U.P. & ors.2018 (36) LCD 93

4. Babita Verma, Manager Kisan Ucchtar & ors. Vs St. of U.P & ors. Writ-C No. 856 of 2022 decided on 14.02.2022

5. Syed Akhtar Hasan Rizvi Vs St.of U.P. & ors. Special Appeal No. 261 & 263 of 2015 decided on 07.01.2016

6. T.P. Singh Vs Registrar/Assistant Registrar, Firms Societies & Chits, Teliyarganj & ors. (2019) 1 UPLBEC 209

7. A.P. Aboobaker Musaliar Vs District Registrar (G), Kozhikode & ors. (2004) 11 SCC 247

(Delivered by Hon'ble Abdul Moin, J.)

1. Heard Sri Sharad Pathak, learned counsel for the petitioners, learned Additional Chief Standing counsel appearing for the State-respondents and Sri S.K. Kalia, learned Senior Advocate assisted by Sri Yogendra Kumar Mishra, learned counsel appearing for the 4.

2. Instant writ petition has been filed praying for the following reliefs:-

"(i) Issue a writ, order or direction in the nature of certiorari quashing the of impugned order dated 11.02.2022, passed by opposite party no. 2 contained in Annexure No. 1 to the writ petition.

(ii) Issue a writ, order or direction in the nature of Mandamus commanding the opposite party no. 2 to finalize the list of members of the General Body of the society in view of the parameters provided in Section 4-B of the Societies Registration Act, 1860 and include name of petitioners in the final list of members of the society."

3. The case set forth by the petitioners is that the last elections of the society were held on 18.06.2019 of which the result was declared on 19.06.2019. Copy of the result has been filed as annexure 4 to the writ petition. One Sri Imtiyaz Ahmad was elected as Secretary.

4. Thereafter, it was decided to induct new members and thus a notice was issued both in the newspaper as well as pasted on the notice board of the society inviting applications. It is contended that

various persons had applied for membership, including the 28 petitioners, in September, 2019. As per the bye-laws, the petitioners had deposited a sum of Rs. 1100/- each for the membership fee (the membership as per bye-laws being Rs. 500/-). All the applications for membership were considered in the general body meeting held on 28.09.2019, a copy of which is annexure 13 to the writ petition. In the meeting held on 17.11.2019, the society approved the induction of the petitioenrs as members. Considering Clause 21 of the bye-laws and the secretary being duly authorized as per bye-laws to carry on all necessary correspondence, Sri Imtiyaz Ahmad the Secretary informed the Registrar about the membership in November, 2019. Certain objections/complaints were filed by one Sri Ziya Kauser and Hafiz Anwar along with other complaints and the Registrar issued notices to the society to justify the new membership. It is claimed that the even the petitioners filed their objections/representation before the Registrar vide representation dated 19.01.2022, a copy of which is annexure 30 to the petition. The Registrar thereafter proceeded to hear the matter and by means of the impugned order dated 11.02.2022, a copy of which is annexure 1 to the writ petition, held that the membership of the 28 petitioners as members is not established and has thus not found the 28 petitioners to be validly inducted members of the society. He has further directed that the elections be held in the society from the list of 28 members for which objections have been invited for the purpose of correction of any clerical errors in the list of such members.

5. Being aggrieved, the present petition has been filed.

6. Raising a challenge to the impugned order, learned counsel for the petitioners has primarily indicated three grounds namely (a) that the Registrar has patently exceeded his jurisdiction, as provided under Section 4 B of the Societies Registration Act, 1860 (hereinafter referred to as "Act, 1860") in examining more documents than prescribed inasmuch as the Registrar could only examine the correctness of the list of members on the parameters and on the basis of documents as indicated in Section 4 B of the Act, 1860 (b) no opportunity of hearing had been given to the petitioners while declaring their membership as invalid and (c) the decision making process is bad in the eyes of law. No other ground has been urged or argued.

7. Elaborating the same, Sri Sharad Pathak, learned counsel for the petitioners argues that Section 4 B of the Act, 1860 provides that the Registrar has to examine the correctness of the list of members of general body of such society on the basis of the register of members of the general body, the minutes book thereof, cash book, receipt book of membership fee and bank pass book of the society **only** while in the present case the respondent authority has examined various other documents which do not even come within the ambit of Section 4 B of the Act, 1860 and thus has exceeded his jurisdiction and authority while passing the impugned order and arriving at a finding that the membership of the petitioners is improper.

8. So far as no opportunity of hearing having been granted to the petitioners, reliance has been placed on the judgment of this Court in the case of **Sarvendra Veer Vikram Singh and 33 Ors Vs. State of U.P and Ors** reported in **2017 (8) ADJ 671**

and the judgment of this Court in the case of **Shiv Narain Agarwal and ors Vs. State of U.P and Ors** passed in **Misc. Single No. 16656 of 2021** decided on 06.08.2021, copies of which have been filed as annexurs 35 & 36 to the petition to contend that the order impugned would be vitiated for non compliance with principles of natural justice as no opportunity of hearing had been given to the petitioners prior to holding their membership to be invalid.

9. On the other hand, learned Additional Chief Standing counsel as well as Sri S.K. Kalia, learned Senior Advocate assisted by Sri Yogendra Kumar Mishra, learned counsel appearing for the respondent no. 4 argue that once the dispute relates to membership of the society, as such, such dispute can be adjudicated before the Civil Court and not before this Court while exercising writ jurisdiction. In this regard, reliance has been filed on a Division Bench judgment in the case of **Shitla Prasad Tiwari and Ors Vs. State of U.P and Ors reported in 2018 (36) LCD 93** and a judgment of this Court in the case of **Babita Verma, Manager Kisan Ucchtar and Ors Vs. State of U.P and Ors** passed in **Writ-C No. 856 of 2022** decided on 14.02.2022.

10. Sri Kalia, learned Senior Advocate also argues that a perusal of the impugned order would indicate that various disputed questions are involved and it would be the civil Court which can go into the said disputed questions by asking the parties concerned to lead evidence and this Court while exercising jurisdiction under Article 226 of Constitution of India may not go into such disputed questions of fact and thus prays that the present petition be dismissed.

11. So far as non grant of opportunity of hearing to the petitioners is concerned, it is argued that grant of opportunity of hearing to the members would not be required inasmuch as in the judgment of **Sarvendra Veer Vikram Singh (supra)** the list of members that was sent by the society had been **admitted** by the Deputy Registrar while passing a specific order but in the instant case, the list of members was never admitted rather from day one, the objections were filed against the list of members which has finally culminated in the passing of the impugned order and thus, the said judgment would not be applicable in the facts of the instant case more particularly when no vested right has crystallized to the petitioners to claim membership as such, there is no requirement of any opportunity of hearing rather an opportunity has duly been given to the society of which the petitioners claim to be the members. So far as the judgment in the case of **Shiv Narain Agarwal (supra)** is concerned, it is argued that in the judgment of **Shiv Narain Agarwal (supra)** the earlier judgment of **Sarvendra Veer Vikram Singh (supra)** has been followed without noticing the distinguishing factor and thus the said judgment would also not be applicable in the facts of the instant case.

12. Heard learned counsel appearing for the contesting parties and perused the records.

13. At the very outset, the Court gave an option to Sri Sharad Pathak, learned counsel appearing for the petitioners of approaching the Civil Court keeping in view the law laid down by the Division Bench of this Court in the case of **Shitla Prasad Tiwari (supra) and Babita Verma (supra).** To that, Sri Sharad Pathak, learned

counsel appearing for the petitioners stated that the petition may be decided on merits even though when it was indicated to Sri Sharad Pathak, learned counsel appearing for the petitioner that a decision on merits may prejudice the case before the Civil Court also. However, Sri Sharad Pathak, learned counsel appearing for the petitioner has insisted upon this Court passing an order on merits of the case and accordingly, the Court proceeds to decide the case on merits.

14. From the arguments as raised by the learned counsel appearing for the contesting parties and perusal of records it is apparent that the 28 petitioners were inducted as members by the society concerned. Various objections were raised by various persons to the induction of the petitioners as members. It is claimed that that while inducting the petitioners as members, they have paid the membership fee for which a receipt had been issued and the amount of membership had also been deposited in the bank account of the society and all the petitioners were duly approved and inducted as members in the meeting of the society convened on 07.11.2019. The list of the members was than submitted in the office of the respondent no. 2 for registration but instead of it being registered/admitted, the objections were invited and at the same time various objections were also received and thereafter the impugned order was passed whereby the petitioners were not found to be validly inducted members.

15. The grounds raised in the petition are primarily (a) that the Registrar has patently exceeded his jurisdiction as provided under Section 4 B of the Societies Registration Act, 1860 (hereinafter referred to as "Act, 1860") in examining more documents than prescribed inasmuch as the Registrar could only examine the correctness of the list of members on the parameters as indicated in Section 4 B of the Act, 1860 (b) no opportunity of hearing had been given to the petitioners while declaring their membership as invalid and (c) the decision making process is bad in the eyes of law.

16. So far as ground (a) is concerned, though Section 4 B of the Act, 1860 provides for the Registrar to examine the correctness of the list of members on the basis of the register of members, minutes book, cash book, receipt book of membership fee and bank pass book of the society yet while making the inquiry under Section 4 B of the Act, 1860, the Registrar is not supposed to act as a post office rather is supposed to act administratively by applying his mind on the facts and documents placed before him. It is not that the inquiry made by the Registrar is final inasmuch as the aggrieved party can always take up the matter before a competent Court.

17. This aspect of the matter has been considered by a Division Bench of this Court in the case of **Syed Akhtar Hasan Rizvi v. State of U.P. and others** in Special Appeal No. 261 and 263 of 2015 decided on 07.01.2016. Again, a Division Bench of this Court in the case of **T.P. Singh Vs. Registrar/Assistant Registrar, Firms Societies & Chits, Teliyarganj and Ors** reported in **(2019) 1 UPLBEC 209** considering the aforesaid judgment of **Syed Akhtar Hasan Rizvi (supra)** and also while placing reliance on the judgment of Apex Court in the case of **A.P. Aboobaker Musaliar Vs, District Registrar (G), Kozhikode and Ors** reported in **(2004) 11 SCC 247** has held as under:-

36. Construing sub-sections (1) and (2) of Section 4-B of Act, 1860 harmoniously, Court clearly said that examination of correctness of list if confined only at the time of registration/renewal, it will exclude subsequent change in the membership till next renewal and that will defeat the purpose that bogus membership dispute should not stake to obstruct simple functioning of Society and induct bogus claim. Therefore, if any change in membership takes place within the period when next renewal is due, such change is also to be informed to Registrar and ***he is empowered to look into the correctness of such change.*** *We may notice paras 32 and 33 of the judgment of Division Bench making observations for harmonious interpretation of entire Section 4-B of Act, 1860 as under:*

"32. If the aforesaid interpretation is not given in such a harmonious manner, then the list of members filed at the time of registration/renewal of the Society will be there upto the next renewal, but if any change in the membership takes place within five years as the renewal of the Society falls due in five years, then whether that change is required to be informed to the Registrar or not. 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, though inducted in accordance with the provisions contained in the bye-laws. The Registrar can place as check on illegal induction in this manner.

33. The rider of one month imposed in sub-section (2) itself is indicative of the fact that if there is any change at any point of time, then the same should be informed to the Registrar within a period of one month, and this can be the only interpretation of subsections (1) and (2) of Section 4-B of the Act, keeping in view the statement of objects and reasons, which states that in order to curve the menace of fraudulent list being produced before the Registrar by unscrupulous persons, a check was required to be placed. Now the check, which is required to be placed, is to be placed in a continuous manner and if it is in piece-meal, then it is to be of no avail and the intention of the legislature will stand defeated in regard to validity of the list of members of the General Body being submitted before the Registrar at the time of registration/renewal. The mischief is required to be checked and if it is checked, then under sub-section (2) of Section 4-B of the Act, the Society must inform the Registrar regarding the change in the membership after the registration/renewal takes place upto the period of next renewal. The legislature does not presume vacuum and if there is any causus omissus, then the same can be supplied by the Court."

37. ***Court also observed that in making inquiry under Section 4-B of Act, 1860, Registrar is not a Post Office but supposed to act administratively by applying his mind on the facts and documents placed before him. Division Bench also referred to Supreme Court judgment in A.P. Aboobaker Musaliar v. District Registrar (G), Kozhikode and others, (2004) 11 SCC 247 and observed that when more than one returns are filed before Registrar, it may not hold an elaborate enquiry but bound to satisfy himself prima facie as to which return is to be accepted.*** *Inquiry made by Registrar is not final and aggrieved party can always take up the matter before a Competent Court. Court also held that term "membership" has been defined under Act, 1860 and it indicates that a member of a*

Society shall be a person who, having been admitted therein according to rules and regulations, paid subscription, signed the roll or list of members and has not resigned in accordance with such rules and regulations. Hence, upholding action taken by Deputy Registrar, Court in para 55 of judgment observed:

"The original records were deposited by the appellant. The Deputy Registrar has undertaken exercise to verify the membership on the basis of agenda, *proceedings, membership register and passbook of the bank account etc., and found that there was nothing illegal in the induction of those members and proceeded to accept the membership under Section 4-B of the Act on 17.10.2014."*

38. This judgment makes it clear that under Section 4-B of Act, 1860, Registrar is not supposed to make adjudication of dispute of correctness of membership like a Court but ***whenever a list is submitted or there is any change in the list of members and any objection is raised or otherwise, Registrar has to prima facie satisfy himself that change has been made in accordance with provisions of bye-laws and prima facie genuine.*** *For this purpose,* ***Registrar may examine agenda, minutes of meeting and other relevant steps taken by Society.*** *To this extent, an inquiry can be* ***made by Registrar to find out whether list of members or change in list of members is correct or not.***

(emphasis added)

18. Accordingly, considering the Division Bench judgment of this Court in the case of **T.P. Singh (supra)** it is apparent that the Deputy Registrar is supposed to act administratively by applying his mind on the facts and documents placed before him and to that extent an inquiry can be made by the Registrar to find out whether list of members or change in the list of members is correct or not. Perusal of Section 4 B of the Act, 1860 would indicate that the documents which are required to be examined by the Registrar have been indicated but the legislature in its wisdom has not used the word "only" so as to preclude the Registrar from going into other documents that may be relevant for arriving at a finding by him pertaining to the correctness of the list. Thus, in case the argument of the learned counsel for the petitioners is accepted the same would tantamount to prescribing something by the legislature in Section 4 B of the Act, 1860 which is not provided and thus there would not be any bar in the Registrar going through other documents also apart from the documents as mentioned in Section 4 B of the Act, 1860 in order to examine the correctness of the list of members. Consequently, this Court does not find any infirmity in the impugned order passed by the Registrar in having gone beyond the documents as contemplated under Section 4 B of the Act, 1860.

19. So far as the ground of non opportunity of hearing to the petitioners is concerned, from a perusal of records it is apparent that the list of members containing the name of petitioners that had been submitted by the society was never admitted or accepted by the competent authority rather objections were filed against the same and at the same time objections had also been invited by the competent authority. Accordingly, once the list of members was **never** accepted by the Registrar, as such it cannot be said that the petitioners acquired any vested right for being given an opportunity of hearing. The society, of which the petitioners claims themselves to be a members, was duly

represented and had also been heard by the competent authority prior to passing the impugned order. Thus, the said ground is rejected.

20. So far as the judgment of this Court in the case of **Sarvendra Veer Vikram Singh (supra)** is concerned, suffice to say that in the said judgment the Court had noted in paragraph 35 that the list of members was **admitted** by the Deputy Registrar by passing an order dated 20.12.2016 and the list was not **merely presented**. Admittedly, in this case, the list of members was only presented and never admitted and thus it was in those circumstances that the Court held that an opportunity of hearing was required to be given to the members. As such the said judgment would not be applicable in the facts of the present case.

21. So far as the judgment in the case of **Shiv Narain Agarwal (supra)** is concerned, the judgment of **Sarvendra Veer Vikram Singh (supra)** has been followed without noticing the distinguishing factors as are present in the present case and thus the judgment of **Shiv Narain Agarwal (supra)** would also not be applicable in the facts of the present case.

22. So far as the ground of decision making process being erroneous on account of the aforesaid two grounds, suffice to say that this Court does not find the grounds (a) & (b) are attracted in the facts of the instant case and, as such no error is found in the decision making process of the competent authority which has led to the passing of the impugned order.

23. Considering the aforesaid, this Court does not find any illegality or infirmity with the impugned order dated 11.02.2022, a copy of which is annexure 1 to the writ petition. Accordingly the writ petition is dismissed.

(2022)03ILR A252
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.02.2022

BEFORE

THE HON'BLE MANISH MATHUR, J.

Writ C No. 3000028 of 1991

Kunwar Bahadur Singh Deceased now Dharmraj Singh & Ors. ...Petitioners
Versus
Prescribed Authority/ A.D.M. Ceiling Unnao & Anr. ...Respondents

Counsel for the Petitioners:
D.C. Mukherjee, Amit Mukerjee, Ramesh Chandra Pathak, Sri Sarvesh Kumar Verma, Sukhveer Singh

Counsel for the Respondents:
C.S.C.

Civil Law - U.P. Imposition of Ceiling on land Holdings Act, 1960 - Section 10 (2) - Second notice to tenure holder - while issuing a fresh notice u/s 10(2) prima facie subjective satisfaction of the authority is required to be recorded in the subsequent notice u/s 10(2) that either of the two conditions u/s 29 of the Act is fulfilled i.e. (a) the land has come to be held by a tenure holder under a decree or order of any Court, or as a result of succession or transfer, or by prescription in consequence of an adverse possession, and such land together with the land already held by him exceeds the ceiling area applicable to him or (b) that any other unirrigated land becomes irrigated land as a result of irrigation under certain conditions - A second or a fresh notice u/s 10(2) by the authority cannot be issued cursorily without adverting to the conditions for issuance of a fresh notice -

Failure to adhere to mandatory statutory conditions under Section 29 of Act of 1960 would lead to arbitrariness at the behest of authorities concerned. (Para 14, 16)

Petitioner's objections filed against the alleged second notice given to him u/s 10(2), proposing declaration of other properties held by petitioner as surplus, has been rejected - Prescribed Authority rejected petitioner's objections by a virtually non-speaking order merely indicating the fact that petitioner is in possession of surplus land - No subjective satisfaction by the authority concerned has been recorded as required u/s 29 while passing the impugned order - Impugned notice & order quashed (Para 17, 19)

Allowed. (E-5)

List of Cases cited :

1. Whirlpool Corporation Vs Registrar of Trade Marks, Mumbai & ors., reported in (1998) 8 SCC

2. Kranti Associates (P) Ltd. & anr. Vs Masood Ahmed Khan & ors., reported in (2010) 9 SCC 496

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

1. Heard Mr. Sukhveer Singh, learned counsel for petitioner and learned State Counsel for the opposite parties.

2. The petition has been filed assailing order dated 01.07.1991 whereby petitioner's objections filed against the alleged second notice given to him under Section 10(2) of U.P. Imposition of Ceiling on land Holdings Act, 1960 (hereinafter referred to as Act of 1960) has been rejected. A further prayer for issuing a direction to opposite parties not to proceed for re-determination of petitioner's holdings in terms of second notice has also been made.

3. Learned counsel for petitioner submits that initially, a general notice under Section 9 of Act of 1960 was issued on 11.06.1973 whereafter a specific notice under Section 10(2) of the Act was issued to petitioner on 23.04.1974. Since there was no adequate receipt of the said notice, a subsequent notice was issued to petitioner whereafter his land was determined to be surplus and was adjusted as per the petitioner's option. It is submitted that aforesaid determination made on 13.01.1975 declaring an area of 5 Bighas, 8 Biswas in terms of irrigated land became final qua the petitioner. It is submitted that the surplus land was thereafter taken possession of by State since neither party preferred any appeal.

4. Learned counsel for petitioner submits that thereafter a second notice was issued in July, 1989 under Section 10(2) of Act of 1960 proposing declaration of other properties held by petitioner as surplus. Petitioner filed his objections to aforesaid notice on 01.08.1989 in which the primary objection advanced was that the fresh/second notice was barred by limitation under provisions of Section 13A of Act of 1960 as well as Section 31(3) of Amending Act no.18 of 1972. Additionally, objections were also taken specifically stating that petitioner was not in possession of any property belonging to one Smt. Sarswati Devi as Benami transaction. It was said that the said Sarswati Devi was step mother of petitioner and had separate holdings which were independent of petitioner and as such her holdings could not have been clubbed with that of petitioner.

5. Aforesaid objections were rejected by means of impugned order dated 01.07.1991 against which petition has been preferred. Initially vide order dated 19.01.2006, a preliminary objection had

been taken regarding maintainability of petition due to availability of Appeal under Section 13 of Act of 1960. The said preliminary objection was rejected by this Court holding the writ petition to be maintainable. Prior to aforesaid, impugned proceedings had been stayed by means of interim order dated 20.08.1991.

6. Learned counsel for petitioner has laid much emphasis on the fact that a second notice is not provided for under the provisions of the Act and only re-determination under Section 13-A of Act of 1960 can be made in case of any mistake apparent on the face of record. It is submitted that a fresh notice can however be issued but that can be only in terms of provisions of Sections 29 & 30 of Act of 1960, which are necessarily required to be fulfilled and indicated in the notice itself. It has further been submitted that impugned notice even otherwise is barred by limitation indicated in the Act.

7. Learned State Counsel appearing on behalf of opposite parties have refuted the submissions advanced by learned counsel for petitioner on the basis of counter affidavit filed in the petition. It is submitted that the alleged second notice was in fact a fresh notice under Section 10(2) of Act of 1960 and was issued since petitioner was found to be in possession of the land recorded in the name of Smt. Sarswati Devi, alleged step mother of petitioner. It is submitted that considering aforesaid, notice had been issued to petitioner under provisions of Sections 5 and 30 of Act of 1960 and is therefore maintainable. It has been further submitted that impugned order has considered all the objections taken by petitioner and that the notice is perfectly legal and not barred by limitation. It has been further submitted that impugned proceedings have been initiated in pursuance of notice under Section 10(2) of Act of 1960 and is not a re-determination of surplus land under provisions of Section 13-A of Act of 1960. Even otherwise it is submitted that petition has been filed only against a show cause notice to which petitioner can very well submit reply and final decision may be taken by authorities concerned.

8. Considering the submissions advanced by learned counsel for the parties and upon perusal of record, it is apparent that the present petition has been filed against proceedings initiated against petitioner in terms of notice under section10(2) of Act of 1960 and which has been alleged by petitioner to be a second notice. Hon'ble the Supreme Court in the case of **Whirlpool Corporation v. Registrar of Trade Marks, Mumbai & others,** reported in (1998) 8 SCC 1 has clearly indicated the exceptions where writ petition is maintainable even despite availability of alternative remedy. Such exceptions being enforcement of fundamental rights, violation of principles of natural justice, where order or proceedings are without jurisdiction and where vires of an Act is challenged.

9. As such, it is quite evident that a show cause notice such as a notice under Section 10(2) of the Act can be adjudicated upon by this Court only in case a plea of jurisdiction or incompetence of authority concerned has been taken by petitioner.

10. In objections filed by petitioner to the said notice,it has been clearly stated tat he was earlier issued a notice under Section 10(2) of Act of 1960 which culminated in passing of final order dated 13.01.1975 whereby certain land in possession of

petitioner was declared surplus. It has been further stated in the objections that once earlier land belonging to petitioner has already been declared surplus,a second notice pertaining to same is not maintainable. A specific plea has also been taken that properties belonging to Smt. Sarswati Devi are separate and independent from the holdings of petitioner. As such, it is evident that the plea of jurisdiction and competence of the authorities concerned for issuance of impugned notices under Section 10(2) of Act of 1960 has been taken by petitioner. The same pleadings have also been reiterated in the present writ petition.

11. In view of aforesaid, the writ petition would be maintainable against impugned proceedings initiated pursuant to notice under under Section 10(2) of Act of 1960 particularly since objections filed by petitioner against the said notice have been rejected by means of impugned order.

12. In the counter affidavit, opposite parties have neither denied the fact that earlier notices under Section 10(2) of Act of 1960 were issued to petitioner nor is the fact that pursuant to earlier notices, land belonging to petitioner has been declared surplus by order dated 13.01.1975. In paragraph-6 of counter affidavit, however, it has been stated that a fresh notice under Section 10(2) of Act of 1960 was issued since petitioner was found to be in possession of land recorded in the name of Smt. Sarswati Devi and, therefore notice was issued in terms of Sections 5 and 30 of the Act.

13. A perusal of Sections 29 & 30 of Act of 1960 indicate that the provisions pertain to subsequent declaration of further land as surplus land and determination of surplus land regarding future acquisition respectively. The provisions of aforesaid sections are as follows:-

*"29. **Subsequent declaration of further land as surplus land** - Where after the date of enforcement of the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act, 1972,-*

(a) any land has come to be held by a tenure-holder under a decree or order of any court, or as a result of succession or transfer, or by prescription in consequence of adverse possession, and such land together with the land already held by him exceeds the ceiling area applicable to him; or

(b) any unirrigated land becomes irrigated land as a result of irrigation from a State irrigation work or any grove-land loses its character, as grove-land or any land exempted uader this Act ceases to fall under any of the categories exempted-- the ceiling area shall be liable to be re-determined and accordingly the provisions of this Act, except Section 16, shall mutatis mutandis apply."

***"30. Determination of surplus land regarding future acquisition** - (1) Where any land has become liable to be treated as surplus land under Section 29, the tenure-holder shall, within such period as may be prescribed, submit a statement to the Prescribed Authority in the form and in the manner laid down under Section 9 indicating in the statement the plot or plots which he would like to retain as a part of his ceiling area.*

(2) (a) Where the statement submitted under sub-section (1) is accepted by the Prescribed Authority, it shall proceed to determine the surplus land accordingly.

(b) Where a tenure-holder fails to submit a statement required to be submitted under sub-section (1) or submits an

incomplete or incorrect statement the Prescribed Authority shall proceed in the manner laid down under Section 10.

(c) The provisions of this Act in respect of declaration, acquisition, disposal and settlement of surplus land, shall mutatis mutandis, apply to surplus land covered by this section."

14. For the purposes of a fresh notice under Section 10(2) of Act of 1960 pertaining to subsequent declaration of further land as surplus land after the enforcement of Amendment Act of 1972, it is imperative that the land has come to be held by a tenure holder under a decree or order of any Court, or as a result of succession or transfer, or by prescription in consequence of an adverse possession, and such land together with the land already held by him exceeds the ceiling area applicable to him or that any other unirrigated land becomes irrigated land as a result of irrigation under certain conditions.

15. Once the said conditions of Section 29 are fulfilled, the provisions of Section 30 of the Act become applicable. From a perusal of aforesaid proceedings, it is clear that for issuance of a fresh notice under Section 10(2) of Act of 1960, the conditions stipulated under section 29 of Act of 1960 are compulsorily required to be fulfilled.

16. As a consequence, in the considered opinion of this Court while issuing a fresh notice under Section 10(2) of Act of 1960, prima facie subjective satisfaction of the authority is required to be recorded in the subsequent notice under Section 10(2) of Act of 1960 that either of the two conditions under Section 29 of the Act is fulfilled. A second or a fresh notice under Section 10(2) of Act of 1960 by the authority cannot be issued cursorily without adverting to the conditions for issuance of a fresh notice. Failure to adhere to mandatory statutory conditions under Section 29 of Act of 1960 would lead to arbitrariness at the behest of authorities concerned.

17. In the present case, it is apparent no such prima facie satisfaction has been recorded by the authority concerned as required under Section 29 of Act of 1960. Even the Prescribed Authority while rejecting petitioner's objections vide order dated 01.07.1991 has not at all adverted to the requirements for issuance of fresh notice under Section 10(2) of Act of 1960. In fact, the objections have been rejected by a virtually non-speaking order merely indicating the fact that petitioner is in possession of surplus land. No subjective satisfaction by the authority concerned has been recorded while passing the impugned order, which is unreasonable and arbitrary and therefore violative of Article 14 of the Constitution of India.

18. With regard to orders passed by the authorities concerned requiring reasoning, Hon'ble the Supreme Court in Kranti Associates (P) Ltd. & another v. Masood Ahmed Khan and others, reported in (2010) 9 SCC 496 has held that reasons are the soul of an order without which an order is clearly vitiated. The relevant portions of aforesaid decision are as follows:-

"47. Summarising the above discussion, this Court holds:

(a) In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.

(b) A quasi-judicial authority must record reasons in support of its conclusions.

(c) Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.

(d) Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.

(e) Reasons reassure that discretion has been exercised by the decision-maker on relevant grounds and by disregarding extraneous considerations.

(f) Reasons have virtually become as indispensable a component of a decision-making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.

(g) Reasons facilitate the process of judicial review by superior courts.

(h) The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the lifeblood of judicial decision-making justifying the principle that reason is the soul of justice.

(i) Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.

(j) Insistence on reason is a requirement for both judicial accountability and transparency.

(k) If a judge or a quasi-judicial authority is not candid enough about his/her decision-making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

(l) Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or ?rubber-stamp reasons? is not to be equated with a valid decision-making process.

(m) It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision-making not only makes the judges and decision-makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor [(1987) 100 Harvard Law Review 731-37] .)

(n) Since the requirement to record reasons emanates from the broad doctrine of fairness in decision-making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See Ruiz Torija v. Spain [(1994) 19 EHRR 553] EHRR, at 562 para 29 and Anya v. University of Oxford [2001 EWCA Civ 405 (CA)] , wherein the Court referred to Article 6 of the European Convention of Human Rights which requires, ?adequate and intelligent reasons must be given for judicial decisions?.

(o) In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of ?due process?.

19. Considering aforesaid facts, this Court reaches to a conclusion that the proceedings under challenge are violative of the mandatory conditions of Section 29 of Act of 1960 and is therefore unsustainable.

20. Consequently, impugned order dated 01.07.1991 as well as notice issued under Section 10(2) of Act of 1960 are hereby quashed by issuance of a writ in the nature of Certiorari.

21. In view of aforesaid, the writ petition succeeds and is **allowed**. Parties to bear their own costs.

(2022)03ILR A258
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.02.2022

BEFORE

THE HON'BLE MANISH MATHUR, J.

Writ C No. 3000130 of 1994

Kaushlendra Bahadur Singh ...Petitioner
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:
U.S. Sahai

Counsel for the Respondent:
C.S.C.

Civil Law - U.P. Imposition of Ceiling on land Holdings Act, 1960 - Sections 3, (14) & 4-A - Irrigated plot or unirrigated - Determination - For determination as to whether a particular agricultural plot was under irrigation or not u/s 4-A it is essential that there must be irrigation facility and decision regarding irrigation facility and growing of crops is required to be taken by the Prescribed Authority on the basis of Khasras for the years 1378 Fasli, 1379 Fasli and 1380 Fasli, along with the latest village map and such other records as it may consider necessary, and may also make local inspection where it is considered necessary - Local inspection as such is meant merely to be corroborative and cannot form the basis for determination of irrigated land (Para 11, 23)

In the instant case dispute was to whether plot no.347 could be held as irrigated or unirrigated land - disputed plot was held to be irrigated on the basis of statement of Lekhpal & the Lekhpal made said statement on the basis of alleged spot inspection - *Held* – In the impugned order there is nothing to indicate that the relevant revenue records i.e. Khasras for the said three years have been considered by the authority concerned - Such a basic activity not having been done by the authorities concerned renders the impugned orders against provisions of Section 4-A of Act of 1960 - Prescribed Authority could not have made local inspection and the statement of Lekhpal at best is merely corroborative - fact that two crops were shown to have been produced on the plot in question is also merely corroborative and has to be seen in juxtaposition with other aspects of the matters, particularly with regard to entries made in the Khasras of the relevant years- Impugned order set aside (Para 14, 24, 27)

Allowed. (E-5)

List of Cases cited :

1. St. of U.P. Vs D.J. & ors. 2007 4 AWC 3700 (Allahabad)

2. St. of U.P. through Collector Vs Mukh Ram Singh & anr. 1991 RD 312

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

1. Heard learned counsel for petitioner and Sri J.P. Maurya, learned Additional Chief Standing Counsel for opposite parties 1 to 3. No one has appeared on behalf of opposite parties 4 and 5.

2. Petition has been filed against order dated 26.02.1992 passed by the prescribed authority as well as order dated 03.08.1994 passed in appeal by the Additional Commissioner in terms of U.P. Imposition of Ceiling on land Holdings Act, 1960(hereinafter referred to as the Act of 1960).

3. Initially, the dispute pertained only to plots numbered 572, 576 & 347 and their being irrigated or unirrigated in terms of the provisions of Act of 1960.

4. The initially recorded tenure-holder was issued notices under Section 10(2) of Act of 1960 and in pursuance thereof, the Prescribed Authority vide order dated 27.02.1976 declared 65.108 acres of land of the tenure holder as surplus.

5. The order was challenged in appeal which was partly allowed vide order dated 27.08.1976. Against the aforesaid order, the original tenure holder filed Writ Petition No.3043 of 1976 which was allowed vide order dated 20.12.1978 remitting the matter to Prescribed Authority for a decision afresh. In pursuance thereof, vide order dated 25.07.1979 plots numbered 572 & 576 were held unirrigated but plot no.347 having an area of 23.557 acres was held to be irrigated. The Prescribed Authority was not inclined to accept the choice furnished by petitioner.

6. Order dated 25.07.1979 was thereafter challenged in appeal with submission that Plot No.347 was also unirrigated and that compliance of Section 4-A of Act of 1960 was not made. The said appeal was dismissed vide order dated 13.11.1979, which was thereafter challenged in Writ Petition No.1108 of 1980 which was allowed vide judgment and order dated 20.07.1984 again remanding the matter for consideration afresh by the appellate authority.

7. After remand, the Commissioner being the appellate authority thereafter again remitted the matter to the Prescribed Authority vide order dated 27.12.1988 whereafter impugned order dated 26.02.1992 was passed and has been upheld in appeal by impugned order dated 03.08.1994.

8. Learned counsel for petitioner submits that as of now the dispute pertains only to fact as to whether plot no.347 could be held as irrigated or unirrigated land not only in terms of remand order but also in terms of the provisions of Act of 1960 and also explanation of choice. It is submitted that in terms of Section 4-A of Act of 1960, determination of irrigated land is to be made only after examination of relevant revenue records such as *Khasras* for the years 1378 *Fasli*, 1379 *Fasli* and 1380 *Fasli*, which can be said to be the only authoritative documents to indicate whether a particular agricultural plot was under irrigation or not. It is submitted that while passing impugned orders, the authorities in question have not only ignored the provisions of Section 4-A of Act of 1960 but also the remand order of this Court specifically directing the concerned authorities to pass appropriate orders only after examination of the revenue records such as *Khasras*. It is also submitted that impugned orders have been passed purely on conjectures and surmises without any substance and also while brushing aside specific assertions made by petitioner. It is submitted that despite direction of this Court for examination of revenue records, a bare perusal of impugned orders will make it evident that relevant revenue records

such as *Khasras* have not been examined by the concerned authorities. It is also submitted that the omission on part of the authorities was despite the fact that petitioner had submitted relevant extracts of *Khasras* for the said three years according to which the disputed property was shown to be unirrigated.

9. Sri J.P. Maurya, learned Additional Chief Standing Counsel for the opposite parties refuting the submissions advanced by learned counsel for petitioner has submitted that the impugned orders have been passed in keeping with the provisions of Section 4-A of Act of 1960 as well as remand order of this Court. It is submitted that the authorities have clearly recorded a finding that abutting agricultural plots had their private irrigation work completed before 15.08.1972 and that the disputed plot was within the effective command area of the said plots in terms of explanation I to Section 4-A of Act of 1960. It is submitted that the authorities also considered the spot inspection report and the statement of Lekhpal concerned for arriving at the conclusion. It is submitted that there was no deviation effected by the authorities with regard to provisions of Section 4-A of Act of 1960 or the remand order.

10. Upon consideration of submissions advanced by learned counsel for the parties and perusal of record, it is apparent that the relevant revenue extracts such as *Khasras* for the relevant years are not on record of the proceedings of this Writ Petition However, the appellate authority in its order has indicated that the petitioner had brought the extracts of relevant *Khasras* for the said three years on record of the proceedings of appeal.

11. For the said purposes of determination of agricultural plot to be irrigated, the provisions of Section 4-A is relevant in which it has been specifically stated that the prescribed authority shall examine the relevant *Khasras* for the years 1378 *Fasli*, 1379 *Fasli* and 1380 *Fasli* along with the latest village map and such other records as it may consider necessary, and may also make local inspection where it is considered necessary The provisions of Section 4-A of Act of 1960 are as follows:-

"4A. Determination of irrigated land. *- The prescribed authority shall examine the relevant Khasras for the years 1378 Fasli, 1379 Fasli and 1380 Fasli, the latest village map and such other records as it may consider necessary, and may also make local inspection where it considers necessary and thereupon if the prescribed authority is of opinion :-*

firstly, (a) that, irrigation facility was available for any land in respect of any crop in any one of the aforesaid years; by -

(i) any canal included in Schedule NO. 1 of irrigation rates notified in Notification No. 1579-W/XXIII-62-W-1946, dated March 31, 1953, as amended from time to time; or

(ii) any lift irrigation canal; or

(iii) any State tube-well or a private irrigation work; and

(b) that at least two crops were grown in such land in any one of the aforesaid years; or

secondly, that irrigation facility became available to any land by a State Irrigation Work coming into operation subsequent to the enforcement of the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act, 1972, and at least two crops were grown in such land in any agricultural year between the date of

such work coming into operation and the date of issue of notice under Section 10; or

thirdly, (a) that any land is situated within the effective command area of a lift irrigation canal or a State tube-well or a private irrigation work; and

(b) that the class and composition of its soil is such that it is capable of growing at least two crops in an agricultural year; then the Prescribed Authority shall determine such land to be irrigated land for the purposes of this Act.

Explanation I. - For the purposes of this section the expression' effective command area' means an area, the farthest field whereof in any direction was irrigated -

(a) in any of the years 1378 Fasli, 1379 Fasli and 1380 Fasli; or

(b) in any agricultural year referred to in the clause 'secondly'.

Explanation II. - The ownership and location of a private irrigation work shall not be relevant for the purpose of this section.

Explanation III. - Where sugarcane crop was grown on any land in any of the years 1378 Fasli, 1379 Fasli and 1380 Fasli, it shall be deemed that two crops were grown on it any of these years, and that the land is capable of growing two crops in an agricultural year."

12. Since the impugned orders have been passed after remand by this Court, necessarily the impugned orders are bound to be proscribed by the conditions of remand as indicated by this Court in its judgment and order dated 20.07.1984.

13. The said remand order clearly indicates that the Prescribed Authority has failed to examine the relevant *Khasras* for the three years indicated herein above in terms of Section 4-A of Act of 1960. The primary purpose of examination of relevant revenue record such as *Khasras* for the said three years is relevant primarily on account of fact that they record the fact of the plot in question to be irrigated or otherwise. The said indication in the *Khasras* is supposed to be conclusive proof, subject to rebuttal by evidence. It is for this reason that this court while passing the earlier order of remand had made a specific direction to authorities concerned to examine the *Khasras* for the relevant years.

14. However, on examination of impugned order passed by the Prescribed Authority as well as order passed by appellate authority, there is nothing to indicate that the relevant revenue records such as *Khasras* for the said three years have been considered by the authority concerned. Such a basic activity not having been done by the authorities concerned renders the impugned orders not only against provisions of Section 4-A of Act of 1960 but also against the terms of the remand order of this court dated 20.07.1984.

15. It is also seen from a perusal of impugned order passed by Prescribed Authority that Plot No.347 has been taken to be irrigated on account of the fact that a neighbouring Gata no.369 had its private irrigation system installed prior to cut off date i.e. 15.08.1972. It is on this basis that the Prescribed Authority has recorded a finding that since Plot No.347 comes within the effective command area of Pot No.369, it therefore could be held to be irrigated.

16. With regard to aforesaid reasoning of the Prescribed Authority, it is clear that the term 'private irrigation work' has been defined in Section 3(14) of Act of 1960 and

means a private tube-well, or a private lift irrigation work operated by diesel or electric power for the supply of water from a perennial water source, completed before August 15, 1972

17. Expression ' effective command area' has been defined in explanation (I) to Section 4-A of Act of 1960 and means an area, the farthest field whereof in any direction **was** irrigated in any of the three years 1378 *Fasli*, 1379 *Fasli* and 1380 *Fasli*; or in any agricultural year referred to in the clause 'secondly'. Explanation II states that the ownership and location of a private irrigation work shall not be relevant for the purpose of this section.

18. From a conjoint reading of Section 3(14) and Explanation I to Section 4-A of Act of 1960, it is evident that for an agricultural plot to come within the effective command area of a private irrigation work, it is necessary that the farthest field was irrigated in any of the three *Fasli* years referred to herein above or in any agricultural year whereof the irrigation facility became available to any land by a State irrigation work coming into operation subsequent to enforcement of the amendment Act of 1972 and where at least two crops were grown in such land in any agricultural year between the date of such work coming into operation and the date of issue of notice under Section 10.

19. For the purposes of Explanation I and determination of effective command area, it is thus imperative that the relevant revenue record such as Khasra for the said three years should be examined since, in the present case, it is not the contention of the opposite parties that any State irrigation work came into operation and was effective over the plot in question.

20. From a perusal of the provisions of the Act, it is thus clear that the authorities concerned should have taken into account the relevant records such as *Khasras* for the aforementioned three years. That apparently was also the basis of remand order of this Court dated 20.08.1984. As would be evident from the impugned orders, the authorities having not examined the Khasra for the three years clearly vitiates the impugned orders on that score alone, particularly when extracts of *Khasras* have already been brought on record in proceedings of appeal as evident from the appellate order.

21. A reading of the impugned orders will also make it evident that the disputed plot has been held to be irrigated on the basis of statement of Lekhpal. Much emphasis has been laid by the authorities on the statement made by the Lekhpal to the effect that the plot in question was irrigated. The Lekhpal in turn has made a statement on the basis of alleged spot inspection that was carried out.

22. Learned State counsel has also emphasized the fact that the impugned orders have been passed taking into account the spot inspection which could have been resorted to in terms of Section 4-A of Act of 1960.

23. It is no doubt correct that Section 4-A of Act of 1960 leaves a discretion upon the authorities concerned to direct local inspection to be made wherever it considers necessary. However, it is also apparent from a reading of Section 4-A of Act of 1960 that it is the statutory mandate that the Prescribed Authority is first required to examine the relevant *Khasras* for the said three years. Local inspection as such is meant merely to be corroborative and

cannot form the basis for determination of irrigated land, keeping in view the specific provisions of Section 4-A of Act of 1960. Thus, the Prescribed Authority could not have made local inspection and the statement of Lekhpal at best is merely corroborative.

24. It is also evident from a perusal of order passed by the Prescribed Authority that the petitioner had raised a specific plea that although plot no.369 may be irrigated but it is not on the same plane as plot no.347 which is on a higher plane than plot no.369. Although the Prescribed Authority had noted such objections in the order but has not specifically dealt with such a pleading and has merely rejected the same on the ground that it is not borne out by the statement of Lekhpal.

25. The aspect of matter whether a plot can be held to be irrigated or otherwise under Section 4-A of Act of 1960 has been dealt with by a judgment of this Court in **State of U.P. v. District Judge** and others reported in 2007 4 AWC 3700 (Allahabad) in which it has been held that for determination of irrigated land under Section 4-A of Act of 1960, it is essential that there must be irrigation facility and decision regarding irrigation facility and growing of crops is required to be taken on the basis of *Khasras* of 1378 to 1380 *Faslis*. It is held that for the aforesaid determination, the examination of the said *Khasras* is imperative since there is a specific column indicating the source of irrigation.

26. Similar is the view taken in the decision of this Court in **State of U.P. through Collector v. Mukh Ram Singh and another** reported in 1991 RD 312 whereunder it has been held that simply because there are two tube-wells near the disputed plot, it cannot be held that in view of Section 4-A and clause thirdly of that Section, to record that it is an irrigated plot unless and until there is a finding based on appreciation of evidence including entries in *Khasras* that it come within the zone of command area.

27. While passing the impugned orders, the authorities have also placed reliance on the fact that two crops were shown to have been produced on the plot in question. Much reliance has been placed on the aforesaid aspect. However upon reading of Section 4-A of Act of 1960, it is evident that the said factor is also merely corroborative and has to be seen in juxtaposition with other aspects of the matters, particularly with regard to entries made in the *Khasras* of the relevant years.

28. In view of the fact that the impugned orders having been passed against the dictum of this Court vide judgment dated 20.07.1984 and the provisions of Section 4-A of Act of 1960, are clearly vitiated and are therefore set aside only with regard to findings pertaining to Gata no.347 situate in Village Indur, P.O. Fakarpur, Tehsil Kaisharganj, District Bahraich by issuance of a writ in the nature of Certiorari.

29. The writ petition consequently stands **allowed.** Parties to bear their own costs.

(2022)03ILR A263
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.02.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE MOHD. ASLAM, J.

Criminal Misc. Appl. Defective u/s 372 Cr.P.C. (Leave To Appeal) No. 14 of 2016

Toofani ...Appellant

Versus

State of U.P. & Ors. ...Opposite Parties

Counsel for the Appellant:
Sri Baijant Kumar Mishra

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

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 372 - No appeal to lie unless otherwise provided - appeal against acquittal - Indian Penal Code, 1860 - Sections 147, 148, 302 & 302/149, The Limitation Act,1963 - Section 5 - "victim" is entitled to prefer appeal in respect of any type of order referred to in the proviso to Section 372 if such order has been passed on or after 31-12-2009 irrespective of the date of registration of FIR or the date of occurrence etc. - significant date is the date of the order of acquittal passed by the Trial Court - cause of action arises in favour of the victim of an offence only when an order of acquittal is passed - if that happens after 31.12.2009 victim has a right to challenge the acquittal, through an appeal - right not only extends to challenging the order of acquittal but also challenging the conviction of the accused for a lesser offence or imposing inadequate compensation. (Para - 8)

Appeal against acquittal order - delay condonation application - Misc. Application for granting leave to appeal - Stamp Reporter reported appeal beyond time by 5172 days - appeal before Court beyond time by 5173 days - maintainability - judgment of the year 2002 i.e. 11.01.2002 - proviso to Section 372 CrPC not in force - enforced w.e.f. 31.12.2009 - after 14 years of impugned judgment - even after 7 years of the amendment having been enforced - approached Court - with an application for granting to leave.(Para - 2,3,4,7,9)

HELD:-Present appeal dismissed as not maintainable. Provision of Section 5 of Limitation Act , not available to the appellant . Appears to be a meaningless attempt on the part of the appellant to file this appeal by invoking the provision of Section 5 of Limitation Act .Grounds narrated in the affidavit filed in support of delay condonation application under Section 5 of Limitation Act, are not sufficient to condone such huge delay.(Para - 9)

Appeal dismissed. (E-7)

List of Cases cited:-

Mallikarjun Kodagali Vs St. of Karn. &ors. , (2019) 2 SCC 752 (3 Judges)

(Delivered by Hon'ble Vivek Kumar Birla, J.
&
Hon'ble Mohd. Aslam, J.)

1. Heard Sri Baijant Kumar Mishra, learned counsel for the appellant and learned A.G.A. Sri Ratan Singh through video conferencing.

2. The present appeal has been filed against the acquittal order dated 11.01.2002 passed by Additional Sessions Judge, Court No.7, Deoria in Sessions Trial No.94 of 1992 (State vs. Yogendra and others) arising out of Case Crime No.150 of 1991, under Sections 147, 148, 302, 302/149 IPC P.S. Vishunpura District Doeria now Kushinagar.

3. The present appeal has been filed along with delay condonation application filed under Section 5 of Limitation Act as well as along with a Misc. Application for granting leave to appeal under Section 372 CrPC.

4. The Stamp Reporter has reported this appeal beyond time by 5172 days and on the date of presenting this appeal before this Court which was beyond time by 5173 days.

5. Learned counsel for the appellant has submitted that appeal filed at the instance of the informant would be maintainable under Section 372 CrPC in

view of the amendment inserted by Act No.5 of 2009 w.e.f. 31.12.2009. Learned counsel for the appellant has drawn the attention of this Court towards Section 372 CrPC which is quoted as under:-

"372. No appeal to lie unless otherwise provided.--No appeal shall lie from any judgment or order of a criminal court except as provided for by this Code or by any other law for the time being in force:

Provided that the victim shall have a right to prefer an appeal against any order passed by the court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the court to which an appeal ordinarily lies against the order of conviction of such court."

6. Learned counsel for the appellant has submitted that the delay was for the reason that in the year 2002 the appellant was suffering from poor health and he could not approach his local counsel, when he was feeling quite well he approached his counsel, then he got information that a State appeal will be filed by the State. Thereafter, the appellant went outside of house for earning livelihood and when he came to Allahabad in the march, 2016 for his personal work, then he got information that State appeal was not filed and therefore, there is a delay in filing the present appeal.

7. We have asked the learned counsel for the appellant as to how this appeal would be maintainable as the judgment is of the year 2002 i.e. 11.01.2002, when the proviso to Section 372 CrPC, quoted above, was not in force which was enforced w.e.f. 31.12.2009. It is submitted by learned counsel for the appellant that the appellant is the informant and therefore, he could have challenged the aforesaid judgment in view of the aforesaid proviso.

8. Before proceeding further it would be relevant to take note of the judgment of Supreme Court in **Mallikarjun Kodagali vs. State of Karnataka and others, (2019) 2 SCC 752 (3 Judges)**, paragraphs 9, 24, 26, 27, 45, 46, 47, 48, 50, 51 and 72 whereof are quoted as under:-

"9. With this background, we need to consider the questions that arise before us consequent to the introduction of the proviso to Section 372 CrPC with effect from 31-12-2009. The questions are somewhat limited: Whether a "victim" as defined in CrPC has a right of appeal in view of the proviso to Section 372 CrPC against an order of acquittal in a case where the alleged offence took place prior to 31-12-2009 but the order of acquittal was passed by the Trial Court after 31-12-2009? Our answer to this question is in the affirmative. The next question is: Whether the "victim" must apply for leave to appeal against the order of acquittal? Our answer to this question is in the negative.

x x x x x

24. Feeling aggrieved by the decision of the High Court, the National Commission for Women preferred a petition for special leave to appeal admittedly invoking the inherent powers of this Court. In that context this Court held that in view of Section 372 CrPC no appeal shall lie from a judgment or order by a criminal court except as provided by CrPC or by any other law which authorises an appeal. The proviso to Section 372 CrPC gives a limited right to the victim to file an

appeal in the High Court against any order of a criminal Court acquitting the accused or convicting him for a lesser offence or the imposition of inadequate compensation. This Court then observed as follows:(National Commission for Women v. State (NCT of Delhi), (2010) 12 SCC 599 p.603, para 8)

"8. ...The proviso may not thus be applicable as it came in the year 2009 (long after the present incident) and, in any case, would confer a right only on a victim and also does not envisage an appeal against an inadequate sentence."

x x x x x

26. The thrust of the decision of this Court, which appears to have been misunderstood by the High Court, is with regard to entertaining a petition under Article 136 of the Constitution by a third party. As far as criminal matters are concerned, this Court undoubtedly held that permitting a third party to prefer a petition under Article 136 of the Constitution would be dangerous and would cause confusion. The reasoning of this Court was not directed towards the proviso to Section 372 CrPC. It is only in passing that this Court observed that on the facts of the case, the proviso to Section 372 CrPC might not be applicable since it came into the statute book after the incident.

27. The decision of this Court in National Commission for Women is quite clearly distinguishable and reliance on this decision by the High Court is inapposite.

x x x x x

45. With regard to the second question, the High Court concluded that the right to appeal is a substantive right. Consequently, the inescapable conclusion would be that the right to appeal given to a victim would be prospective and enforceable with effect from 31-12-2009 only. This would be irrespective of the date of registration of the FIR or the date of the occurrence. The High Court held as follows:(Tata Steel v. Atma Tube Products Ltd., 2013 SCC OnLine P & H 5834 para 126)

"126. Since right to appeal is a substantive right and it cannot be inferred by implication unless the Statute expressly provides so, the only inescapable conclusion would be to hold that the right to appeal given to a "victim" under proviso to Section 372 of the Code is prospective and has become enforceable w.e.f. 31-12-2009 only. A "victim" is entitled to prefer appeal in respect of any type of order referred to in the proviso to Section 372 if such order has been passed on or after 31-12-2009 irrespective of the date of registration of FIR or the date of occurrence etc. To be more specific, it is clarified that it is the date of passing of the order to be appealed from and not any other fact situation, which shall determine the right to appeal of a "victim". As a corollary thereto, it is held that the remedy availed by a "victim" including revision petition against acquittal of the accused by an order passed before 31-12-2009, cannot be converted into an appeal under proviso to Section 372 and it shall have to be dealt with in accordance with the parameters settled for exercising revisional jurisdiction by a superior court."

46. The Full Bench of the Delhi High Court also considered this issue in Ram Phal v. State 2015 SCC OnLine Del 9802. The

question considered by the Delhi High Court was: SCC Online Del para 3)

"3.(b) Whether the appellate remedy under the proviso to Section 372 CrPC is available with respect to only such offences which were committed as on the date when the appellate right was conferred by law or the appellate right would be available with respect to the date of the decision or the appellate remedy is without any reference to the two points of time i.e. the date when the offence was committed or when the appellate right was conferred by law, (Act No.5 of 2009 with effect from 31.12.2009)?"

47. While answering the question, the Delhi High Court referred to Tata Steel decided by the Punjab & Haryana High Court. The Delhi High Court referred to the conclusion that: (Ram Phal case para 56)

"56. ...a "victim" is entitled to prefer appeal in respect of any type of order referred to in the proviso to Section 372 if such order has been passed on or after 31-12-2009 irrespective of the date of registration of FIR or the date of occurrence etc."

48. Reference was also made to the Division Bench of the Patna High Court in Parmeshwar Mandal v. State of Bihar, 2013 SCC Online Pat 602 and parts of the following passages were referred to and relied upon. It was said in Parmeshwar Mandal:

"23. Proviso to Section 372 of the Code is in two parts. First clause of the said proviso begins with "provided that' and ends with "Inadequate compensation' and creates a right in the victim to prefer appeal against any order passed by a court either (i) acquitting the accused or (ii) convicting for a lesser offence or (iii) imposing inadequate compensation. Thereafter, by inserting conjunction "and', another clause has been added in the same sentence by which forum for preferring such appeal has been identified, which relates to procedural part of law. Thus, the said proviso contains both substantive part, creating right in the victim to prefer an appeal, and procedural part, by identifying the forum for filing such an appeal. It is not in dispute that the substantive part of law operates prospectively, unless made retrospective, and the procedural part is presumed to be retrospective within its defined limits.

x x x x x

25. ...The Central Government, by Notification No. S.O. 3313(E) dated 30-12-2009, appointed 31st day of December 2009, as the date for the Act. 5 of 2009 to come into force, which was published in Gazette of India, Ext., Pt.II, S.3(ii), dated 30-12-2009. Hence, in absence of any express intention notified by the Legislature to the contrary, it has to be concluded that the right of victim, to prefer an appeal in terms of said proviso to Section 372, became available to the victim(s) of all cases in which orders were passed by any criminal court acquitting the accused or convicting him for a lesser offence or imposing inadequate compensation, on or after 31st of December, 2009. In other words, date of judgment of a criminal court has to be necessarily treated as the relevant date for applying the test of maintainability of appeal by the victim under three contingencies laid down under the proviso to Section 372 of the Code, irrespective of

the date of occurrence, institution of the case, cognizance or commitment."

50. The Full Bench of the Rajasthan High Court in Baldev Sharma v. Gopal 2017 SCC Online Raj 3005 considered (amongst others) the following two questions:

"1. (i) Whether the proviso to Section 372 as introduced by the amending Act No. 5 of 2009 which has been brought into effect on 31.12.2009 can be given effect to in cases where the offence occurred prior to 31.12.2009 and thereby given the right of appeal to the victim in the event; (a) whether the court below has acquitted the accused or (b) has convicted the accused for a lesser offence or (c) has imposed inadequate compensation. Though the judgment in such cases may have been passed by the court below after 31.12.2009.

(ii) Whether the appeal by the victim under proviso to Section 372 is also required to be dealt with in the same manner as an appeal filed by the State under Section 378 Cr.P.C. and the provisions of Section 378 are required to be read into the provisions of Section 372 Cr.P.C. with regard to appeals filed by the victims."

51. It was held, relying upon the same passages in Tata Steel and Parmeshwar Mandal that "judgments passed on or after the said date 31-12-2009 are the ones in respect whereto, irrespective of the date of the offence, the victim can avail the right to file an application seeking leave to appeal."

x x x x x

72. What is significant is that several High Courts have taken a consistent view to the effect that the victim of an offence has a right of appeal under the proviso to Section 372 CrPC. This view is in consonance with the plain language of the proviso. But what is more important is that several High Courts have also taken the view that the date of the alleged offence has no relevance to the right of appeal. It has been held, and we have referred to those decisions above, that the significant date is the date of the order of acquittal passed by the Trial Court. In a sense, the cause of action arises in favour of the victim of an offence only when an order of acquittal is passed and if that happens after 31.12.2009 the victim has a right to challenge the acquittal, through an appeal. Indeed, the right not only extends to challenging the order of acquittal but also challenging the conviction of the accused for a lesser offence or imposing inadequate compensation. The language of the proviso is quite explicit, and we should not read nuances that do not exist in the proviso."

9. It is not in dispute that the impugned judgment is of the year 2002. We are not satisfied with the argument of the learned counsel for the appellant as the amendment has brought into force and statutory right in favour of the victim was granted by way of amendment under Section 372 CrPC w.e.f. 31.12.2009 and prior to that amendment, in State case only the State Government could have filed the appeal that too along with an application for granting leave to appeal. The appellant at the time of passing of the impugned judgment could have at the most challenged the order by filing criminal revision which right was admittedly not exercised by the appellant. It is after 14 years of the impugned judgment and even

after 7 years of the amendment having been enforced, he approached this Court by filing delay condonation application along with an application for granting to leave. It is not in dispute that in view of the judgment of the Hon'ble Apex Court in Mallikarjun Kodagali (supra), the appeal can be filed in the light of proviso to Section 372 CrPC and there is no requirement to file an application to grant leave to appeal. However, this provision was not in force in the year 2002 as there is no specific provision that this amendment is retrospective in nature. Therefore, in the opinion of the Court, the present appeal would not be maintainable and accordingly, the same is dismissed as not maintainable. We find that provision of Section 5 of Limitation Act is, therefore, not available to the appellant and in fact, this appears to be a meaningless attempt on the part of the appellant to file this appeal by invoking the provision of Section 5 of Limitation Act. As we find that the appeal itself is not maintainable and the grounds narrated in the affidavit filed in support of delay condonation application under Section 5 of Limitation Act need not be looked into, which, in any case, are not sufficient to condone such huge delay.

10. Accordingly, the appeal stands dismissed as not maintainable.

(2022)03ILR A269
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.02.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE SUBHASH VIDYARTHI, J.

Criminal Misc. Appl. u/s 372 Cr.P.C.
(Leave To Appeal) No. 150 of 2014

Shriniwas ...Appellant

Versus

State of U.P. & Ors. ...Opposite Parties

Counsel for the Appellant:
Sri Bharat Singh

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

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 384 - Summary dismissal of appeal - Section 378 (3) - No appeal to the High Court under sub-section (1) or sub section (2) shall be entertained except with the leave of the High court , Section 372 - No appeal to lie unless otherwise provided - appeal against acquittal - Indian Penal Code, 1860 - Sections 302, 34 - circumstantial evidence - if two views are possible, the High Court ought not to interference with the trial court's judgment - there is no bar High Court's power to reappreciate evidence in an appeal against acquittal - leave application filed under Section 378(3) Cr.P.C. is not required in the appeal filed by the victim under Section 372 Cr.P.C. .(Para - 2,11)

(B) Criminal Law - The Code of criminal procedure, 1973 - while dealing with a judgment of acquittal, appellate court has to consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial Court were perverse or otherwise unsustainable - Appellate court is entitled to consider whether in arriving at a finding of fact, trial Court had failed to take into consideration admissible evidence and/or had taken into consideration the evidence brought on record contrary to law.(Para - 10)

Appeal against order of acquittal - deceased (practising doctor) went on daily routine - not returned home on time - son and brother (deceased) went on searching - found dead body in filed - FIR reggistered against unknown person - judgement of acqittal - grounds - witnesses of fact - not seen the incident - darati, the weapon used in the incident -

recovered on pointing out - recovered after more than two months .(Para - 1 to 7)

HELD:-It is a case of circumstantial evidence, where the chain of circumstances were not so complete so as to arrived at the conclusion that the accused persons have committed the offence by using the weapon allegedly recovered. Motive attributed is extremely weak . Findings recorded by the trial court are not perverse in nature . No interference by Court in exercise of the powers under Section 384 Cr.P.C.. Trial court has taken possible view of the matter on appreciation of the evidence . No interference in the judgment of trial court. (Para - 15,16,17)

Appeal dismissed. (E-7)

List of Cases cited:-

1. Babu Vs St. of Kerala (2010) 9 SCC 189 : (2010) 3 SCC (Cri) 1179

2. Achhar Singh Vs St. of H.P. (2021) 5 SCC 543

3. Anwar Ali & anr. Vs St. of H.P. (2020) 10 SCC 166

(Delivered by Hon'ble Vivek Kumar Birla, J.
&
Hon'ble Subhash Vidyarthi, J.)

1. Heard Sri Bharat Singh, learned counsel for the appellant-applicant and Sri Ratan Singh, learned A.G.A. appearing for the State.

2. As already held by this Court in number of cases that leave application filed under Section 378(3) Cr.P.C. is not required in the appeal filed by the victim under Section 372 Cr.P.C. like the present appeal. A reference may be made to the order dated 4.8.2021 passed in Criminal Appeal U/S 372 Cr.P.C. No. 123 of 2021 (Rita Devi vs. State of U.P. and another). As such, the application for leave to appeal stands rejected as not maintainable and / or not required.

3. This appeal has been filed against the order dated 18.2.2014 passed by the Additional Sessions Judge, Court No. 8, Badaun acquitting the respondent nos. 2, 3 and 4 in Session Trial No. 917 of 2011 (State v. Monu Singh and others) arising out of Case Crime No. 539 of 2011, under Sections 302, 34 IPC, P.S. Wazeerganj, District Badaun.

4. According to the first information report the deceased Ramniwas, who was practising as a Doctor in the clinic of Hariom, on 17.5.2011 at about 11:00 A.M. went to Katgaon on daily routine and at about 9:00-10:00 P.M. son (Anil) of the deceased called the brother (deceased) of the informant and asked for coming home and the deceased informed that he is coming shortly. When at about 10:00 P.M. the deceased did not reach home the informant and Anil went out for searching him. At about 02:00 A.M. they found dead body of the deceased in the field of Babu Singh on the side of road. First information report was registered against unknown persons as Case Crime No. 539 of 2011, under Sections 302, 34 IPC., P.S. Wazeerganj, District Badaun.

5. In support of prosecution case P.W.-1 Sriniwas Sharma (informant), P.W.-2 Smt. Ramsukhi, P.W.-3 S.I. Devi Dayal (Chik Lekhak), P.W.-4 S.I. Mahesh Prasad (Investigating Officer), P.W.-5 S.I. Rameshwar Dayal, P.W.-6 Dr. R.K. Verma, P.W.-7 S.I. Vijaypal Singh were produced.

6. Judgment of acquittal was passed by the trial court on the grounds that although P.W.-1 and P.W.-2 are witnesses of fact but admittedly, they have not seen the incident. They have stated only to the extent that the dead

body was found in a field when they had gone out to search the deceased. P.W.-1, Sriniwas Sharma, is the brother of the deceased and P.W-2 is the wife of the deceased. P.W.-2, Smt. Ramsukhi, has stated that her son had called his father and he stated that he is coming home shortly, however, he did not come and when the deceased did not reach home P.W.-1 had gone out with his nephew (Anil) to search him and the dead body of the deceased was found in a field. Although it is alleged that the darati, the weapon used in the incident, was recovered on pointing out of Narendra Singh (one of the accused), however, it was found that the incident was dated 17.5.2011, whereas the weapon was recovered after more than two months on 19.7.2011 and even the F.S.L. report had mentioned that it cannot be ascertained that there was human blood on the weapon used, therefore, it was held that this being case of circumstantial evidence and there was no cogent evidence to complete the chain of circumstances so as to hold that the crime was committed by the accused and none else.

7. Challenging the impugned judgment of acquittal submission of learned counsel for the appellant is that P.W.-1 in his statement had clearly stated that when he had gone out in search of the deceased he had seen the accused persons coming from the side of the spot, where the dead body was found and this clearly connects the accused persons with the offence. It was further pointed out that even the weapon used in the incident was recovered on pointing out of Narendra Singh. Submission, therefore, is that the impugned judgment is liable to be set aside and the accused persons are liable to be convicted in the present case.

8. We have considered the submissions and have perused the record.

9. Before proceeding further it would be appropriate to take note of the law laid down by Supreme Court on the issue involved.

10. In the case of **Babu vs. State of Kerala (2010) 9 SCC 189 : (2010) 3 SCC (Cri) 1179,** the Hon'ble Apex Court has observed that while dealing with a judgment of acquittal, the appellate court has to consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial Court were perverse or otherwise unsustainable. The appellate court is entitled to consider whether in arriving at a finding of fact, the trial Court had failed to take into consideration admissible evidence and/or had taken into consideration the evidence brought on record contrary to law. Paragraphs 12 to 19 of the aforesaid judgment are quoted as under:-

"12. This court time and again has laid down the guidelines for the High Court to interfere with the judgment and order of acquittal passed by the Trial Court. The appellate court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be more, the probable one. While dealing with a judgment of acquittal, the appellate court has to consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial Court were perverse or otherwise unsustainable. The appellate court is entitled to consider whether in arriving at a finding of fact, the trial Court had failed to take into consideration admissible evidence and/or had taken into consideration the evidence

brought on record contrary to law. Similarly, wrong placing of burden of proof may also be a subject matter of scrutiny by the appellate court. (Vide Balak Ram v. State of U.P. AIR 1974 SC 2165; Shambhoo Missir & Anr. v. State of Bihar AIR 1991 SC 315; Shailendra Pratap & Anr. v. State of U.P. AIR 2003 SC 1104; Narendra Singh v. State of M.P. (2004) 10 SCC 699; Budh Singh & Ors. v. State of U.P. AIR 2006 SC 2500; State of U.P. v. Ramveer Singh AIR 2007 SC 3075; S. Rama Krishna v. S. Rami Reddy (D) by his LRs. & Ors. AIR 2008 SC 2066; Arulvelu & Anr. Vs. State (2009) 10 SCC 206; Perla Somasekhara Reddy & Ors. v. State of A.P. (2009) 16 SCC 98; and Ram Singh alias Chhaju v. State of Himachal Pradesh (2010) 2 SCC 445).

13. In Sheo Swarup and Ors. King Emperor AIR 1934 PC 227, the Privy Council observed as under:

"...the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses...."

14. The aforesaid principle of law has consistently been followed by this Court. (See: Tulsiram Kanu v. The State AIR 1954 SC 1; Balbir Singh v. State of Punjab AIR 1957 SC 216; M.G. Agarwal v. State of Maharashtra AIR 1963 SC 200; Khedu Mohton & Ors. v. State of Bihar AIR 1970 SC 66; Sambasivan and Ors. State of Kerala (1998) 5 SCC 412; Bhagwan Singh and Ors. v. State of M.P. (2002) 4 SCC 85; and State of Goa v. Sanjay Thakran and Anr. (2007) 3 SCC 755).

15. In Chandrappa and Ors. v. State of Karnataka (2007) 4 SCC 415, this Court reiterated the legal position as under:

"(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 curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be

presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

16. In Ghurey Lal v. State of Uttar Pradesh (2008) 10 SCC 450, this Court re-iterated the said view, observing that the appellate court in dealing with the cases in which the trial courts have acquitted the accused, should bear in mind that the trial court's acquittal bolsters the presumption that he is innocent. The appellate court must give due weight and consideration to the decision of the trial court as the trial court had the distinct advantage of watching the demeanour of the witnesses, and was in a better position to evaluate the credibility of the witnesses.

17. In State of Rajasthan v. Naresh @ Ram Naresh (2009) 9 SCC 368, the Court again examined the earlier judgments of this Court and laid down that an "order of acquittal should not be lightly interfered with even if the court believes that there is some evidence pointing out the finger towards the accused."

18. In State of Uttar Pradesh v. Banne alias Baijnath & Ors. (2009) 4 SCC 271, this Court gave certain illustrative circumstances in which the Court would be justified in interfering with a judgment of acquittal by the High Court. The circumstances includes:

i) The High Court's decision is based on totally erroneous view of law by ignoring the settled legal position;

ii) The High Court's conclusions are contrary to evidence and documents on record;

iii) The entire approach of the High Court in dealing with the evidence was patently illegal leading to grave miscarriage of justice;

iv) The High Court's judgment is manifestly unjust and unreasonable based on erroneous law and facts on the record of the case;

v) This Court must always give proper weight and consideration to the findings of the High Court;

vi) This Court would be extremely reluctant in interfering with a case when both the Sessions Court and the High Court have recorded an order of acquittal.

A similar view has been reiterated by this Court in Dhanapal v. State by Public Prosecutor, Madras (2009) 10 SCC 401.

19. Thus, the law on the issue can be summarised to the effect that in exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial Court's acquittal bolsters the presumption of his innocence. Interference in a routine manner where the other view is

possible should be avoided, unless there are good reasons for interference."

11. In **Achhar Singh vs. State of Himachal Pradesh (2021) 5 SCC 54**3 reiterating the law, Supreme Court held that it is fundamental in criminal jurisprudence that every person is presumed to be innocent until proven guilty and it is obligatory on the prosecution to establish the guilt of the accused save where the presumption of innocence has been statutorily dispensed with, for example, under Section 113-B of the Evidence Act, 1872. It was further held that it is well crystallized principle that if two views are possible, the High Court ought not to interference with the trial court's judgment. However, such a precautionary principle cannot be overstretched. It is well settled that there is no bar High Court's power to reappreciate evidence in an appeal against acquittal. Paragraph 14 to 16 of the aforesaid judgment are quoted as under:-

14. It is fundamental in criminal jurisprudence that every person is presumed to be innocent until proven guilty, for criminal accusations can be hurled at anyone without him being a criminal. The suspect is therefore considered to be innocent in the interregnum between accusation and judgment. History reveals that the burden on the accuser to prove the guilt of the accused has its roots in ancient times. The Babylonian Code of Hammurabi (1792-1750 B.C.), one of the oldest written codes of law put the burden of proof on the accuser. Roman Law coined the principle of actori incumbit (onus) probatio (the burden of proof weighs on the plaintiff) i.e., presumed innocence of the accused. In Woolmington v. Director of Public Prosecutions , the House of Lords held that the duty of the prosecution to prove the prisoner's guilt was the "golden thread" throughout the web of English Criminal Law. Today, Article 11 of the Universal Declaration of Human Rights, Article 14 of the International Covenant on Civil and Political Rights and Article 6 of the European Convention on Human Rights all mandate presumption of innocence of the accused.

15. A characteristic feature of Common Law Criminal Jurisprudence in India is also that an accused must be presumed to be innocent till the contrary is proved. It is obligatory on the prosecution to establish the guilt of the accused save where the presumption of innocence has been statutorily dispensed with, for example, under Section 113-B of the Evidence Act, 1872. Regardless thereto, the "Right of Silence' guaranteed under Article 20(3) of the Constitution is one of the facets of presumed innocence. The constitutional mandate read with the scheme of the Code of Criminal Procedure, 1973 amplifies that the presumption of innocence, until the accused is proved to be guilty, is an integral part of the Indian criminal justice system. This presumption of innocence is doubled when a competent Court analyses the material evidence, examines witnesses and acquits the accused. Keeping this cardinal principle of invaluable rights in mind, the appellate Courts have evolved a selfrestraint policy whereunder, when two reasonable and possible views arise, the one favourable to the accused is adopted while respecting the trial Court's proximity to the witnesses and direct interaction with evidence. In such cases, interference is not thrusted unless perversity is detected in the decisionmaking process.

16. It is thus a well crystalized principle that if two views are possible, the High Court ought not to interfere with the

trial Court's judgment. However, such a precautionary principle cannot be overstretched to portray that the "contours of appeal" against acquittal under Section 378 CrPC are limited to seeing whether or not the trial Court's view was impossible. It is equally well settled that there is no bar on the High Court's power to reappreciate evidence in an appeal against acquittal11. This Court has held in a catena of decisions (including Chandrappa v. State of Karnataka (2007) 4 SCC 415, State of Andhra Pradesh v. M. Madhusudhan Rao (2008) 15 SCC 582 and Raveen Kumar v. State of Himachal Pradesh (2021) 12 SCC 557) that the Cr.P.C. does not differentiate in the power, scope, jurisdiction or limitation between appeals against judgments of conviction or acquittal and that the appellate Court is free to consider on both fact and law, despite the self-restraint that has been ingrained into practice while dealing with orders of acquittal where there is a double presumption of innocence of the accused."

12. In **Anwar Ali and another vs. State of Himachal Pradesh (2020) 10 SCC 166** it was held by the Supreme Court that in case of circumstantial evidence, the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else and the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. Relevant paragraphs 15 to 17 of the aforesaid judgment are quoted as under:-

"15. It is also required to be noted and it is not in dispute that this is a case of circumstantial evidence. As held by this Court in catena of decisions that in case of a circumstantial evidence, the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else and the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

16. In the case of Babu (supra), it is observed and held in paragraphs 22 to 24 as under:

"22. In Krishnan v. State (2008) 15 SCC 430, this Court after considering a large number of its earlier judgments observed as follows: (SCC p. 435, para 15)

"15. ... This Court in a series of decisions has consistently held that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests:

(i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(ii) those circumstances should be of definite tendency unerringly pointing towards guilt of the accused;

(iii) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the

conclusion that within all human probability the crime was committed by the accused and none else; and

(iv) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. (See Gambhir v. State of Maharashtra (1982) 2 SCC 351)"

23. In Sharad Birdhichand Sarda v. State of Maharashtra (1984) 4 SCC 116 while dealing with circumstantial evidence, it has been held that the onus was on the prosecution to prove that the chain is complete and the infirmity or lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent before conviction could be based on circumstantial evidence, must be fully established. They are: (SCC p. 185, para 153)

(i) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned "must" or "should" and not "may be" established; (ii) 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;

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

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

(v) 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. A similar view has been reiterated by this Court in State of UP v. Satish (2005) 3 SCC 114 and Pawan v. State of Uttaranchal (2009) 15 SCC 259.

24. In Subramaniam v. State of T.N. (2009) 14 SCC 415, while considering the case of dowry death, this Court observed that the fact of living together is a strong circumstance but that by alone in absence of any evidence of violence on the deceased cannot be held to be conclusive proof, and there must be some evidence to arrive at a conclusion that the husband and husband alone was responsible therefor. The evidence produced by the prosecution should not be of such a nature that may make the conviction of the appellant unsustainable. (See Ramesh Bhai v. State of Rajasthan (2009) 12 SCC 603)."

17. Even in the case of G. Parshwanath (supra), this Court has in paragraphs 23 and 24 observed as under:

"23. In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact sought to be relied upon must be proved individually. However, in applying this principle a distinction must be made between facts called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to proof of primary facts, the court has to judge the evidence and decide whether that evidence proves a particular fact and if that fact is proved, the question whether that fact leads to an inference of guilt of the accused person

should be considered. In dealing with this aspect of the problem, the doctrine of benefit of doubt applies. Although there should not be any missing links in the case, yet it is not essential that each of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences, the court must have regard to the common course of natural events and to human conduct and their relations to the facts of the particular case. The court thereafter has to consider the effect of proved facts.

24. In deciding the sufficiency of the circumstantial evidence for the purpose of conviction, the court has to consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt and if the combined effect of all these facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself or themselves is/are not decisive. The facts established should be consistent only with the hypothesis of the guilt of the accused and should exclude every hypothesis except the one sought to be proved. But this does not mean that before the prosecution can succeed in a case resting upon circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever, extravagant and fanciful it might be. 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, where various links in chain are in themselves complete, then the false plea or false defence may be called into aid only to lend assurance to the court."

13. We find that it is a case of circumstantial evidence and P.W.-2 is witness of fact and that too it is not even a case of last seen evidence. P.W.-2, wife of the deceased, had stated to the extent that her son called his father on which he stated that he will shortly come but he did not reach home and thereafter P.W.-1 gone out in search of the deceased. P.W.-1, brother of the deceased, has stated only this much that the dead body was found in a field and he had seen the accused persons coming from the side of the dead body. The recovery of weapon allegedly used in the incident was recovered after more than two months allegedly on pointing out of one accused Narendra Singh, which was sent to F.S.L. report for forensic report. From perusal of original record the Forensic Report dated 19.11.2012 (Ex. 24Ka) indicates that five articles including darati were sent for F.S.L. report on which the finding was given that on item no. 5-darati the bloodstained were disintegrated and therefore, were not sufficient to record any finding. In respect of shirt, baniyan (vest) and underwear it was found that the bloodstained were not sufficient / useless for the purpose of classification and although it was stated that insofar as the garments and soil is concerned, human blood was found.

14. We also noticed that the weapon recovered was a darati and the P.W.-6, the doctor, who has conducted the postmortem, stated that the nature of injuries could not have been caused by darati and it could have been caused only by sharp edged weapon only. This opinion assumes importance as darati is a sharp edged tool

having spikes (kantedar) and thus will leave different cut marks on the body.

15. In such view of the matter, we find that the court below has rightly held that the weapon used could not be connected with the offence. We, therefore, in such circumstances, are of the opinion that it is a case of circumstantial evidence, where the chain of circumstances were not so complete so as to arrived at the conclusion that the accused persons have committed the offence by using the weapon allegedly recovered.

16. We also find that the motive attributed is extremely weak, which is stated to be of the year 2003, whereas the incident is of the year 2011, that too in relation to daughter of the informant and niece of the deceased. The other circumstantial evidence are only to the extent that the dead body was found in a field and except the bald statement of P.W.-1 to the extent that the accused persons were coming from the direction of the spot, where dead body was found and recovery of alleged weapon which, infact, could not be connected with the crime, having been made after two months, there is no other evidence, we do not find that the findings recorded by the trial court are perverse in nature so as to warrant any interference by this Court in exercise of the powers under Section 384 Cr.P.C.

17. In the totality of circumstances, we find that the trial court has taken possible view of the matter on appreciation of the evidence and we do not find that it is a fit case for interference in the judgment of trial court.

18. The appeal is accordingly dismissed.

(2022)03ILR A278
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.02.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE SUBHASH VIDYARTHI, J.

Criminal Misc. Appl. u/s 372 Cr.P.C.
(Leave To Appeal) No. 452 of 2018

Noor Fatima ...Appellant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Appellant:
Sri Parvez Alam, Sri Akash Deep Srivastava

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

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 372 - Indian Penal Code, 1860 - Sections 364, 302 & 201 - circumstantial evidence - limitations of exercise of power of scrutiny by the High Court in an appeal against an order of acquittal passed by a Trial Court - unless the High Court finds that there is complete misreading of the material evidence which has led to miscarriage of justice, the view taken by the trial court which can also possibly be a correct view, need not be interfered with.(Para -22)

(B) Criminal Law - Indian Evidence Act, 1872 - circumstantial evidence - motive alone in the absence of any other circumstantial evidence would not be sufficient to convict the appellant - settled principle of law that an accused person cannot be penalized only on the basis of motive.(Para -17,20)

Respondents-accused charged for committing an offence - kidnapping or abducting in order to murder - informant gave typed information to the Superintendent of Police - allegation - Respondent no. 2 and 3 abducted her son along

with their companions - they have killed her son - Trial Court held - case is based on circumstantial evidence, motive for committing the murder assumes much significance - acquitted all accused persons for charges leveled against them - hence appeal.

HELD:-Judgment of the Trial Court acquitting accused the persons based on a proper appreciation of the evidence and findings of the court below are not perverse and it needs no interference by Court. No sufficient grounds for admitting the appeal. Appeal dismissed summarily at the stage of admission. (Para - 23,24)

Appeal dismissed. (E-7)

List of Cases cited:-

1. Heera Lal & ors. Vs St. of U.P., 2011 (8) ADJ 189 = 2011 (75) ACC 8

2. Sampath Kumar Vs Inspector of Police, (2012) 4 SCC 124

3. Jayamma Vs St. of Karna., 2021 (6) SCC 213

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

1. Heard Sri Akash Deep Srivastava, learned counsel for the appellant and Sri Ratan Singh, learned AGA for the State on admission of the appeal and perused the record.

2. The respondents-accused were charged for committing an offence under Section 364, 302 and 201 IPC in Case Crime No.56 of 2012, P.S. South, District, Firozabad.

3. The prosecution case, briefly stated, is that on 07.01.2012, the informant Noor Fatima gave a typed information to the Superintendent of Police, firozabad stating that her son Furkan had enticed away Sindal daughter of Late Khalil and had married her after running away from the home. Danish (respondent no.2) brother of Sindal used to keep animosity from the informant's son and Danish forcibly took away his sister Sindal from the informant's house. Thereafter he got a forged Talaknama prepared. It is alleged that Danish used to beat and threaten the informant's son. On 1.1.2012 at about 08:00 P.M., informant's son Furkan received a call on his mobile no. 7417110595 and when she asked her son that who had made phone call, she said that Zubair alias Chapta (respondent no.3) had made the phone call and he left home. Nadeem son of Manjoor and Irfan son of Zahid had seen Furkan with Zubair alias Chapta at Urvashi Chauraha at 08:30 P.M. and Danish was also standing there at a short distance. Since then informant's son did not return home. The informant alleged that Danish and Zubair alias Chapta have abducted her son along with their companions and they have killed her son. During trial, as many as nine witnesses were produced by the prosecution to prove its case. Accused produced Mohd. Monis as D.W.-1. The learned Trial Court has stated that as the case is based on circumstantial evidence, motive for committing the murder assumes much significance. The informant Noor Fatima (P.W.1) has stated in the FIR that her son had enticed away and married Danish's sister Sindal and due to this Danish used to keep animosity against Furkan. Danish is a man of criminal nature. Along with his accomplices, Danish threatened and forcibly took away Sindal from the informant's house and he got a fictious Talaknama prepared. However, in her cross examination, P.W.1 stated that Danish or any member of his family did not register any case against Furkan. She expressed ignorance regardding whether both the families were at talking terms or whether there was any tension between their families.

4. Analyzing the statements of the witnesses to ascertain the motive for committing the offence, the learned Trial Court held that as the informant herself stated that Danish had pressurised his sister and she had been taken away to her home, the motive for murder could have vanished. But at this stage it cannot be denied that he might be having some annoyance for the reasons that the deceased had taken away his sister and had married her. Therefore, Danish had a motive to kill the deceased.

5. The deceased is said to have gone missing on 01.01.2012 and the informant reported matter to the Superintendent of Police, Firozabad on 07.01.2012. The Superintendent of Police instructed the Sub-Inspector concerned to lodge an FIR on the same day. Even after the superintendent of Police had issued a direction for lodging the FIR on 07.01.2012 and had handed over the application to the informant herself, she did not go to the police station till as late as on 15.01.2012. The explanation given by the informant that the accused persons used to threaten her, was not found to be believable as she clearly stated that she kept on visiting the police station and when the police did not register her report, she had submitted the application to the Superintendent of Police. Taking into consideration all these facts, the learned court below recorded a finding that in spite of the Superintendent of Police having issued a direction for registration of the FIR on 07.01.2012, the failure of the informant to lodge the FIR for eight more days clearly indicates that the informant has lodged the FIR with delay, for which no explanation has been given by her.

6. In the present case, there is no direct evidence to prove the guilt of the accused persons and it is a case of circumstantial evidence. It is obligatory upon the prosecution to form a chain of circumstances so complete that there is no evidence from the conclusion that the crime was committed by the accused persons. The informant alleged that the deceased Furkan had received a phone call on his mobile no. 7417110595 and he told him that Zubair alias Chapta had made the phone call. Furkan left immediately after receiving the call. However, the Investigating Officer did not obtain call details record of the mobile number of the deceased, which was a serious error in carrying out investigation of the case and due to which it cannot be ascertained as to whether the accused Zubair alias Chapta had made a phone call on the number of the deceased or not and no finding to this effect could be recorded in absence of the call details record.

7. Regarding the allegation that the deceased was last seen with the accused persons, learned Trial Court analysed the statement of the prosecution witnesses and found that there were serious contradictions in the statements of P.W.2 Irfan. In his cross examination, P.W.2 stated that on 01.01.2012, he and his uncle Nadeem had seen the deceased with Zubair alias Chapta and Danish was standing at some distance. P.W.2- Irfan stated that after returning from the godown he had gone to his uncle's home without having his dinner. He stated that when he returned from the godown, Furkan was at his residence. After returning from the godown he had dinner but Furkan did not eat with him. At one place he stated that Furkan left hom after he had gone from there while at another place he stated that Furkan left in his presence wearing grey colour pants. Then P.W.2- Irfan has made self-contradictory statements in his cross

examination due to which the learned Trial Court has found his statements notworthy of belief.

8. P.W.2-Irfan stated that when he last saw Furkan with the accused Zubair alias Chapta, Nadeem was also there but the prosecution did not examine Nadeem as witness.

9. The prosecution relied upon a decision of the High Court in **Heera Lal and others vs. State of U.P., 2011 (8) ADJ 189 = 2011 (75) ACC 8,** in which the High Court has held that "the prosecution is not bound to produce all the ocular witnesses to prove a paticular fact. It is the quality and not quantity of evidence which matters more in criminal cases to prove a particular fact. No adverse interference can be drawn against the prosecution on the ground of non-examination of other ocular witnesses of the incident." However, as in the evidence must be corroborated by examination of an independent witness. In the present case, P.W.2- Irfan is the real brother of deceased-Furkan and as such, he is an interested witness and there are material self contradictions in his statement, the other witness Nadeem ought to have been examined by the prosecution but it has not been done. P.W.-3, Afsar has also stated that he did not see the deceased-Furkan with the accused persons. He stated that although he saw the deceased-Furkan for the last time on 01.01.2012 but does not recognize the persons, who were sitting with the deceased-Furkan. After examining and analyzing the statements of prosecution witnesses, the learned Trial Court came to a conclusion that the prosecution could not establish that the deceased was last seen with the accused persons.

10. The prosecution case was that after the arrest of accused persons on 15.01.2012 and on their pointing out the knife used in the murder, the clothes of the deceased, a skeleton and shoes were recovered from Bhuda Nahar and the deceased's brother P.W.-2-Irfan identified the skeleton on the basis of his clothes and no such evidence was produced by the defence to doubt the identification of the dead body of the deceased. However, independent witness of recovery, P.W.-3 Afsar has stated that no knife was recovered in his presence. P.W.-7 and P.W.-9, the Investigating Officers have stated that knives were not sent for forensic examination. It could only be ascertained by a forensic examination as to whether there was human blood on the knives or not but this has not been done by the Investigating Officers. Further the sample of soil from the place of alleged occurrence has not been taken and sent for forensic examination. For these reasons, the alleged knives recovered cannot be connected with the incident so as to prove that the same were used in committing murder of the deceased.

11. The skeleton received had some flesh only on the toes of foot and there was no flesh on any other part of the body. The skeleton consisted of only skull, nose, the bones of upper and lower jaws and there were only 13 partial ribs and ten rings of spinal cord and parts of the hip bones of both sides.

12. The Investigating Officer P.W.-9 has stated that the skeleton was found in the canal and there were a jacket, shoes and socks on the skeleton. He has stated that in both the sleeves of the jacket, some portion of the hand were there which had been torn away by the animals but this statement was not supported by the statement of P.W.5-Dr. Prakash Mohan, who carried out the

postmortem. He has stated that there were no signs of animal bite on the skeleton. P.W.-4, Dr. Suresh Chandra Mittal, Government Medical Jurisprudence Expert has stated that a dead body gets converted into a skeleton within a period of one to three months and it depends upon the place from where the body is found. As per the statement of P.W.-4, even the minimum duration within which a dead body is converted into a skeleton is one month. In the present case, the period between disappearance of the deceased and recovery of skeleton is merely 15 days and it is not possible that during this period a dead body can get converted into skeleton having no pieces of flesh on it.

13. The learned Trial Court has also taken into consideration the fact that for establishing that the skeleton recovered was of the deceased-Furkan. It was incumbent upon the prosecution to conduct a DNA test which was not done in the present case. P.W.-4 has stated that on the basis of X ray only, he could not tell as to whether the skull and the other body parts of the skeleton were of the same person or not. He further stated that, he ascertained the age of the deceased from his skull. As the hip bones were not complete and only a part of which was found, the age of deceased could not have been ascertained from the hip bones. For ascertaining as to whether the skull and the bones of the other parts of body belonged to the same person, DNA test was necessary, which was not done.

14. P.W-7 the Investigating Officer has stated that requisite documents relating to the skeleton were not sent to the forensic laboratory and a report was prepared merely on the basis of X-Ray. During this period, the skeleton was kept in the police station but no entry of this fact was made in the general diary. In these circumstances, there is an apprehension regarding proper preservation of skeleton kept in the police station as also against the identity of the same to ascertain as to whether the skeleton on which the postmortem was conducted and the skeleton on which the X-Ray was the same as was recovered in this case. However, the prosecution could not prove these facts.

15. Regarding the clothes and shoes recovered with the skeleton, the learned Trial Court has taken into consideration the evidence on record and has observed that the informant has not described that the deceased was wearing the aforesaid clothes when he left his home for the last time. In the statement of the informant and Nadeem recorded under Section 161 Cr.P.C. also these persons did not give any information regarding the clothes worn by the deceased. The Investigating Officer has stated that the jacket and jeans were present on the skeleton but the court below has disbelieved this statement of Investigating Officer on the ground that as per the statements of the expert witnesses P.W.-4 and P.W.-5, the condition of the skeleton was such as makes it impossible that it had a jacket put on it and a jeans tied around its waist.

16. Keeping in view the statement of expert witnesses, the learned court below came to a conclusion that the statement of the Investigating Officer in this regard is not believable. Even the other Investigating Officer P.W.-9 has admitted that the jacket was found near the body of the skeleton and not on it. Moreover the clothes on the basis of which the skeleton has been identified to be of Furkan are only jacket, jeans, shoes and socks but the other clothes such as shirt, vest and sweater etc. have not

been recovered from the place of of occurrence. After a thorough discussion of these facts, learned Trial Court has came to a conclusion that on the basis of the clothes it cannot be held that the skeleton was of the deceased-Furkan and while arriving at this conclusion, the learned Trial Court has also kept into consideration the fact that the clothes which are said to have been recovered from the place near the skeleton, have not been produced before the court.

17. After a detail analysis of the entire evidence, the learned Trial Court has arrived at a finding that in a case based on circumstantial evidence the prosecution has failed to complete the chain of circumstances implicating the accused persons for committing the alleged offence. It is a settled principle of law that an accused person cannot be penalized only on the basis of motive. The prosecution could not prove that the deceased was last seen with the accused persons. It could not establish that the recovered skeleton was of the deceased-Furkan. As per the principles of medical jurisprudence as well as the statement of the expert witness, it was not possible that within a period of 15 days from the disappearance of the deceased, his body could have converted into a skeleton having no flesh on it. The DNA test of recovered skeleton was also not conducted. So the prosecution could not establish as to whether the skull and other bones of the body of the recovered skeleton were of the same person or not. There were severe discrepancies in the statement of clothes found from the place of occurrence. Keeping in all these facts, the Trial Court has recorded that it cannot be said that the prosecution could not establish its case only because of the defects in investigation and the evidence adduced by the prosecution could not establish even a single link of the chain to prove the guilt of the accused persons. Accordingly, the Trial Court acquitted all the accused persons for the charges leveled against them.

18. Sri Akash Deep Srivastava, learned counsel for appellant has assailed the aforesaid judgment and order of acquittal mainly on the ground that the accused persons had a motive for committing murder of the deceased. He has also submitted that the dead body of the deceased and the weapon used in the murder were also recovered at the pointing out of the accused persons. The body of the deceased was identified by the informant in presence of the Investigating Officer. The sole ground for acquittal of the accused persons is that the prosecution did not get a DNA examination conducted which was not required in as much as the brother of the deceased had identified the dead body of the deceased and, therefore, there is no doubt regarding the identification of the dead body of the deceased. His submission is that when the prosecution has clearly established the motive behind the murder of the deceased, then merely because of certain negligence during investigation by the Investigating Officer, an order of acquittal cannot be passed.

19. So far as the submission of learned counsel for appellant that the accused persons had a motive to commit murder of the deceased, we may see that although, in a case based on circumstantial evidence, motive assumes significant, but the existence of motive alone can hardly be a ground for conviction in absence of other material sufficient to establish a single link of the chain to prove the guilt of the accused persons.

20. In **Sampath Kumar v. Inspector of Police, (2012) 4 SCC 124**, the Hon'ble Supreme Court referred to and relied upon

its previous decisions and proceeded to hold that motive alone can hardly be a ground for conviction. The relevant passage of the aforesaid judgment is as follows: -

"29. In *N.J. Suraj v. State* the prosecution case was based entirely upon circumstantial evidence and a motive. Having discussed the circumstances relied upon by the prosecution, this Court rejected the motive which was the only remaining circumstance relied upon by the prosecution stating that the presence of a motive was not enough for supporting a conviction, for it is well settled that the chain of circumstances should be such as to lead to an irresistible conclusion, that is incompatible with the innocence of the accused.

30. To the same effect is the decision of this Court in *Santosh Kumar Singh v. State and Rukia Begum v. State of Karnataka* where this Court held that motive alone in the absence of any other circumstantial evidence would not be sufficient to convict the appellant. Reference may also be made to the decision of this Court in *Sunil Rai v. UT, Chandigarh*. This Court explained the legal position as follows: (*Sunil Rai* case, SCC p. 266, paras 31-32)

"31. ... In any event, motive alone can hardly be a ground for conviction.

32. On the materials on record, there may be some suspicion against the accused, but as is often said, suspicion, howsoever strong, cannot take the place of proof."

21. Regarding the second contention of learned counsel for appellant that the dead body and the weapon used in the murder were recovered at the pointing out of the accused persons and the body was identified by the informant in presence of the Investigating Officer, the learned court below examined the evidence on record in minute details and after a detal examination of the same has recorded a finding that the body recovered was merely a skeleton with only traces of flesh on the toes of foot and it was not possible that a dead body can be converted into such a skeleton within a short period of merely 15 days. Morever, the skeleton was also not complete and the P.W.4- Government Medical Jurisprudence Expert stated that the hip bone was not complete and age determination was not possible from it. The age of the deceased had been determined from the skeleton. It could have been established as to whether the skull and the remaining body of the skeleton is of the same person or not, could have been established only by a DNA test which has not been done. Since, it is a case based on circumstantial evidence, the opinion of the expert witnesses namely P.W.-4 the Government Medical Jurisprudence Expert and P.W.-5, the doctor who conducted the postmortem examination of the dead body assumed a greater significance. The statements of witnesses regarding recovery of clothes are also contradictory as the prosecution could not establish the complete chain of circumstances to establish the guilt of the accused persons.

22. In **Jayamma vs. State of Karnataka, 2021 (6) SCC 213**, the Hon'ble Supreme Court has been pleased to explain the limitations of exercise of power of scrutiny by the High Court in an appeal against against an order of acquittal passed by a Trial Court in the following words:

"The power of scrutiny exercisable by the High Court under Section 378, CrPC should not be routinely invoked where the view formed by the trial court was a "possible view'. The judgment of the trial court cannot be set aside merely because the High Court finds its own view more probable, save where the judgment of the trial court suffers from perversity or the conclusions drawn by it were impossible if there was a correct reading and analysis of the evidence on record. To say it differently, unless the High Court finds that there is complete misreading of the material evidence which has led to miscarriage of justice, the view taken by the trial court which can also possibly be a correct view, need not be interfered with. This self-restraint doctrine, of course, does not denude the High Court of its powers to re-appreciate the evidence, including in an appeal against acquittal and arrive at a different firm finding of fact."

23. After a thorough scrutiny of statements of witnesses, we find that the judgment of the Trial Court acquitting the accused persons is based on a proper appreciation of the evidence and the findings of the court below are not perverse and it needs no interference by this Court.

24. In view of the aforesaid discussion, we are of the view that there are no sufficient ground for admitting the appeal. The appeal is dismissed summarily at the stage of admission.

(2022)03ILR A285
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.12.2021

BEFORE

THE HON'BLE BRIJ RAJ SINGH, J.

Application U/S 482 No.617 of 2009

Mohammad Sikandar Bhai ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Dr. S.B. Singh

Counsel for the Opposite Parties:
A.G.A., Sri Mohamad Aslam Ansari

A. Civil Law - Negotiable Instrument Act, 1881 - Sections 138 & 142 - Application preferred for quashing the summoning order under NI Act.- Applicant issued 4 cheques. All were dishonoured due to the fact that the account of payee was closed.-Legal notice sent to the applicant for making payment. O.P. No.02 filed complaint before court below-St.ment u/S 200 and 202 Cr.P.C. recorded-Summons issued against applicant- After legal notice of one month, 15 days' period for committing the offence will start and thereafter after expiry of 15 days, the offence is completed and within one month if no complaint filed, Magistrate is barred to take cognizance of the complaint which is filed beyond limitation period, if delay has not been properly explained. Application allowed.

Application allowed. (E-12)

List of Cases cited:-

1. Prem Chandra Vijay Kumar Vs Yashpal Singh & anr.

2. SII Import, USA Vs Exim Aides Silk Exporters Bangalore

3. Sadanandan Bhadran Vs Madhavnan Sunil Kumar (1998)6 SCC 514

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

1. Heard Dr. S.B. Singh, learned counsel for the applicant and learned A.G.A. for the State-opposite party no.1. No one appears on behalf of opposite party no.2, even in the revise call.

2. This application under Section 482 Cr.P.C. has been preferred by the applicant for quashing the summoning order dated 20.06.2006, under Section 138 of the Negotiable Instruments Act as well as proceeding in Case No.1567 of 2006 (Firm Khalique and Brothers Vs. Firm Aqsa Testiles), pending in the Court of Chief Judicial Magistrate, Mau, District Mau.

3. The opposite party no.2 has made averment that the applicant issued four cheques in his favour (Cheque No.16049 dated 10.06.2005 for Rs.30,000/-, Cheque No.16050 dated 20.06.2005 for Rs.30,000/-, Cheque No.16051 dated 25.08.2005 for Rs.30,000/- and Cheque No.16052 dated 01.07.2005 for Rs.25,000/-). All the cheques were submitted in I.D.B.I. Bank at Varanasi and the all the cheques were dishonoured due to the fact that the account of payee was closed. The legal notice was sent by opposite party no.2 to the applicant on 13.12.2005 requiring the opposite party no.2 to make payment of Rs.1,15,000/-, failing which the case will be executed. The opposite party no.2 filed the complaint before the court below on 21.03.2006 which is annexed as Annexure No.3 to the application.

4. The statement under Sections 200 and 202 Cr.P.C. were recorded by the court below and thereafter, summons were issued on 20.06.2006 for appearing before the Court. The applicant has challenged summoning order as well as entire case instituted against him.

5. Learned counsel for the applicant submits that opposite party no.2 has mentioned in the complainant itself that cause of action arose on 28.11.2005 and thereafter opposite party no.2 had given legal notice on 13.12.2005. After giving one month's notice and thereafter 15 days' period as mentioned in Sections 138 and 142 of the Negotiable Instrument Act (here-in-after referred to as "the N. I. Act"), the cause of action arose on 26.01.2006. The complaint case was filed on 21.03.2006.

6. Learned counsel for the applicant has advanced argument that opposite party no.2 filed the case beyond reasonable limitation. The opposite party no.2 has not given any plausible reason for delay in the entire complaint; thus, the case under N.I. Act is liable to be quashed.

7. Sections 138 and 142 of the N.I. Act are relevant for disposal of the present case. Sections 138 and 142 of the N.I. Act is reproduced as below:

"Section 138. Dishonour of cheque for insufficiency, etc., of funds in the account. *--Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both:*

Provided that nothing contained in this section shall apply unless --

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Section 142. Cognizance of offences. -- [(1)] *Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) --*

(a) no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

(b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138: [Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period.]

(c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under section 138.]

(2) The offence under Section 138 shall be inquired into and tried only by a court within whose local jurisdiction,--

(a) if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated; or

(b) if the cheque is presented for payment by the payee or holder in due course, otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated."

8. I have gone through the records.

9. The cause of action arose on 28.11.2005, therefore, the opposite party no.2 had sent legal notice on 13.12.2005 to the applicant. The time of one month notice expired on 11.01.2006 as per Sections 142 (1) (b) of the N.I. Act. If fifteen days' further added, the same will expire on 26.01.2006. The opposite party no.2 filed the case under the N.I. Act on 21.03.2006, which is much beyond the time schedule prescribed under Sections 138 (c) and 142 (1) (b) of the N.I. Act.

10. Learned counsel for the applicant has cited some cases i.e. **PREM CHAND VIJAY KUMAR Vs. YASHPAL SINGH AND ANOTHER, SIL IMPORT, USA Vs. EXIM AIDES SILK EXPORTERS, BANGALORE; AND SADANANDAN BHADRAN Vs. MADHAVAN SUNIL KUMAR.**

In the case of Prem Chand Vijay Kumar, Hon'ble Supreme Court has held that the Magistrate cannot take cognizance if the complaint is not filed within one month from the date, of which the cause of action arose. The Court has enunciated that cause of action will arise just soon after completion of the offence and period of limitation. Para 15 of the said judgment is reproduced as below:-

"15 . In SIL Import, USA v. Exim Aides Silk Exporters it was held that the language used in Section 142 admits of no doubt that the Magistrate is forbidden from taking cognizance of the offence if the complaint was not filed within one month of the date on which the cause of action arose. Completion of the offence is the immediate forerunner of rising of the cause of action. In other words, cause of action would arise soon after completion of the offence and period of limitation for filing of the application starts running simultaneously."

11. Similarly, the case of Sil Import, USA Vs. Exim Aides Silk Exporters, Bangalore is also important to mention. The Court has pronounced the judgment, wherein, it is provided that after legal notice of one month, fifteen days' period for committing the offence will start and thereafter after expiry of fifteen days, the offence is completed and within one month, if, no complaint is filed the Magistrate is barred to take cognizance of the complaint, which is filed beyond limitation period. Para 24 of the said judgment is reproduced as below:-

"24. The upshot of the discussion is, on the date when the notice sent by Fax reached the drawer of the cheque the period of 15 days (within which he has to make the payment) has started running and on the expiry of that period the offence is completed unless the amount has been paid in the meanwhile. If no complaint was filed within one month therefrom the payee would stand forbidden from launching a prosecution thereafter, due to the clear interdict contained in Section 142 of the Act."

12. In the case of **Sadanandan Bhadran Vs. Madhavan Sunil Kumar reported in (1998) 6 SCC 514,** Hon'ble Supreme Court has dealt with the provision of Section 20 of the Civil Procedure Code and cause of action has been dealt which is relevant in the present case. Para 6, 7 & 8 of the said judgment is reproduced as below:-

"6. In a generic and wide sense (as in Section 20 of the Civil Procedure Code, 1908) 'cause of action' means every fact which it si necessary to establish to support a right or obtain a judgment. Viewed in that context, the following facts are required to be proved to successfully prosecute the drawer for an offence under Section 138 of the Act:

(a) that the cheque was drawn for payment of an amount of money for discharge of a debt/liability and the cheque was dishonoured;

(b) that the cheque was presented within the prescribed period;

(c) that the payee made a demand for payment of the money by giving a notice in writing to the drawer within the stipulated period; and

(d) that the drawer failed to make the payment within 15 days of the receipt of the notice.

If we were to proceed on the basis of the generic meaning of the term

'cause of action' certainly each of the above facts would constitute a part of the cause of action but then it is significant to note that clause (b) of Section 142 gives it a restrictive meaning, in that, it refers to only one fact which will give rise to the cause of action and that is the failure to make the payment within 15 days from the date of the receipt of the notice. The reason behind giving such a restrictive meaning is not far to seek. Consequent upon the failure of the drawer to pay the money within the period of 15 days as envisaged under clause @ of the proviso to Section 138, the liability of the drawer for being prosecuted for the offence he has committed arises, and the period of one month for filing the complaint under Section 142 is to be reckoned accordingly. The combined reading of the above two sections of the Act leaves no room for doubt that cause of action within the meaning of Section 142 arises - and can arise - only once.

7. Besides the language of Sections 138 and 142 which clearly postulates only one cause of action there are other formidable impediments which negates the concept of successive causes of action. One of them is that for dishonour of one cheque there cane be only one offence and such offence is committed by the drawer immediately in his failure to make the payment within fifteen days of the receipt of the notice served in accordance with clause (b) of the proviso to Section 138. That necessarily means that for similar failure after service of fresh notice on subsequent dishonour the drawer cannot be liable for any offence nor can the first offence be treated as non est so as to give the payee a right to file a complaint treating the second offence as the first one. At that stage it will not be a question of waiver of the right of the payee to prosecute the drawer but of absolution of the drawer of an offence, which stands already committed by him and which cannot be committed by him again.

8. The other impediment to the acceptance of the concept of successive causes of action is that it will make the period of limitation under clause of Section 142 otiose, for, a payee who failed to file his complaint within one month and thereby forfeited his right to prosecute the drawer, can circumvent the above limitative clause by filing a complaint on the basis of a fresh presentation of the cheque and its dishonour. Since in the interpretation of statutes the Court always presumes that the legislature inserted every part thereof for a purpose and the legislative intention is that the very part should have effect the above conclusion cannot be drawn for, that will make the provision for limiting the period of making the complaint nugatory."

13. The entire complaint filed by opposite party no.2 does not indicate any reason as to why delay took place in filing the complaint. The averment regarding the delay and time-barred complaint is made in para 11 and 12 of the instant application and the opposite party no.2 has not denied the contents of para 11 and 12 while giving reply in para 10 of the counter affidavit the opposite party no.2 has said that case is argumentative and suitable reply will be given at the time of argument. The opposite party no.2 has rather admitted the contents of para 11 and 12 because vague reply has been given. The complaint filed by the opposite party no.2 does not satisfy the test envisaged in Sections 138 and 142 of the N.I. Act.

14. In view of the aforesaid discussion, I set aside the summoning order dated 20.06.2006 and quash the criminal

proceeding in Case No.1567 of 2006 (Firm Khalique and Brothers Vs. Firm Aqsa Testiles), pending in the Court of Chief Judicial Magistrate, Mau, District Mau.

15. The application stands **allowed.**

(2022)03ILR A290
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.02.2022

BEFORE

THE HON'BLE UMESH KUMAR, J.

Application U/S 482 No.810 of 2022

Ashish Singh @ Rinku Singh ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Ran Vijay Singh

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

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 482 - Quashing of charge sheet as well as summoning order- 'Per Incuriam' are those decisions which are given in ignorance or forgetfulness of some statutory provisions or authority binding on the court concerned or a St.ment of law caused by inadvertence or conclusions that have been arrived at without application of mind or proceeded without any reason so that in such a case some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstratively wrong.

B. Criminal Law - Indian Penal Code, 1860 - Section 506 -. is cognizable and has to be tried as a St. case and not as complaint case.

Application dismissed. (E-12)

List of Cases cited:-

1. Virendra Singh Vs St. of U.P. & ors. 2000(2) JCC 649(All)

2. Bahori & ors. Vs St. of U.P. & ors. 2017(10) ADJ 480

3. Dr. Rakesh Kumar Sharma Vs St. of U.P. & anr. 2007(9) ADJ 478

4. Awadhesh Kumar & ors. Vs St. of U.P. & anr. 2008(2) ADJ 253

5. Dhanveer & ors. Vs St. of U.P. & anr. 2010(9) ADJ 496

6. Mata Sewak Upadhyaya Vs St. of U.P. & ors. 1995 AWC 2031(FB)

7. Bhagwan Singh Vs St. of U.P. & ors. 2016(3) ACR 3365

8. Praveen Kumar & anr. Vs St. of U.P. & ors. 2011(2) ACR 2083

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

1. Heard learned counsel for the applicant and learned A.G.A.appearing for State of U.P.-opposite party no.1 and perused the material placed on record.

2. The instant application under Section 482 has been filed seeking quashing of the impugned charge-sheet dated 04.01.2019 as well as summoning order dated 15.10.2019 in Case No.1216 of 2019 (State vs. Ashish Singh @ Rinku Singh) arising out of Case Crime No. 257 of 2018 under Sections 147, 149, 352, 427, 504 and 506 IPC, P.S. Lohta, District Varanasi, pending before Judicial Magistrate-IV, Varanasi.

3. It is submitted by learned counsel for the applicant that initially F.I.R. has been lodged against two known persons and some unknown persons. Even during investigation their name could not be

ascertained and charge-sheet has been submitted only against applicant as another accused who has expired during investigation.

4. The learned counsel for the applicants submitted that the offence under Sections 147, 149, 352, 427, 504 and 506 IPC are non-cognizable hence in view of the explanation to Section 2(d) of Cr.P.C., the case can not proceed as State case but has to proceed as complaint case. He further submitted that the learned Magistrate has erroneously passed an order taking cognizance on the charge-sheet. In support of his submission reliance has been placed on the decisions rendered by the Division Bench in **Virendra Singh vs. State of U.P. and others 2000 (2) JCC 649 (All)** and on the orders/decisions following the Division Bench decision passed in **Bahori and others vs. State of U.P. and others [2017 (10) ADJ 480]; Dr. Rakesh Kumar Sharma vs. State of U.P. and another [2007 (9) ADJ 478]; Awadhesh Kumar and others vs. State of U.P. and another [2008 (2) ADJ 253]; and Dhanveer and others vs. State of U.P. and another [2010 (9) ADJ 496].**

5. I have carefully considered the above submissions.

6. It is not disputed that the offence under Sections 147, 149, 352, 427, 504 and 506 IPC are non-cognizable. Two persons were named in the F.I.R., one expired during investigation. The sole argument that during investigation, none was identified nor anyone was traced by Police, hence submission of charge-sheet under Sections 147 and 149 of I.P.C. is an error and no charge-sheet can be submitted, under the circumstances in this reference F.I.R. and statement of witnesses are relevant at this stage. Moreover, invoking the powers under Section 482 Cr.P.C. is unwarranted to interfere in the case at pre-trial stage,. The offence under Section 506 IPC was made cognizable and non-bailable vide **U.P. Govt. 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.** This notification was held to be illegal in **Virendra Singh (supra)**. Consequently, offence punishable under Section 506 IPC was held to be non-cognizable and in view of the explanation to Section 2(d) of Cr.P.C. report of the police officer after investigation disclosing case of non-cognizable offence has to be deemed to be a complaint, therefore, the police officer submitting the report has to be deemed to be a complaint. In other words the charge-sheet submitted by the police in a non-cognizable offence shall be treated to be a complaint and the procedure prescribed for hearing of the complaint case shall be applicable to that case. It is in this backdrop, the learned counsel for the applicant submits that the charge-sheet submitted by the Investigating Officer shall be treated as a complaint and the cognizance taken by the Magistrate shall be deemed to have been taken on a complaint.

7. Learned A.G.A. has opposed the application placing reliance on the Full Bench decision rendered in **Mata Sewak Upadhyay vs. State of U.P. and others, 1995 AWC 2031 (1996 (1) ECRC 97),** wherein, the validity of the notification making Section 506 IPC cognizable offence vide U.P. notification was upheld. Relying on **Mata Sewak (supra)** subsequent decisions have been rendered in **Bhagwan Singh vs. State of U.P. and**

others, 2016 (3) ACR 3365 and **Praveen Kumar and another vs. State of U.P. and others, 2011 (2) ACR 2083.**

8. In **Virendra Singh (supra)** the Court was not called upon to adjudicate upon the validity of the notification dated July 31, 1989. The petition was filed against a first information report under Section 506 IPC, however, the Court proceeded to make observations on the validity of the notification thereby declaring Section 506 as non-cognizable and non-bailable offence. The Court made the following observation in paragraph 8, which reads thus:

"It is surprising that while Sections 323, 324 and 325, I.P.C. are bailable offences the State Government has chosen to declare by this illegal notification of 1989 that Section 506, I.P.C. is a non bailable and cognizable offence. This means that if person breaks someone's hand, or attacks him with a knife on his leg or hand he will be granted bail by the police on his mere request, but if he gives a threat he will be arrested and will have to apply for bail to the Court. This is an anomalous situation. At any event, we are of the opinion that the notification dated 31-7-1989 issued under Section 10 of the Criminal Law Amendment Act, 1932 making Section 506, I.P.C. cognizable and non bailable is illegal. "

9. The Division Bench, however, did not take notice of **Mata Sewak (supra)** upholding the validity of the notification. The questions, inter alia, that was referred and were permitted to be raised in **Mata Sewak** reads thus:

iv. Whether provisions of Section 10 of Criminal Law Amendment Act, 1932 are constitutionally invalid?

v. Whether the U.P. Amendment Notification No. 777/VIII 94(2)87 dated July 31, 1989, published in the U.P. Gazettee, dated August 2, 1989, making offence under Section 506, IPC cognizable and non-bailable is invalid?"

In para 195 the answers to the questions referred to the Full Bench or permitted to be raised before it was answered as follows:

6. Section 10 of the Criminal Law Amendment Act, 1932 is valid.

7. U.P. Government Notification dated July 31, 1989, making offence under Section 506 IPC cognizable and non-bailable is valid."

10. Full Bench unanimously upheld the validity of the Government Notification making Section 506 IPC cognizable and non-bailable. Decisions relied upon by the learned counsel for the applicant including **Virendra Singh (supra)** have not noticed the Full Bench decision rendered in **Mata Sewak (supra)**, it appears that the decision was not placed nor brought to the notice of the Court. The decision of the Division Bench and the subsequent decisions following **Virendra Singh (supra)** is a per incuriam and does not lay down the correct legal position. The decisions rendered in **Praveen Kumar (supra)** and **Bhagwan Singh (supra)** following **Mata Sewak (supra)** lays down the correct law.

11. In **Narmada Bachao Andolan Vs. State of Madhya Pradesh & Anr., AIR 2011 SC 1989,** the Supreme Court considered the Doctrine of "Per Incuriam", paragraph 60, reads thus:

"PER INCURIAM - Doctrine:

'60. 'Incuria' literally means 'carelessness'. In practice per incuriam is taken to mean per ignoratium. The Courts have developed this principle in relaxation of the rule of stare decisis. Thus, the 'quotable in law' is avoided and ignored if it is rendered, in ignorance of a statute or other binding authority. While dealing with observations made by a seven Judges-Bench in ***India Cement Ltd. etc. etc. v. State of Tamil Nadu etc. etc., AIR 1990 SC 85,*** *the five Judges-Bench in* ***State of West Bengal v. Kesoram Industries Ltd. & Ors., (2004) 10 SCC 201: (AIR 2005 SC 1646: 2004 AIR SCW 5998),*** *observed as under: -*

'A doubtful expression occurring in a judgment, apparently by mistake or inadvertence, ought to be read by assuming that the Court had intended to say only that which is correct according to the settled position of law, and the apparent error should be ignored, far from making any capital out of it, giving way to the correct expression which ought to be implied or necessarily read in the context,.....A statement caused by an apparent typographical or inadvertent error in a judgment of the Court should not be misunderstood as declaration of such law by the Court.'

12. Thus, 'per incuriam' are those decisions which are given in ignorance or forgetfulness of some statutory provision or authority binding on the Court concerned, or a statement of law caused by inadvertence or conclusions that have been arrived at without application of mind or proceeded without any reason so that in such a case some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong. It is also well settled, if intricacies of relevant provisions are either not noticed or brought to the notice of the Court or if the view is expressed without analysing the said provision or the settled position of law, such a view cannot be treated as binding precedent. The Division Bench in **Virendra Singh (supra)** did not notice the judgment of a larger Bench in **Mata Sewak (supra)** upholding the validity of the notification making offence under Section 506 cognizable and non-bailable.

13. In view of the law laid down in **Mata Sewak (supra)** followed in **Praveen Kumar (supra)** and **Bhagwan Singh (supra)**, Section 506 is cognizable and non-bailable and has to be tried as a State case not as complaint case.

14. The argument advanced by learned counsel for the applicant that submission of charge-sheet should be treated as complaint under Section 2(d) of Code of Criminal Procedure cannot be accepted at this stage. Hence, order taking cognizance against the applicant need not be interfered.

15. In the circumstances, the petition being devoid of merit is, accordingly, dismissed. However, the applicant is at liberty to move application for discharge at an appropriate stage.

(2022)03ILR A293
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.02.2022

BEFORE

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

Application U/S 482 No.1955 of 2022

Rajendra Prasad Patel & Anr. ...Applicants
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicants:
Sri Piyush Kant Vishwakarma

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

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 482 - For Quashing Notice u/Ss 107/116/111 Cr.P.C.- Even in administrative reasons reasons should be recorded as it is incumbent upon the authorities to pass a speaking and reasoned order- S.D.M. while issuing the impugned notice has not complied with the mandatory provisions of Section 111 Cr.P.C. and has issued the notice in a printed proforma and has only filled the dates therein. He has also not recorded his opinion that there exist sufficient ground to take action u/S 107 Cr.P.C., the details of information received are also not given, which could have formed the basis for apprehending breach of peace and therefore notice issued by S.D.M. may be set aside to be a vague notice, which does not fulfill the requirement of Section 111 Cr.P.C.

Application allowed. (E-12)

List of Cases cited:-

1. Ranjit Kumar & ors. Vs St. of U.P. & ors. 2004(45) ACC 627

2. Aurangzeb & ors. Vs St. of U.P. & anr. 2004(50) ACC 734

3. ShiVs Kant Tripathi Vs St. of U.P. & anr. 2006(1) UPCrR

4. Km. Shri Lekha Vidyarthi & ors. Vs St. of U.P. & ors. AIR 1991 SC 537

5. Madhulimaye Vs S.D.M. Munger AIR 1971 SC 2486

6. Mohan Lal Vs St. of U.P. 1977 ACC 333

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

1. Heard Mr. Piyush Kant Vishwakarma, learned counsel for the applicants and Mr. Pankaj Srivastava, learned A.G.A. for the State as well as perused the entire material available on record.

2. This application under Section 482 Cr.P.C. has been filed to quash the notice dated 22nd December, 2021 under Sections 107/116/111 Cr.P.C. issued against the applicants and the consequential orders passed by the Sub-Divisional Magistrate, Mariahu, District-Jaunpur.

3. Relevant facts of the present case are that the dispute relates to land bearing new Araji No. 198A (old Gata/Araji No. 215/2) area 20 decimal situated in Village-Ahirauli, Paragana and Tehsil Mariahu, District-Jaunpur, which has been old Abadi of applicants' grand-father, namely, Bhagi in which kachcha house of the applicants' grandfather was built and trees were also planted by the grandfather of the applicant over the same land. During consolidation operation in the aforesaid village, the said land being Abadi land (residential land) was out of consolidation proceeding and was recorded in the name of descendants of Bhagi i.e. grandfather of the applicants, namely, Ramshiroman and others, which is evident from C.H. Form 41 and 45, a copy of which has been enclosed as Annexure-1 to the affidavit accompanying the present applicant.

4. When, Rama Shankar Patel and Ram Achal Patel, sons of Jharihag resident of the same village, who are not descendants of Bhagi, were cutting trees and making pakka house over the said land, the applicants objected, due to which, the Police of Police Station-Mariyahu, District-Jaunpur has submitted a Chalani report

dated 26th November, 2021 under Sections 107/116 Cr.P.C. against the applicants, a copy of which has been enclosed as Annexure-3 to the affidavit accompanying the present application. By means of Chalani report dated 26th November, 2021, it was stated that due to dispute with respect to Abadi land, there is litigation between the parties, who may commit an act, which will lead to disturbance. As a result, there is every possibility of breach of peace on account of the applicants.

5. Upon the aforesaid Chalani report, a Case No. 5164 was registered and the Sub-Divisional Magistrate, Mariahu, Jaunpur issued impugned notice dated 22nd December, 2021 under Section 107/116/111 Cr.P.C. requiring the applicants to show cause as to why they would not be directed to furnish personal bonds of Rs. 50,000/- each for maintaining peace for a period of six months.

6. The objection raised by counsel for the applicant is that impugned notice has been issued without application of mind and notice is vague and ambiguous. Only on the basis of Chalani report, the Sub-Divisional Magistrate has issued the same and he has not recorded his prima facie satisfaction as to why and how, the applicants may be threat for breach of peace. In the impugned notice, no prima facie direct or indirect evidence has been mentioned on the basis of which it can be said that there is apprehension of breach of peace from the applicants due to dispute of residential land. Learned counsel for the applicants, therefore, submits that proceeding on the basis of said notice is a nullity. Reliance has been placed on a number of decisions of this Court in the case of **Ranjeet Kumar and others Vs. State of U.P. and others** reported in *2002 (45) ACC page 627*, wherein it has been held that Upper City Magistrate has no jurisdiction or authority to proceed on the basis of this void notice.

7. Similar view has been expressed in the case of **Aurangzeb and others State of U.P. and another** reported in *2004 (50) ACC page 734*. Paragraph of the said decision is quoted below:

"It is submitted that notice under challenge is void and proceedings against the applicants are nullity without jurisdiction as substance of information received as required is incomplete, vague and ambiguous and notice is only defective. It is also submitted on report of police on 21.6.2004, a notice under Section 111 Cr.P.C. to initiate proceedings under Sections 107/116 Cr.P.C. is served upon the applicants vide Annexure-1 and the impugned notice does not fulfill the requirements of mandatory provisions of Section 111 Cr.P.C., thus the notice is null and void and the proceedings before the learned Magistrate are a nullity and the impugned notice is on a printed proforma in which gaps are filled and the substances of information received as set forth is wholly incomplete, vague and ambiguous. It is further submitted that the learned Magistrate (S.D.M.) has no jurisdiction or authority to proceed on the basis of this void notice and he has placed reliance in the case of Ranjeet Kumar and others V. State of U.P. and others."

8. Similar view has also been taken by the Single Bench of this Court in the case of **Shiv Kant Tripathi Versus State of U.P. & Another** reported in *2006 (1) UPCrR*.

9. On the cumulative strength of the aforesaid, learned counsel for the applicants submits that the impugned notice cannot be legally sustained and is liable to be quashed

10. Per contra, the learned A.G.A. has opposed the prayer so made on behalf of the applicants but he has fairly conceded that the impugned notice suffers from vagueness.

11. Before coming to the aforesaid submissions advanced by the learned counsel for the applicants, it would e worthwhile to reproduce Sections 107, 111 and 116 Cr.P.C., which read as follows:

*"**107. Security for keeping the peace in other cases.***

(1) When an Executive Magistrate receives information that any person is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity and is of opinion that there is sufficient ground for proceeding, he may, in the manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond,1with or without sureties,] for keeping the peace for such period, not exceeding one year, as the Magistrate thinks fit.

(2) Proceedings under this section may be taken before any Executive Magistrate when either the place where the breach of the peace or disturbance is apprehended is within his local jurisdiction or there is within such jurisdiction a person who is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act as aforesaid beyond such jurisdiction.

***111. Order to be made.** When a Magistrate acting under section 107, section 108, section 109 or section 110, deems it necessary to require any person to show cause under such section, he shall make an order in writing, setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties (if any) required.*

116. Inquiry as to truth of information.

(1) When an order under section Ill has been read or explained under section 112 to a person present in Court, or when any person appears or is brought before a Magistrate in compliance with, or in execution of, a summons or warrant, issued under section 113, the Magistrate shall proceed to inquire into the truth of the information upon which action has been taken, and to take such further evidence as may appear necessary.

(2) Such inquiry shall be made, as nearly as may be practicable, in the manner hereinafter prescribed for conducting trial and recording evidence in summons- cases.

(3) After the commencement, and before the completion, of the inquiry under sub- section (1), the Magistrate, if he considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquillity or the commission of any offence or for the public safety, may, for reasons to be recorded in writing, direct the person in respect of whom the order under section 111 has been made

to execute a bond, with or without sureties, for keeping the peace or maintaining good behaviour until the

conclusion of the inquiry, and may detain him in custody until such bond is executed or, in default of execution, until the inquiry is concluded: Provided that-

(a) no person against whom proceedings are not being taken under section 108, section 109, or section 110 shall be directed to execute a bond for maintaining good behaviour;

(b) the conditions of such bond, whether as to the amount thereof or as to the provision of sureties or the number thereof or the pecuniary extent of their liability, shall not be more onerous than those specified in the order under section 111.

(4) For the purposes of this section the fact that a person is an habitual offender or is so desperate and dangerous as to render his being at large without security hazardous to the community may be proved by evidence of general repute or otherwise.

(5) Where two or more persons have been associated together in the matter under inquiry, they may be dealt with in the same or separate inquiries as the Magistrate shall think just.

(6) The inquiry under this section shall be completed within a period of six months from the date of its commencement, and if such inquiry is not so completed, the proceedings under this Chapter shall, on the expiry of the said period, stand terminated unless, for special reasons to be recorded in writing, the Magistrate otherwise directs: Provided that where any person has been kept in detention pending such inquiry, the proceeding against that person, unless terminated earlier, shall stand terminated on the expiry of a period of six months of such detention.

(7) Where any direction is made under sub- section (6) permitting the continuance of proceedings, the Sessions Judge may, on an application made to him by the aggrieved party, vacate such direction if he is satisfied that it was not based on any special reason or was perverse."

12. I have gone through the records of the present applicants, perused Sections 107, 111 and 116 Cr.P.C. and considered the submissions made by the learned counsel for the applicants. I find substance in the submissions made by the learned counsel for the applicants that such notice like the present one suffers from vagueness.

13. 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."

14. In the case of **Madhu Limaye Vs. S.D.M. Monghyr (2)** reported in *AIR 1971 SC 2486*, the Apex Court, in para 36 of its judgment has observed as under:-

"We have seen the provisions of Sec. 107. That section says that action is to be taken in the manner here-in-after provided and this clearly indicates that it is not open to a Magistrate in such a case to depart from the procedure to any substantial extent. This is very salutary because the liberty of the person is involved and the law is rightly solicitous that this liberty should only be curtained according to its own procedure and not according to the whim of the Magistrate concerned. It behoves us, therefore, to emphasize the safeguards built into the procedure because from there will arise the consideration of the reasonableness of the restrictions in the interest of public order or in the interest of general public."

15. In this very case the Apex Court went on to observe in Para 37 as under:-

"Since the person to be proceeded against has to show cause, it is but natural that he must know the grounds for apprehending a breach of the peace or disturbance of the public tranquility at his hands. Although the section speaks of the ''substance' of the information it does not mean the order should not be full. It may not repeat the information bodily but it must give proper notice of what has moved the Magistrate to take the action. This order is the foundation of the jurisdiction and the word "substance' means the essence of the most important parts of the information."

16. In the present case, the learned Sub-Divisional Magistrate, while issuing the impugned notice dated 22nd December, 2021 has not complied with the mandatory provisions, as enumerated in Section 111 Cr.P.C. and has issued the notice in a printed proforma and has only filled the dates therein. The learned Sub-Divisional Magistrate has also not recorded his opinion that there exists sufficient ground to take action under the provisions of Section 107 Cr.P.C. In the impugned notice, the details of the information received are not given, which could have formed the basis for apprehending breach of peace, therefore, the notice issued by the Sub-Divisional Magistrate, Jaunpur dated 22nd December, 2021 may be set aside to be a vague notice, which does not fulfill the requirement of Sections 111 Cr.P.C.

17. This Court in the case of **Mohan Lal Versus State of U.P.,** reported in *1977 ACC page 333* has expressed its dissatisfaction as under:-

"there are series of decisions in which the same principles have been repeated again and again. It is distressing to note that the repeated pronouncement of this Court and also the perception made by the Supreme Court have fallen on the deaf ears of our Executive Magistrates, who still treat the making of order u/s 111 an idle formality."

18. In view of the law and the reasons, this Court is of the opinion that the impugned notice u/s 107/116 Cr.P.C which has been issued by the Sub-Divisional Magistrate dated 22nd December, 2021 mechanically in printed proforma without spelling out the substance of facts to be met by the applicants, being wholly illegal and void, is is liable to be quashed.

19. Accordingly, the present application under Section 482 Cr.P.C. deserved to be allowed.

20. This order shall not preclude the Sub-Divisional Magistrate, Mariahu,

Jaunpur to issue fresh notice in accordance with law.

(2022)03ILR A299
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 05.03.2022

BEFORE

THE HON'BLE SURESH KUMAR GUPTA, J.

Application U/S 482 No. 2180 of 20018

Chavi Lal & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Rama Kant Dixit

Counsel for the Opposite Parties:
G.A.

A. Criminal Law - Code of Criminal Procedure, 1973 -Sections 227 & 239 - At the time of discharge application only it is to be seen whether prima facie case is made out? The detailed enquiry is not required at the time of framing of charge. The accused can be discharges only when the charge is groundless.

Application dismissed. (E-12)

List of Cases cited:-

1. Dilawar Babu Kurane Vs St. of Mah. (2002) 2 SCC 135

2. Yogesh@Sachin Jagdish Joshi Vs St. of Mah. (2008)10 SCC 394

3. Palvinder Singh Vs Balwinder Singh & ors. (2009)2 SCC(Cri.)850

4. Sajjan Kumar Vs C.B.I. JT 2010(10) SC 413

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

1. Heard learned counsel for petitioners and learned A.G.A. for the State and perused the material available on record.

2. By means of this petition under Section 482 Cr.P.C. the petitioner have sought following reliefs:-

"Wherefore, it is most respectfully prayed that this Hon'ble Court may graciously be pleased to set aside impugned order dated 08.02.2018 passed by learned Sessions Judge, Shravasti whereby revision of the petitioners against the judgment and order dated 19.12.207 passed by learned Chief Judicial Magistrate Shravasti has been rejected without application of judicious mind."

3. Brief facts of the case are as under:-

The revenue record i.e. Khatauni was inspected by Tehsildar Bhinga (first informant) of Village Panchayat Bechuwa and it was found that Khata No. 313/4.381 acre was recorded in the name of Awadh son of Mohan in 1395 to 1400 Fasli but the said land was fraudulently, intentionally and illegally was recorded/mutated in the name of Smt. Belwa D/o Awadh, wife of Chhavi Ram as legal heirs by Naib Tehsildar Druv Nath Pandey on 28.12.1989 and also mentioned the fake caste in column 13. Likewise Khata No. 482/4.062 acre was also mutated in the name of Smt. Pushpa Devi alias Prema Devi showing the daughter of Ram Pheran S/o Jamuna Prasad also interring the fake caste in Column 13. It was further narrated that the Investigating Officer investigated the matter and recorded the statement under Section 161 Cr.p.C. and submitted the charge sheet against the petitioners and also

other co-accused persons on 31.08.1992 and 26.12.1992 in Case No. 2724 of 2002 (State Vs. Chhavi Lal and others) arising out of Case Crime No. 138 of 1992, under Sections 167, 218, 466, 467, 468, 471, 420 and 120-B IPC, Police Station Kotwali Bhinga District Shravasti. Thereafter the petitioners appeared before the court concerned and bail was granted to them.

4. Learned counsel for petitioners has submitted that the trial court as well as revisional court without application of judicious mind rejected the discharge application of the petitioner. Further submission is that no disclosed offence is made out against the petitioner. The petitioner moved an application for discharge on 6.11.2016 stating therein that no such material evidence has been collected by the Investigating Officer against the petitioners on which very basis no offence is made out and main author of the crime is co-accused Naib Tehsildar Dhruv Nath who made entry in the revenue record without calling the report from Lekhpal of concerned village and the petitioners have not given any application or evidence before him for mutating their names under the proceedings of Section 34 of the Land Revenue Act.

5. Further submission is that since there is no cogent and reliable evidence against the petitioners, so the petitioners filed discharge application before the learned Chief Judicial Magistrate, Shravasti by means of order dated 19.12.2017. Learned Chief Judicial Magistrate, Shravasti rejected the discharge application without considering the aspect of the matter that the petitioner never moved any application for name of the petitioners to be recorded in the revenue record before the Naib Tehsildar but the learned trial court wrongly rejected the discharge application of the petitioners. Being aggrieved with the said order, the petitioners also filed revision before the Sessions Court, Shravasti bearing Criminal Revision No. NIL of 2018 (Chhavi Lal V. State) but learned Sessions Court also rejected the revision of the petitioners without considering the material aspect available on record and dismissed the revision vide order dated 08.02.2018. It is further submitted that the main accused i.e. Dhruv Nath Pandey, who is the main author of this crime has not been arrested and he is also not attending the court in the garb of order dated 25.09.1992 passed in Writ Petition No. 6788 (SB) of 1992 while the said petition has been dismissed for want of prosecution vide order dated 23.12.2010.

6. It is vehemently argued by learned counsel for petitioners that since the aforesaid writ petition of co-accused Dhruv Nath Pandey has already been dismissed by this Court but still learned trial court has not summoned the co-accused Dhruv Nath Pandey and the petitioners are unnecessarily suffering trauma of trial as the whole proceedings against the petitioners have been initiated due to malafide intention and no disclosed offence is made out against the petitioners. Thus, this is the abuse of the process of law. Learned counsel for petitioners prays to allow this petition and set aside the entire proceedings.

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

8. "Section 239 in The Code Of Criminal Procedure, 1973

239. When accused shall be discharged. If, upon considering the police report and the documents sent with it under section 173 and making such examination,

if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so doing."

9. Hon'ble the Apex Court in the catena of judgment has provided that at the time of discharge application, only it is to be seen whether prima facie case is made out or not? The detailed inquiry is not required at the time of framing of charge, the accuse can be discharged only when the charge is groundless.

10. In the case of ***Dilawar Balu Kurane Vs. State of Maharashtra reported in (2002) Supreme Court Cases 135***, the Apex Court has examined the ambit and scope of section 227 Cr.P.C. and held:-

"In exercising powers under section 227 Cr.P.C., the settled position of law is that the Judge while considering the question of framing the charges under the limited purpose of finding out whether or not a prima facie case against the accused has been made out; where the materials placed before the court disclose grave suspicion against the accused which has not been properly explained the court will be fully justified in framing a charge and proceeding with the trial; by and large if two views are equally possible and the Judge is satisfied that the evidence produced before him gave rise to some suspicion but not grave suspicion against the accused, he will be fully justified to discharge the accused, and in exercising jurisdiction under section 227 Cr.P.C., the Judge cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court but should not make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducing a trial."

11. In case of ***Yogesh alias Sachin Jagdish Joshi reported in (2008) 10 SCC 394,*** the Apex court has almost propounded the same principles in the following terms:-

"It is trite that the words "not sufficient ground for proceeding against the accused" appearing in section 227 Cr.P.C., postulate exercise of judicial mind on the part of the Judge to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. However, in assessing this fact, the Judge has the power to sift and weigh the material for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine a prima face case depends upon the facts of each case and in this regard it is neither feasible nor desirable to lay down a rule of universal application. By and large, however, if two views are equally possible and the Judge is satisfied that the evidence produced before him gives rise to suspicion only as distinguished from grave suspicion, he will be fully within his right to discharge the accused. At this stage, he is not to see as to whether the trial will end in conviction or not. The broad test to be applied is whether the materials on record, if unrebutted, make a conviction reasonably possible."

12. In the case of ***Palwinder Singh Vs. Balwinder Singh and others*** reported in ***(2009) 2 SCC (Cri) 850,*** the Apex Court

reiterated the aforesaid principles and held:-

"The jurisdiction of the learned Sessions Judge while exercising power under section 227 Cr.P.C is limited. Charges can also be framed on the basis of strong suspicion. Marshalling and appreciation of evidence is not in the domain of the Court at that point of time. "

13. Apart from the aforesaid cases, in the case of ***Sajjan Kumar vs. Central Bureau of Investigation, JT 2010(10) SC 413,*** the Apex Court has formulated the following guidelines with regard to the question as to how a matter for framing a charge against the accused is to be dealt with:

"(i) The Judge while considering the question of framing the charges under Section 227 of the Cr.P.C. has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case.

ii) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained, the Court will be fully justified in framing a charge and proceeding with the trial.

iii) The Court cannot act merely as a Post Office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

iv) If on the basis of the material on record, the Court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.

v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the Court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.

vi) At the stage of Sections 227 and 228, the Court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value discloses the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

vii) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal."

14. The aforesaid decisions have almost settled the legal position that at the stage of charge the court is not required to

consider pros and cons of the case and to hold an enquiry to find out truth. Marshalling and appreciation of evidence is not in the domain of the court at that point of time. What is required from the court is to sift and weigh the materials for the limited purpose of finding out whether or not a prima facie case for framing a charge against the accused has been made out. Even in a case of grave or strong suspicion charge can be framed. The court has to consider broad probabilities of the case, total effect of the evidence and the documents produced including basic infirmities, if any. If on the basis of the material on record, the court could form an opinion that the accused might have committed offence, it can frame the charge, but the court should not weigh the evidence as if it were holding trial. Accused can be discharged only when the charge is groundless.

15. In my considered opinion, learned Chief Judicial Magistrate Shravasti as well as learned Sessions Judge has taken into account all the relevant material and passed the impugned orders keeping in view the parameters laid down by Hon'ble Apex Court. It does not appear to be a case which is to be closed at the stage of charge. Therefore, the submission of the learned counsel for applicant that no charge was made out has no substance.

16. For the reasons discussed above, the application under Section 482 Cr.P.C. no merits and is accordingly dismissed.

17. Interim order, if any, stands vacated.

18. Since the matter is pending since long time before the trial court, therefore, it is directed that the trial court take endevour to expedite the present case expeditiously.

(2022)03ILR A303
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.03.2021

BEFORE

THE HON'BLE BRIJ RAJ SINGH, J.

Application U/S 482 No.3716 of 2022

Bablu @ Vishnu Dhar Dubey ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Mohd. Rashid Siddiqui, Sri Abhnav Gaur, Sri Ankit Shukla, Ms. Ballabhi Shukla, Sri Anoop Trivedi (Sr. Adv.)

Counsel for the Opposite Parties:
A.G.A., Sri Irfanul Huda, Sri O.P. Singh (Sr. Adv.)

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 319(1) - The provision of de-novo trial is mandatory for the accused summoned u/S 319 Cr.P.C. It vitally affects the rights of the person so brought before the court. It would not be sufficient to tender the witnesses for cross examination of such a person. Rather, they have to be examined afresh

B. Criminal Law - Code of Criminal Procedure, 1973 - Section 319(1) - The words 'could be tried together with the accused' in Section 319 Cr.P.C. appear to be only directory. 'Could be' cannot under these circumstances be held to be 'must be'.

Application allowed. (E-12)

List of Cases cited:-

1. Tahir & anr. Vs St. of U.P. 2000(1) JIC 588(All)

2. Shashi Kant Singh Vs Tarkeshwar Singh & ors. (2002)5 SCC 738

3. Nayeem Vs St. of U.P. 2002(2) JIC 389(All)

4. Jokhan Patel Vs St. of U.P. 2001(2) JIC 459(All)

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

1. Heard Mr. Anoop Trivedi, learned Senior Advocate assisted by Ms. Ballabhi Shukla, learned counsel for the applicant, Mr. O.P. Singh, learned Senior Advocate assisted by Mr. Irfanful Huda, learned counsel for the opposite party No.2 as well as Mr. Aniruddha Sharma, learned A.G.A. for the State opposite party and perused the record.

2. The present 482 Cr.P.C. application has been filed with a prayer to quash the order dated 21.12.2021 passed by Additional District and Sessions Judge/Special Judge (Prevention of Corruption Act), Court No.01, District Gorakhpur, passed in Sessions Trial No.19 of 2015 (State Vs. Govind Yadav & others) arising out of Case Crime No.463 of 2014, under Sections 147, 148, 149, 302, 386, 396 & 504 I.P.C., Police Station Khorabar, District Gorakhpur, pending in the court of Additional Sessions Judge/Special Judge (Prevention of Corruption Act), Court No.01, District Gorakhpur, with a further prayer to stay the further proceedings of the aforesaid case.

3. Brief facts of the case are that the brother of first informant, namely, Raju Yadav was allegedly shot by accused persons, namely, Govind Yadav, Suresh Yadav, Bablu Dubey on 08.08.2014. F.I.R. was lodged on 08.08.2014 in Case Crime No.463 of 2014, under Sections 147, 148, 149, 307, 302, 386, 396 and 504 I.P.C., Police Station Khorabar, Distirct Gorakhpur.

4. Charge sheet was filed against the accused and cognizance was taken. D.G.C. (Criminal), Gorakhpur moved an application under Section 319 Cr.P.C. to summon the applicant as accused, which was allowed on 18.07.2016 by District and Sessions Judge, Gorakhpur. The applicant filed an application under Section 319 (4) (a) Cr.P.C. before the court below on 28.01.2021 which was rejected on 12.02.2021.

5. Being aggrieved against the order dated 12.01.2021, the applicant filed Application U/S 482 No.6670 of 2021 before this Court and the same was allowed on 16.03.2021. This Court directed that opportunity to the accused-applicant will be given for recording the statement of examination-in-chief of P.W.-1 in his presence and further it was observed that full opportunity to cross examine the witness will also be provided.

6. The examination-in-chief of P.W.-1 was recorded afresh before the court below and applicant was allowed to cross-examine P.W.-1 afresh. The applicant preferred two applications bearing Paper No.142 Kha and 143 Kha under Section 311 Cr.P.C. on 02.12.2021 to recall of prosecution witness no.6, namely, Jitendra Pal Singh - the Investigating Officer (I.O.) and prosecution witness no.3 - Dr. Awadhesh, who conducted the post-mortem. The court below rejected the aforesaid applications on 21.12.2021. Being aggrieved against the said order, the applicant has filed the present Application U/S 482 Cr.P.C.

7. The trial court has rejected the application solely on the ground that the trial has been concluded and statement under Section 313 Cr.P.C. has been recorded and the case is going on at final stage. It is further observed that the applicant has not stated what are the questions to be asked in cross-examination and thus rejected the application on 21.12.2021.

8. Mr. Anoop Trivedi, learned Senior counsel has submitted that after examination-in-chief the accused has right under Section 319 (4) (a) Cr.P.C. to cross-examine the witnesses and the proceedings of the trial as afresh. He has further submitted that once examination-in-chief has taken place, the trial is de novo in respect of the accused applicant and he has all rights open to recall the witnesses. The question in the form of cross examination cannot be disclosed because the accused wants to confront the I.O. and Doctor in the light of the statement made in examination-in-chief. The accused will not open as to what are the questions to be put before the P.W.-1. The trial is de novo, therefore, after going through the statement of P.W.-1 he feels in the interest of justice to confront the I.O. and the Doctor. He has also submitted that the fair trial is required under Section 319 (4) (a) Cr.P.C. and it is open for the accused-applicant to confront the witnesses in the light of the statement of examination made by P.W.-1. In case, he is not allowed cross-examination with I.O. and Doctor, it will be denial of fair trial as enshrined Article 21 of the Constitution of India.

9. Pet contra, Sri O.P. Singh, learned Senior Advocate appearing on behalf of opposite party no.2, has submitted that the applicant has not disclosed the material as to why he should be allowed to examine I.O. and Doctor. He has further submitted that statement under Section 313 Cr.P.C. has been recorded and the case is going on in the final hearing, it is not the occasion to allow the application under Section 311 Cr.P.C. and the court below has rightly rejected the applications. He has further submitted that the cross-examination of Doctor as well as I.O. had already taken place during the first statement of examination-in-chief of P.W.-1.

10. Sri Anoop Trivedi, learned Senior Advocate has relied several judgments:-

(i) **Tahir & another Vs. State of U.P. 2000 (1) JIC 588 (All)**

(ii) S**hashikant Singh Vs. Tarkeshwar Singh and others** reported in **(2002) 5 SCC 738.**

(iii) **Nayeem Vs. State of U.P.** reported in **2002 (2) JIC 389 (All)**

(iv) J**okhan Patel Vs. State of U.P.** reported in **2001 (2) JIC 459 (All**)

(v) **Dharmveer Singh & others Vs. State of U.P. & others** reported in **2011 (2) JIC 496 (All)**

11. Relevant paragraph no.10 of the judgment passed in the case of **Shashikant Singh** *(supra)* is quoted below:-

"10. The intention of the provision here is that where in the course of any enquiry into, or trial of, an offence, it appears to the court from the evidence that any person not being the accused has committed any offence, the court may proceed against him for the offence which he appears to have committed. At that stage,

the court would consider that such a person could be tried together with the accused who is already before the Court facing the trial. The safeguard provided in respect of such person is that, the proceedings right from the beginning have mandatory to be commenced afresh and the witnesses re-heard. In short, there has to be a de novo trial against him. The provision of de novo trial is mandatory. It vitally affects the rights of a person so brought before the Court. It would not be sufficient to only tender the witnesses for the cross-examination of such a person. They have to be examined afresh. Fresh examination in chief and not only their presentation for the purpose of the cross-examination of the newly added accused is the mandate of Section 319(4). The words 'could be tried together with the accused' in Section 319(1), appear to be only directory. 'Could be' cannot under these circumstances be held to be 'must be'. The provision cannot be interpreted to mean that since the trial in respect of a person who was before the Court has concluded with the result that the newly added person cannot be tried together with the accused who was before the Court when order under Section 319(1) was passed, the order would become ineffective and inoperative, nullifying the opinion earlier formed by the Court on the basis of evidence before it that the newly added person appears to have committed the offence resulting in an order for his being brought before the Court."

12. Sri O.P. Singh, learned Senior Advocate has relied upon the judgment and order passed in the case of **Chand Patrakar and another Vs. State of U.P. and another** decided on 06.12.2021 in **Criminal Revision No.3280 of 2021**. Relevant paragraph nos.28 and 30 of the aforesaid judgment are quoted below:-

"28. This Court finds that the aforesaid grounds so taken in the application under Section 311 of the Cr.P.C. or not only vague but they do not disclose any of the conditions which are necessary for recalling the witness. Merely on asking the application under Section 311 of the Cr.P.C. cannot be allowed as there has to be sufficient reasons behind it.

30. The application so preferred by the revisionist also does not give any specific details as to what are the questions which are to be raised in the cross-examination of PW-1 as only bald and vague assertion has been made that certain questions relating to the occurrence of the incident were left to be asked. In the absence of any pleadings set-forth by the revisionist before the court below seeking re-examination / recall of the witness as well as canvasing of any argument to show that the order under challenge is illegal, perverse and palpably unjust, this Court cannot interfere."

13. The judgments cited by Sri O.P. Singh, learned counsel for opposite party no.2 have got different footings because the present case is arising out of de novo trial under Section 319(4)(a) Cr.P.C. The trial in respect of present accused-applicant is fresh and he has right to confront the Doctor and I.O. in pursuance of his application. All of the aforesaid cases cited by learned counsel for opposite party indicate that application for cross-examination has been allowed under Section 311 Cr.P.C. in pursuance of regular trial, whereas, in the present case under Section 319(1) Cr.P.C. de novo trial is going on in respect of accused-applicant; thus, once the trial is fresh, the accused-applicant has legal right to confront any of

the witness who has to be examined by him.

14. The provision under Section 319 (1) Cr.P.C. is enabling provision by which the trial court has power to summon the accused on the basis of the evidence relating to commission of offence. The accused has been saved in a way that the proceedings under Section 319 (4) (a) Cr.P.C. right from the beginning is mandatory to be commenced afresh and the witnesses are to be reheard. It is thus clear that the trial has to be a de novo trial against the accused. The provision of de novo trial is mandatory for the accused summoned under Section 319 Cr.P.C. It vitally affects the rights of a person so brought before the court. It would not be sufficient to only tender the witnesses for the cross examination of such a person rather they have to be examined afresh. The words "could be tried together with the accused' in Section 319(1), appear to be only directory. "Could be' cannot under these circumstances be held to be "must be'. The provision cannot be interpreted to mean that since the trial in respect of a person who was before the court below has concluded with the result that the newly added person cannot be tried together with the accused who was before the court below when order under Section 319(1) was passed. The earlier proceeding will become ineffective and inoperative because the accused brought under Section 319(1) Cr.P.C. has to be given fair trial in view of Section 319 (4) (a) Cr.P.C.

15. Since, the trial is de novo in respect of applicant accused, he cannot be denied the right to cross examine two witnesses. This finding of the court below is not sustainable in the eyes of law, wherein, it has been observed that the applicant has not disclosed the material for cross-examination. The accused has right to confront the witnesses. The question of cross-examination is sanctum sanctorum for accused which will not be opened by him in the application. The accused will put the question on the basis of examination-in-chief of P.W.-1 at the time of cross-examination but the court below has taken contrary view.

16. In view of the aforesaid factual and legal aspect of the matter the order dated 21.12.2021 passed by Additional District and Sessions Judge/Special Judge (Prevention of Corruption Act), Court No.1, District Gorakhpur, in the aforesaid case Sessions Trial No.19 of 2015 (State Vs. Govind Yadav & others) arising out of Case Crime No.463 of 2014, under Sections 147, 148, 149, 302, 386, 396 & 504 I.P.C., Police Station Khorabar, District Gorakhpur, is set aside and the matter is remitted to the court below to take fresh decision in pursuance of both applications bearing Paper No.142 Kha and 143 Kha, under Section 311 Cr.P.C. in the light of the observations made above, within a period of three weeks from the date of production of certified copy of this order.

17. The application stands **allowed.**

18. It is further observed that in the peculiar facts and circumstances of the case, the trial is pending since more than seven years, it is necessary to issue direction to expedite the trial, therefore, I direct the court below to complete the trial within a period of eight months from today. In case, day to day hearing is required, the dates will be fixed accordingly and no unnecessary adjournment will be granted to either of the parties.

(2022)03ILR A308
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.02.2022

BEFORE

THE HON'BLE SANJAY KUMAR SINGH, J.

Application U/S 482 No.5094 of 2021

Smt. Ramendri ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Awadh Sharma

Counsel for the Opposite Parties:
A.G.A., Sri Virendra Singh

The courts of law are meant for imparting justice between the parties. One who comes to the court must come with clean hands and no material facts should be concealed. Honesty, fairness, purity of mind should be of the highest order to approach the courts failing which the litigant should be shown the exit door at the earliest point of time.

Application dismissed. (E-12)

List of Cases cited:-

1. Arunima Baruwa Vs U.O.I. (2007)6 SCC 120

2. Prestige Lights Ltd. Vs S.B.I. (2007)8 SCC 449

3. Udyami Evam Khadhi Gram Udyog Welfare Sanstha & anr. Vs St. of U.P. & ors. (2008)1 SCC 560

4. K.D. Sharma Vs S.A.I.L. & ors. (2008)12 SCC 481

5. Dalip Singh Vs St. of U.P. & ors. (2010)2 SCC 114

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

1. Heard Shri Awadh Sharma, learned counsel for the applicant, Shri Ram Pal Singh, learned Additional Government Advocate-I assisted by Shri Prashant Kumar Singh, learned Brief Holder representing the State of U.P. and Shri Virendra Singh, learned counsel for the first informant, opposite party No. 2.

2. By means of this application under Section 482 Cr.P.C., the applicant has prayed for quashing of entire proceedings of Case No. 4692 of 2020 (State Vs. Jitendra and others), arising out of Case Crime No. 117 of 2020, under Section 498-A, 304-B IPC and ¾ of Dowry Prohibition Act, police station Salempur, district Bulandshahr, pending in the Court of Chief Judicial Magistrate, Bulandshahr.

3. A preliminary objection has been raised by the learned counsel for the opposite party No. 2 by pointing out that the applicant has not approached this Court with clean hand and has filed successive applications by concealing the material facts and documents.

4. In short compass, the facts giving rise to the present application are that a first information report was lodged by opposite party No. 2, Deepak Kumar at case crime No. 117 of 2020, under Sections 498-A, 304-B and ¾ of Dowry Prohibition Act, police station Salempur, district Bulandshahr arraigning therein as many as four accused namely Jitendra (husband), Pawan (Jeth) Smt. Ramendri (mother-in-law) and Satpal (father-in-law) of the deceased Anjali inter alia with the allegations that marriage of his sister-Anjali was solemnized with Jitendra on 16.2.2020 in which about 10-12 lakhs were spent. Since, the in-laws of his sister were not satisfied with the dowry, they used to

mentally torture his sister for bringing additional dowry of Rs. 500,000/- or a Car. The report further indicates that when the complainant visited his sister at Kiswagarhi, she narrated the ill treatment meter to her by her in-law and thereafter she was beaten and threatened of dire consequences by her in-laws in case their demand of additional dowry is not fulfilled. Thereafter, his sister is living in her maternal house *(Maika)*. On 14.6.2020 at about 10.00 PM, she received a call from the side of her husband and thereafter she went on depression and at about 1/1.30 AM on 15.6.2020, she committed suicide.

5. After lodging of the FIR, the applicant has approached this Court by filing Criminal Misc. Anticipatory Bail Application No. 5675 of 2020, which was disposed of vide order dated 3.12.2020 directing the applicant to surrender before the court below within three months and till then, interim protection was granted to her. However, when the order dated 3.12.2020 was in operation, the applicant has filed the instant application under Section 482 Cr.P.C No. 5094 of 2021 on 05.2.2021 for quashing the entire proceedings of the aforesaid case concealing the aforesaid order dated 03.12.2020, whereas Mr. Awadh Sharma, who is counsel for the applicant in the instant application was also counsel in Criminal Misc. Anticipatory Bail Application No. 5675 of 2020. When, the case was taken up on 15.2.2022, learned counsel for the applicant sought adjournment on the ground that he could not inform the opposite party No. 2. During the pendency of this application, the applicant also challenged the order of this Court dated 3.12.2020 passed in Criminal Misc. Application No. 5675 of 2020, before the Supreme Court by filing Special Leave to Appeal (Crl.) No. 5203 of 2021 on 28.6.2021, which was registered in diary at serial No. 14233 of 2021. The said appeal was dismissed by the Supreme Court vide order dated 29.7.2021 directing the appellant/applicant to surrender within two days before the trial court in compliance of the order of the High Court dated 03.12.2020. Thereafter, the regular bail application of the applicant was directed to be decided expeditiously by the trial court.

6. However, the applicant has chosen not to comply with the order of the Supreme Court dated 29.7.2021 as well as this Court dated 03.12.2020. It appears that during the pendency of this application, non-bailable warrant was issued against the applicant on 01.4.2021, the legality thereof was challenged by the applicant by filing another application under Section 482 Cr.P.C. No. 1152 of 2020 through another advocate Mr. Rama Shankar Mishra, who was also one of the counsel in Criminal Misc. Anticipatory Bail Application No. 5675 of 2020, concealing the order of the High Court dated 03.12.2020 and that of the Supreme Court dated 29.7.2021. The said application was disposed of vide order dated 21.2.2022 directing the applicant to appear and surrender before the court below within two weeks. The said order dated 21.2.2022 also did not bring to the notice of this Court by the learned counsel for the applicant during his argument.

7. When learned counsel for the applicant was confronted with the aforesaid facts, he became speechless and did not dispute the aforesaid factual aspect of the matter.

8. Having heard the submissions of the learned counsel for the parties and examining the matter in its entirety, I am of the considered view that the applicant has

no respect to the orders of the Supreme Court as well as this Court. Furthermore, he has not approached this Court with clean hand and filed this application suppressing the material facts in sheer disobedience of the orders of Supreme Court as well as this Court. Therefore, she does not deserve any indulgence by this Court.

9. The courts of law are meant for imparting justice between the parties. One, who comes to the court, must come with clean hands and no material facts should be concealed. I am constrained to hold that more often the process of the court is being abused by unscrupulous litigants to achieve their nefarious design. I have no hesitation in saying that a person, whose case is based on falsehood, has no right to approach the court. He/she can be summarily thrown out at any stage of the litigation. The judicial process cannot become an instrument of oppression or abuse or a means in the process of the Court to subvert justice, for the reason that the Court exercises its jurisdiction, only in furtherance of justice.

10. Time and again the issue of abuse of process of law has come up before the Supreme Court as well as High Courts. The Courts have, over the centuries, frowned upon litigants, who, with intent to deceive and mislead the courts, initiated proceedings without full disclosure of facts.

11. In **Arunima Baruah Vs. Union of India (2007)6 SCC 120**, Supreme Court held that it is trite law that to enable the Court to refuse to exercise its discretionary jurisdiction suppression must of material fact. Material fact would mean material for the purpose of determination of the lis. It was further held that a person invoking the discretionary jurisdiction of the court cannot be allowed to approach it with a pair of dirty hands.

12. In **Prestige Lights Limited Vs. State Bank of India (2007)8 SCC 449,** Apex Court held as under:

"It is well settled that a prerogative remedy is not a matter of course. In exercising extraordinary power, therefore, a Writ Court will indeed bear in mind the conduct of the party who is invoking such jurisdiction. If the applicant does not disclose full facts or suppresses relevant materials or is otherwise guilty of misleading the Court, the Court may dismiss the action without adjudicating the matter. The rule has been evolved in larger public interest to deter unscrupulous litigants from abusing the process of Court by deceiving it. The very basis of the writ jurisdiction rests in disclosure of true, complete and correct facts. If the material facts are not candidly stated or are suppressed or are distorted, the very functioning of the writ courts would become impossible."

13. In **Udyami Evan Khadi Gramodyog Welfare Sanstha and another Vs. State of U.P. and others, (2008)1 SCC 560,** the appellant-Sanstha applied for loan for establishment of an industry, which was sanctioned. The appellant-Sanstha allegedly defaulted in making payment. The recovery proceedings were initiated against it, writ petitions were filed questioning the legality thereof. Public Interest Litigation was also filed. However, fresh recovery proceedings were initiated which were not the subject matter of challenge in the writ petitions filed by the appellants before the High Court. A fresh writ petition was filed. The same has

been dismissed by the High Court as non-maintainable by holding that the petitioners have suppressed the material facts, i.e. filing of four writ petitions on the same cause of action. The validity of that order was challenged before the Apex Court. The Apex Court dismissed the appeal with costs of Rs. 50,000/-. The Court held as under:

"A writ remedy is equitable one. Any person approaching a superior court must come with a pair of clean hands. It neither should suppress any material fact, but also should not take recourse to the legal proceedings over and over again which amounts to abuse of the process of law.

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For the reasons aforementioned, there is no merit in this appeal which is dismissed accordingly with costs. Counsel's fee quantified at Rs. 50,000/-"

14. In **K.D Sharma Vs. Steel Authority of India Limited and others,** (2008)12 SCC481, Supreme Court held that no litigant can play "hide and seek" with the courts or adopt "pick and choose". To hold a writ of the court one should come with candid facts and clean breast. Suppression or concealment of material facts is forbidden to a litigant or even as a technique of advocacy. In such cases the Court is duty bound to discharge rule nisi and such applicant is required to be dealt with for contempt of Court for abusing the process of the court.

15. Supreme Court in **Dalip Singh Vs. State of Uttar Pradesh and others,** (2010)2 SCC 114 came down heavily on unscrupulous litigants by holding that it is now well established that a litigant who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final.

16. Having considered the factual aspect of the case and the dictum of the Supreme Court, I am of the considered view that the applicant has misused the process of law by filing successive applications before this Court suppressing the material facts and documents and misled the Court. Honesty, fairness, purity of mind should be of the highest order to approach the court, failing which the litigant should be shown the exit door at the earliest point of time.

17. In view of the verbose discussion, the application is rejected with costs, which is quantified at Rs. 25,000/- (rupees twenty five thousand only) to be deposited by the applicant within one month with the Registrar General of this Court, failing which the same shall be recovered from the applicant as arrears of land revenue. After deposit of the amount, the Registrar General shall forward the same to the account of Rajkiya Bal Greh Shishu, Allahabad being Account No. 3785336735, State Bank of India, Khuldabad Branch, Prayagraj, IFSC Code SBI N0002560, Micro Code 211002015, which shall be used for the welfare of the children.

(2022)03ILR A311
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.12.2021

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Application U/S 482 No.10015 of 2009

Pappu ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri V.P. Singh Kashyap

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

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Indian Penal Code, 1860 - Section 363, 366 - inherent powers of the High Court can be exercised to prohibit the abuse of process of Court - maliciously instituted with an ulterior motive should not be allowed to continue.(Para -5,6)

Victim's father lodged an FIR - allegation - minor daughter gone to ease herself out - enticed away by applicant - filed charge-sheet under duress without even recording statement of victim - abuse of process of Court is apparent on its face - statement of the victim under Section 164 Cr.P.C. never recorded - impugned charge sheet clearly a misuse of process of Court .(Para - 3,4,7)

HELD:- Permitting the criminal proceedings, which have been maliciously instituted with ulterior motive against the applicant and it shall be nothing but the abuse of process of Court needs to be interfered by this Court. Case falls within the four walls of Section 482 Cr.P.C. . Proceedings of Criminal Case pending in the Court of C.J.M. are quashed.(Para -9,10)

Application u/s 482 Cr.P.C. allowed. (E-7)

List of Cases cited:-

1. Ahmad Ali Quraishi & anr. Vs St. of U. P. & anr., (2020) 13 SCC 435

2. Vineet Kumar & ors. Vs St. of U.P. & anr., (2017) 13 SCC 369

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

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

1. Heard Sri V.P. Singh Kashyap, learned counsel for the applicant and Sri Vibhav Anand Singh, learned A.G.A. for the State.

2. The present application has been filed with the prayer for quashing the Criminal Case No. 605 of 2007 pending in the Court of C.J.M. Badaun, State vs. Pappu in Case Crime No. 9 of 2007 u/s 363, 366 IPC, P.S. Kunwargaon, District-Badaun.

3. The brief facts of the case are that the victim's father, Prem Pal Sharma S/o Mahavir Prasad had lodged an FIR at P.S. Kunwargaon, District Badaun alleging that on 25.12.2006 at 5.00 pm, when his minor daughter had gone to ease herself out, she was enticed away by the applicant with the help of Sanjeev and Smt. Madhuri. It was further alleged that his minor daughter could not be found thereafter. The FIR was lodged after a delay of about one month i.e. on 21.1.2007.

4. The learned counsel for the applicant has alleged that the investigating officer, in collusion with the informant, has filed a charge-sheet under duress without even recording the statement of victim. It is pertinent to mention here that the statement of the victim was recorded after the intervention of the High Court vide its order dated 25.8.2008. The statement of victim recorded under Section 164 Cr.P.C. on 25.8.2008, which is annexed as Annexure-4 to the affidavit accompanying the application, categorically states that the age of the victim is 24 years and she has gone out of her own sweet will with the applicant Pappu, and she got married with him on 6.1.2007. That she is living with her husband Pappu (applicant) and a son is born out of the wedlock. She has also categorically stated that her father was against her husband marrying her and has

lodged false FIR out of the vengeance. She wants to live with her husband. She should not be separated from her husband and child. Her husband has been falsely implicated in the case.

5. It has been opined in **Ahmad Ali Quraishi and another vs. State of Uttar Pradesh and another, (2020) 13 SCC 435** that the inherent powers of the High Court can be exercised to prohibit the abuse of process of Court. Paragraph 10 of the judgment is being reproduced hereinunder:-

"10. Before we enter into facts of the present case and submissions made by the learned counsel for the parties, it is necessary to look into the scope and ambit of inherent jurisdiction which is exercised by the High Court Under Section 482 CrPC. This Court had the occasion to consider the scope and jurisdiction of Section 482 CrPC. This Court in *State of Haryana and Ors. v. Bhajan Lal and Ors., 1992 suppl. (1) SCC 335*, had elaborately considered the scope and ambit of Section 482 CrPC/Article 226 of the Constitution in the context of quashing the criminal proceedings. In para 102, this Court enumerated seven categories of cases where power can be exercised under Article 226 of the Constitution/Section 482 CrPC by the High Court for quashing the criminal proceedings. Para 102 is as follows:

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

(7) Where a criminal proceeding is manifestly attended with malafide 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.

6. The Apex Court has opined in **Vineet Kumar and others vs. State of Uttar Pradesh and another, (2017) 13 SCC 369** that the proceeding maliciously instituted with an ulterior motive should not be allowed to continue. The relevant paragraph 23 is being reproduced hereinunder :-

"23. This Court time and again has examined scope of jurisdiction of High Court Under Section 482 CrPC and laid down several principles which govern the exercise of jurisdiction of the High Court under Section 482 CrPC. A three-Judge Bench of this Court in State of Karnataka v. L. Muniswamy and Ors., 1977 (2) SCC 699, held that the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the court or that the ends of justice require that the proceeding ought to be quashed. In para 7 of the judgment, the following has been stated:

7....In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realisation of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice, between the State and its subjects, it would be impossible to appreciate the width and contours of that salient jurisdiction."

7. In the instant case, the abuse of process of Court is apparent on its face as the statement of the victim under Section 164 Cr.P.C. was never recorded and had she been a minor, the matter of her consent would have paled into insignificance, but she has categorically stated in her statement under Section 164 Cr.P.C. that she is major and the same fact has been substantiated by

the age certificate filed by the applicant certified by the C.M.O. Budaun which states that her age on 4.10.2008 was 22 years. Thus, her age on the date of occurrence cannot be less than twenty years. Hence, she is major and has attained the age of consent. The impugned charge sheet is clearly a misuse of process of Court and the prosecution lodged therein cannot be allowed to be continued.

8. The subject matter of the present case falls under category "(7)' of the **State of Haryana and Ors. v. Bhajan Lal and Ors. 1992 Supp (1) SCC 335.**

9. In view of the foregoing discussions, this Court is of the view that permitting the criminal proceedings, which have been maliciously instituted with ulterior motive against the applicant and it shall be nothing but the abuse of process of Court needs to be interfered by this Court. This case falls within the four walls of Section 482 Cr.P.C.

10. The proceedings of Criminal Case No. 605 of 2007 pending in the Court of C.J.M. Badaun, State vs. Pappu, in Case Crime No. 9 of 2007 u/s 363, 366 IPC, P.S. Kunwargaon, District-Badaun are quashed. The application is, accordingly, allowed.

(2022)03ILR A315
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.12.2021

BEFORE

THE HON'BLE SAMEER JAIN, J.

Application U/S 482 No.14051 of 2008

Virendra Kumar Sharma ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Manoj Kumar Rai, Sri K.C. Tripathi

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

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Indian Penal Code, 1860 - The Negotiable instruments Act, 1981- Section 138 - Dishonour of cheque , Section 145 - Evidence on affidavit , Section 145(1) - evidence of complainant may be given by him on affidavit,and for summoning of accused under Section 138 Negotiable Instruments Act, recording of statements under Sections 200 and 202 Cr.P.C., is not required. (Para - 10)

Complaint under Section 138 Negotiable Instruments Act - ground of challenge - without recording statements of opposite party No. 2 and witnesses - under sections 200 and 202 Cr.P.C. - summoning order passed by Chief Judicial Magistrate - entire proceeding of impugned complaint case - pending against applicant - bad in the eye of law - hence present application. (Para - 3,4)

HELD:-Even on the basis of affidavit filed on behalf of the complainant, an accused can be summoned under Section 138 Negotiable Instruments Act and there is no need to record statements under Sections 200 and 202 Cr.P.C. . No illegality committed by learned trial court while passing summoning order against the applicant. (Para -13,14)

Application u/s 482 Cr.P.C. dismissed. (E-7)

List of Cases cited:-

In Re.: Expeditious Trial of Cases Under Section 138 N.I. Act 1881 , AIR 2021 Supreme Court 1957

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

1. Case called out in the revised list. Despite service of notice, none appeared on behalf of the opposite party No. 2.

2. Heard Sri Manoj Kumar Rai, learned counsel for the applicant, learned AGA for the State-respondent and perused the record.

3. The present application u/s 482 Cr.P.C. has been filed by the applicant to quash the proceedings of complaint case No. 1690 of 2007, (Surendra Singh Vs. Virendra Kumar Sharma), under Section 138 Negotiable Instruments Act, P.S. Bhelpur, District Varanasi pending before IInd Chief Judicial Magistrate, Varanasi.

4. Learned counsel for the applicant, at the very outset, contended that he is challenging the proceeding pending against the applicant only on the sole ground that without recording the statements of opposite party No. 2 and witnesses, under sections 200 and 202 Cr.P.C., summoning order dated 2.2.2008 was passed by the learned Additional Chief Judicial Magistrate, Court No. 2, Varanasi against the applicant, therefore, entire proceeding of the impugned complaint case, pending against the applicant, is bad in the eye of law.

5. Except this, no other argument was advanced on behalf of the applicant.

6. Per contra, learned AGA contended that for passing the summoning order under Section 138 Negotiable Instruments Act, there is no requirement of recording of the statements under Sections 200 and 202 Cr.P.C. and if as per the trial court, complaint discloses prima facie offence under Section 138 Negotiable Instruments Act then applicant/accused can be summoned and, therefore, there is no illegality in the summoning order and the present applicant u/s 482 Cr.P.C. is liable to be rejected .

7. The present matter relates to Negotiable Instruments Act and on 2.2.2008, applicant was summoned under Section 138 Negotiable Instruments Act.

8. Perusal of the summoning order dated 2.2.2008 shows that cheque issued by the applicant in favour of the Firm of opposite party No. 2 was dishonoured and thereafter, notices on behalf of opposite party No. 2 were given to the applicant for payment of the cheque amount but inspite of that, no payment was made then ultimately opposite party No. 2 filed complaint of the present case, under Section 138 Negotiable Instruments Act against the applicant. Therefore, from the perusal of the complaint, a prima facie case under Section 138 Negotiable Instruments Act is made out against the applicant.

9. Further, Section 145 of the Negotiable Instruments Act, 1881, which was introduced by the Parliament by Act No. 55 of 2002 (w.e.f. 6.2.2003), states as follows:-

145. Evidence on affidavit.--

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the evidence of the complainant may be given by him on affidavit and may, subject to all just exceptions be read in evidence in any enquiry, trial or other proceeding under the said Code.

(2)The Court may, if it thinks fit, and shall, on the application of the

prosecution or the accused, summon and examine any person giving evidence on affidavit as to the facts contained therein.

10. Thus, as per Section 145(1) of the Negotiable Instruments Act, the evidence of complainant may be given by him on affidavit, and for summoning of accused under Section 138 Negotiable Instruments Act, recording of statements under Sections 200 and 202 Cr.P.C., is not required.

11. In the present case, from the perusal of the summoning order dated 2.2.2008, it is apparent that while passing this order, learned Magistrate perused the complaint as well as affidavit filed in support of the complaint filed by opposite party No. 2 and other documents including cheque etc. and, therefore, in view of the Provisions of Section 145 (i) Negotiable Instruments Act, it cannot be said that learned trial court committed any error while summoning the applicant as there was no need to record the statements either under Sections 200 Cr.P.C. or 202 Cr.P.C.

12. Recently, Constitution Bench of Hon'ble Supreme Court **In Re.: Expeditious Trial of Cases Under Section 138 N.I. Act 1881** reported in **[AIR 2021 Supreme Court 1957]** in paragraph-12 observed as under:-

"12. Another point that has been brought to our notice relates to the interpretation of Section 202 (2) which stipulates that the Magistrate shall take evidence of the witness on oath in an inquiry conducted under Section 202 (1) for the purpose of issuance of process. Section 145 of the Act provides that the evidence of the complainant may be given by him on affidavit, which shall be read in evidence in any inquiry, trial or other proceeding, notwithstanding anything contained in the Code. Section 145 (2) of the Act enables the court to summon and examine any person giving evidence on affidavit as to the facts contained therein, on an application of the prosecution or the accused. It is contended by the learned Amici Curiae that though there is no specific provision permitting the examination of witnesses on affidavit, Section 145 permits the complainant to be examined by way of an affidavit for the purpose of inquiry under Section 202. He suggested that Section 202 (2) should be read along with Section 145 and in respect of complaints under Section 138, the examination of witnesses also should be permitted on affidavit. Only in exceptional cases, the Magistrate may examine the witnesses personally. Section 145 of the Act is an exception to Section 202 in respect of examination of the complainant by way of an affidavit. There is no specific provision in relation to examination of the witnesses also on affidavit in Section 145. It becomes clear that Section 145 had been inserted in the Act, with effect from the year 2003, with the laudable object of speeding up trials in complaints filed under Section 138. If the evidence of the complainant may be given by him on affidavit, there is no reason for insisting on the evidence of the witnesses to be taken on oath. On a holistic reading of Section 145 along with Section 202, we hold that Section 202 (2) of the Code is inapplicable to complaints under Section 138 in respect of examination of witnesses on oath. The evidence of witnesses on behalf of the complainant shall be permitted on affidavit. If the Magistrate holds an inquiry himself, it is not compulsory that he should examine witnesses. In suitable cases, the Magistrate can examine

documents for satisfaction as to the sufficiency of grounds for proceeding under Section 202."

13. Thus, it is clear from the above judgement of Hon'ble Supreme Court that even on the basis of affidavit filed on behalf of the complainant, an accused can be summoned under Section 138 Negotiable Instruments Act and there is no need to record statements under Sections 200 and 202 Cr.P.C.

14. Having considered the aforesaid facts and circumstances of the case, it is apparent that there is no illegality committed by the learned trial court while passing the summoning order dated 2.2.2008 against the applicant. Therefore, the present application u/s 482 Cr.P.C., is devoid of merit and is, accordingly, **dismissed.**

15. Interim order, if any, stands vacated.

(2022)03ILR A318
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.03.2022

BEFORE

THE HON'BLE BRIJ RAJ SINGH, J.

Application U/S 482 No.16386 of 2021

Smt. Shila Devi ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Kumar Ankit Srivastava, Sri C.K. Parekh (Senior Adv.)

Counsel for the Opposite Parties:
A.G.A., Sri Anil Pathak, Sri Sageer Ahmad (Senior Adv.)

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Indian Penal Code, 1860 - Sections 419, 420, 465, 466, 467, 468 and 472 - If there are two views emerging then the court has to examine discharge application filed under Section 227 Cr.P.C. by discussing the evidences on record and then forming the opinion to pass order on the application. (Para - 15)

Applicants father gifted Benami Property - sold by Bhabhi of complainant fraudulently - police collected material and charge sheet filed against applicant - applicant challenged charge sheet - applicant permitted to move discharge application through counsel - Judicial Magistrate dismissed discharge application - revision - dismissed - applicant being aggrieved - filed application U/s. 482 before this Court .(Para - 6)

HELD:-Both courts below have not discussed the evidences and material available before them and reasons have not been recorded. Order passed by courts below set-aside. Matter remitted back to Judicial Magistrate. (Para - 15)

Application u/s 482 Cr.P.C. allowed. (E-7)

List of Cases cited:-

1. Satish Mehra Vs St. of N.C.T. of Delhi & anr. , 2013 Vol. I ACR 591 (S.C.)

2. St. Vs Daraswmami & ors., AIR 2019 S.C. 1518

3. St. of T.N. Vs N. Suresh Rajan , 2104 (84) AC 656.

4. Yogesh @ Sachendra Jagdish Joshi Vs St. of Mah., 2008 Vol. X SC 394

5. Vikram Jauhar Vs St. of U.P. , AIR 2019 S.C. 2109

6. St. of Orrisa Vs Devendra Nath Padhi, 2003 Vol. II SCC 711

7. Jaswant Sing Vs St. of Punj., 2021(6) JKJ 93 SC (20)

8. Randheer Singh Vs St. of U.P., 2021 (5) JKJ 386 SC (31-33)

9. Vinod Kumar Vs U.O.I. , 2021(4) CTC 495

10. U.O.I. Vs Praful Kumar Samal, 1979 (3) SCC 4,

11. Krishnan & ors. Vs Krishna Veni & ors., 1997(4) SCC 241

12. Dharampal & ors. Vs Ramshri & ors., AIR 1993 SC 1361

13. Krishnan & ors. Vs Krishnan Veni, 1997(4) SCC 241

14. Prabhu Chawala Vs St. of Raj., AIR 2016 SC 4245 (6)

15. Hari Bhai Malviya Vs St. of Guj., 2019(17) SC 1

16. Asim Sarif Vs N.I.A., 2019 (7) SCC 148 (16, 17 & 19),

17. Krishnan & ors. Vs Krishnaveni & ors. , (1997) 4 SCC 241

18. H.K. Raval Vs Nidhi Prakash , 1989 (0) JIC 540

19. St. of Orissa Vs Debendra Nath Padhi , AIR 2005 SC 359

20. Prabhu Chawla Vs St. of Raj. ,AIR 2016 SC 4245 (6)

21. Dharampal & ors. Vs Ramshri & ors., AIR 1993 SC 1361

22. Krishnan & ors. Vs Krishna Veni & ors., 1997(4) SCC 241

23. Karanataka Vs Muniswamy & ors. , (1997) 2 SCC 699

24. Sunil Kumar Jha & ors. Vs St. of Bihar , Crl. Misc. Case No. 22050 of 1996

25. Smt. Kalawati Vs St. of U.P. , Crl. Revision No. 1012 of 1990

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

1. Heard Sri C.K.Parekh, learned Senior Advocate assisted by Sri Kumar Ankit Srivastava, learned counsel for the applicant, and Sri Sageer Ahmad, learned Senior Advocate assisted by Sri Anil Pathak, learned counsel for opposite party No. 2, learned A.G.A. for the State and perused material on record.

2. This application under Section 482 Cr.P.C. has been filed to set-aside the order dated 16.3.2021 passed by Sessions Judge, Chandauli in Criminal Revision No. 27 of 2020, arising out of judgment and order dated 21.9.2019 passed by Judicial Magistrate, Chakia, District- Chandauli in Criminal Case No. 340 of 2019 (State Vs. Asharani and others) arising out of Case Crime No. 0153 of 2018 under Sections 419, 420, 465, 466, 467, 468 and 472 I.P.C., Police Station- Chakia, District- Chandauli, pending in the Court of Judicial Magistrate, Chakia, Chandauli as well as allow the discharge application filed by the applicant before the court below. A further prayer has also been made to stay the further proceedings of the aforesaid case.

3. The applicants Shila Devi Purchased property sold by recorded by owner Asharani Shukla wife of Shivendra Dutt Shukla vide sale deed dated 9.7.2018.

4. The FIR was lodged on 11.7.2018 in case Crime No. 153 of 2018 under Sections 419, 420, 465, 466 I.P.C., Police Station Chakia, District- Chandauli by Ramendra Kumar Shukla against three persons namely, Asha Rani and her

husband Shrivendra Dutt Shukla (real brother of informant) and Shila Devi.

5. In the said FIR dated 11.7.2018 the informant made allegations that his father Vidyasagar Shukla gifted the Benami Property to him on 1.6.2018 and the said property has been sold by Asha Rani Shukla (Bhabhi of the complainant) fradulently.

6. The police collected the material and charge sheet was filed against the applicant and the applicant had challenge the charge sheet by filing Crl. Misc. Case No. 24708 of 2019 and this Court directed that applicant is permitted to move discharge application through counsel vide order dated 28.6.2019. In pursuance of the direction issued by this Court the applicant preferred discharge application which was decided by the Judicial Magistrate Chakia, District Chandauli on 21.9.2019 and the said discharge application was dismissed. Thereafter, the revision was preferred which too was dismissed on 16.3.2021 passed by the Sessions Judge, Chandauli in Criminal Revision No. 27 of 2020. The applicant being aggrieved has filed application U/s. 482 before this Court

7. Submission of counsel for applicant:

A. That before the Magistrate, applicant relied on the judgment i.e**. 2013 Vol. I ACR 591 (S.C.) Satish Mehra Vs. State of N.C.T. of Delhi & another** relating to quashing of charges. It was arising out of Criminal Petition under Section 482 Cr.P.C. decided by Delhi High Court. Paragraphs 20 to 22. It is stated that charges under sections 420, 467, 468, 471 and 12B of I.P.C. are quashed by High Court against one of the Accused S.K. Khosala and Apex Court has held that High Court had not committed any error in quashing the charges against the accused.

B. That another judgment referred by trial court as cited by applicant is 2009 Volume VIII SCC 741 M. Ibrahim Vs. State of Bihar. It is again related to quashing of criminal proceeding/ complaint case after framing charge and Apex Court examined the matter under Sections 420, 467, 471 and 504 I.P.C. and held that sale deed executed by accused do not forge a document, hence held in paragraph 12 of said judgment that there is no forgery, hence Section 467/471 I.P.C. is concern, it has been held that since ingredient of cheating as per section 415 I.P.C. are not found and therefore, offence is made out. It was also found that there is no deceit or fraud committed by accused person of that case and ultimately conclusion had been arrived by Apex Court that charges framed under those sections are also quashed.

C. That the two judgments, **State Vs. Daraswmami and others, reported in AIR 2019 S.C. 1518** and another judgment **State of Tamilnadu Vs. N. Suresh Rajan reported in 2104 (84) AC 656**. These two judgments referred by trial court/Magistrate; but the learned Magistrate did not consider these two judgment which were cited by informant before the Magistrate relates the matter under Prevention of Corruption Act and accordingly these two judgments are not at all relevant for the prepose of present case. However also otherwise these two judgments are not relevant case I as much relating to principles laid down in **Yogesh @ Sachendra Jagdish Joshi Vs. State of Maharashtra reported in 2008 Vol. X SC 394.** Apex Court in this judgment held that High Court wrongly acted as appellate

court against the order of Special Court. Approached was wrongly adopted by High Court and therefore, Supreme Court interfered with the judgment. It is submitted that these judgments are not applicable because those were cases under prevention of Corruption Case and High Court had exceeded its power in interfering in trial.

D. That as regard to Order dated 16/3/2021 passed in Criminal Revision 27 of 2020 by Session Judge Chandauli, there is error committed in not dealing with merit of the Prosecution Case as to ascertain whether any offence is made out. In fact as evident from the FIR and evidence collected in investigation, it is simple case of civil dispute of title as well as boundary. The Revision Court further committed though several judgments of Apex court and High Court have been cited or referred in the order by revisional court. However, two judgments **Vikram Jauhar Vs. State of U.P. reported in AIR 2019 S.C. 2109**, the Hon'ble Supreme Court considered the fact and law, regarding disposal of discharge application. In that matter, trial court rejected discharge application then matter again came up before the Hon;bel High Court who rejected revision and ultimately, Apex Court quash the charges and allowed the Appeal of accused persons.

E. Another case as reported in **2003 Vol. II SCC 711 Paragarah 11, State of Orrisa Vs. Devendra Nath Padhi,** this judgment relates to Prevention of Corruption Act and not applicable although paragraphs No.11 of the said judgment of quoted below:-

Para11:" From the above judgments referred to by the learned counsel for the appellant, it is clear that all the court has to do a the time of framing a charge is to consider the question of sufficiency of ground for proceeding against the accused on a general consideration of the material placed before it by the investigating agency. There is no requirement in law that the court at that stage shroud either give an opportunity to the accused to produce evidence in defence or consider such evidence the defence may produced at that stage".

F. Further the following case laws are being cited by applicant before the Hon'ble Court in support of case including in reply to the preliminary objections raised by opposite party regarding non maintainability of Present Petition/Application under Section 482 Cr.P.C.

G. That in the case of **Jaswant Sing Vs. State of Punjab, reported in 2021(6) JKJ 93 SC (20)** as well as in the matter of **Randheer Singh Vs. State of U.P., 2021 (5) JKJ 386 SC (31-33)** the matter arising out of pure civil matter and therefore, Criminal proceedings have been set-aside and quashed.

H. That as regard to case of Superintendent & Remembrance Vs. Mohan Singh, reported in AIR 1975 SC 1002, paragraph No. 2 holding that Section 482 Cr.P.C. for quashing proceeding is maintainable and this judgment followed in the recent case by Apex Court in the case of **Vinod Kumar Vs. UOI reported in 2021(4) CTC** 495. Paragraph No.4 and again held that second application under Section 482 Cr.P.C. is maintainable.

I. That as regard to case of **Union of India Vs. Praful Kumar Samal, reported in 1979 (3) SCC 4,** relevant

paragraph are paragraph No. 7, 23, 24, and 25. The details of exercising power of Discharge is given under Section 227 Cr.P.C. in absence of any legal evidence there is no sufficient evidence found against the accused in execution of the sale deed.

J. That in case relied by Applicant, **Krishnan and others Vs. Krishna Veni and others, reported in 1997(4) SCC 241**, the relevant paragraph are 3, 12 and 14. It is pertinent to mention here that the Case Law Dharampal case (AIR 1993 SC 1361) which has been relied by respondent i.e. has been over ruled by Full Bench of Hon'ble Apex Court. Furthermore case of **Dharampal and others Vs. Ramshri and others, AIR 1993 SC 1361** is concerned and paragraph No. 12 of said judgment of **Krishnan and others Vs. Krishnan Veni 1997(4) SCC 241**, it is held that heh said judgment of Dharampal case was only related to exercise of power to issue of order of attachment under Section 146 Cr.P.C. and in that respect it was held that inherent power under Section 482 Cr.P.C. was prohibited. It is further held in Krishnan case that view taken by Apex Court in Dharampal case is not correct. Therefore, no reliance could be placed by opposite party/informant upon overruled case of Dharampal.

K. The applicant has further relied upon case of **Prabhu Chawala Vs. State of Rajasthan, reported n AIR 2016 SC 4245** (6) wherein, the Apex Court held in paragraph no.6 as follows: which are relevant.

"6.In our considered view any attempt to explain the law further as regards the issue relating to inherent power of High Court under Section 482 Cr.P.C. is unwarranted. We would simply reiterate that Section 482 begins with a non-obstante Clause to state; *"Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any court or otherwise to secure the ends of justice."* A fortiori, there can be no total ban on the exercise of such wholesome jurisdiction where, in the words of Krishna Iyer, J. "abuse of the process of the Court or other extraordinary situation excites the court's jurisdiction. The limitation is self-restraint, nothing more'. We venture to add a further reason in support. Since Section 397 Cr.P.C. is attracted against all orders other than interlocutory, a contrary view would limit the availability of inherent powers under Section 482 Cr.P.C. only to petty interlocutory orders! A situation wholly unwarranted and undesirable."

L. That applicant has further relied upon judgment of Vinu Bhai **Hari Bhai Malviya Vs. State of Gujarat, reported in 2019(17) SC 1**. The relevant paragraphs is paragraph no. 16 & 17 of the said judgment.

M. That the applicant has relied upon recent detail judgment on section 227 Cr.P.C. which is akin to 2398 Cr.P.C. It is pointed out the respondent counsel made an attempt that the principle governing to 227 Cr.P.C. would not apply to Section 239 Cr.P.C. in case of **Asim Sarif Vs. National Investigating Agency, reported in 2019 (7) SCC 148 (16, 17 & 19),** the most relevant paragraph is paragraph no. 19 of the said judgement.

"Taking not of the exposition of law on the subject laid down by this Court, it

is settled that the judge while considering the question of framing charge under Section 227 Cr.P.C. in sessions cases (*which is akin to section 239 Cr.P.C. pertaining to warrant cases)* has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out: where the material placed before the court discloses grave suspicion against the accused which has not been properly explained, the court will be fully justified in framing the charge; by and large if two views are possible and one of them giving rise to suspicion only as distinguish from grave suspicion against the accused the trial judge will be justified in discharging him. It is thus clear that while examining the discharge application filed under Section 227 Cr.P.C., it is expected from the trial judge to exercise its judicial mind to determine as to whether a case for trial has been made out or not. It is true that in such proceedings, the court is not supposed to hold a mini trial by marshalling the evidence on record.

8. **Submission of counsel for opposite party** :-

A. In the case at hand, instant case has been filed against the impugned order, dated 16.3.2021 and 21.9.2019, passed by the learned court of Sessions Judge Chandauli and learned Judicial Magistrate Chakiya, Chandauli, the impugned order, dated 16.3.2021 as well as also 21.9.2019, reveals entire ordeal, both the learned court below by passing such type of impugned order have not committed any error of and in as much as also miscarriage of justice.

B. It is well settled law, inherent power u/s 482 Cr.P.C., must be exercise sparingly only in order to secure the end of justice. It is further submitted, in the case at hand, the applicant has been completely failed to make out any case either any error of law or miscarriage of justice have been committed by the learned courts below by passing such type of impugned orders. Therefore, the applicant has been completely failed to make-out the case to be interfere by the Hon'ble Court in order to exercise inherent power. So as such, the instant case is devoid of merit and liable to dismissed out rightly.

C. It is also well settled law, in order to dealt and decide the discharge application filed u/s 239 Cr.P.C., only those evidence shall be taken into consideration, which are the part of the case diary not otherwise. It is further submitted, at that very stage, the defence of the accused cannot be taken into consideration. It is further submitted, in order to decide discharge application meticulous in detail reference of evidence does not require in order to decide discharge application. At least, discharge rejection order must reveal, there is application of judicial mind and the learned Judicial Magistrate has carefully gone through the evidence available before him. It is further submitted, in the case at hand, that the impugned orders passed by the learned Session Judge, Chandauli and learned Judicial Magistrate, Chakiya, Chandauli reveals there is application of mind. So as such, both the orders, dated 16.3.2021 and 21.9.2019 are just, proper and legal. Therefore, do not require any interference by the Hon'ble Court under Section 482 Cr.P.C.

D. In fact, under the garb of the instant case, the applicant (Smt. Shila Devi) want to create an obstruction in the administration of justice, needles multiple of procedure unnecessary delay in trial and protraction of proceeding. Whereas, the

object of criminal trial is rendered public justice, to punish the criminal and to see i.e. trial is concluded expeditiously before the memory of the witnesses fades out. Meaning thereby, the instant case, is nothing else but it is only abuse of process and multiplicity of the litigation. Therefore, aforesaid case is liable to be dismissed, accordingly, in the interest of justice, so the justice may be done.

Reference of citations by opposite party :-

1. Three Hon'ble Judges Judgment of Apex Court, passed in the matter of ***Krishnan and others vs Krishnaveni and Others, (1997) 4 SCC 241, relevant para No. 10 & 12***

2. Three Hon'ble Judge judgment of the Allahabad High Court passed in the matter of ***H.K. Raval Vs. Nidhi Prakash, 1989 (0) JIC 540*** relevant para no. 19.

3. Three Hon'ble Judges judgment of Apex Court passed in the matter of ***State of Orissa Vs. Debendra Nath Padhi, AIR 2005 SC 359,*** relevant para no. 23.

Finding of the Court :-

9. **Prabhu Chawla Vs. State of Rajasthan AIR 2016 SC 4245 (6)** has been dealt exhaustively and the scope of 482 Cr.P.C. has been dealt. The Hon'ble Supreme Court has observed that High Court has got inherent power under Section 482 Cr.P.C., and nothing in the course shall be deemed to limit over the inherent power of the High Court to make such orders as may be necessary to give effect to any order under the Court, or to prevent abuse of the process of any Court or otherwise to secure the end of justice. The Supreme Court has further enunciated that 397 is attracted against all orders other than interlocutory and 482 Cr.P.C. power cannot be limited by curtailing inherent powers.

10. The counsel for opposite party has relied the judgment of Full Bench of Hon'ble Supreme Court **Dharampal and others Vs. Ramshri and others, AIR 1993 SC 1361.** Learned counsel for opposite party No. 2 submitted that in view of law laid down in Dharampal Case 482 is not maintainable against the revisional order. So far as the case of **Dharampal and others Vs. Ramshri and others (Supra)** is concerned, the said judgment of **Krishnan and others Vs. Krishna Veni and others, reported in 1997(4) SCC 241**, it is held that the said judgment of Dharamapal case was only related to exercise of power to issue of order of attachment under Section 146 Cr.P.C. and in that respect I was held that inherent power under Section 482 Cr.P.C. was prohibited. It is further held in Krishnan and others Vs. Krishna Veni and others case that the view taken by Apex Court in Dharampal Case is not correct. The reliance of Dharampal case placed by opposite party No. 2 is overruled.

11. Legal submission regarding the maintainability of the 482 application by learned counsel for opposite party No. 2 is not sustainable and it is held that against the revisional order of the Sessions Court 482 is maintainable.

12. In view of the aforesaid discussion, now I have to see whether the order passed by the court below is against law or whether the court below discussed merit of the case by applying its mind. I have gone through the judgment of lower

court and there is no discussion of the evidences on record and material which are placed before the court below are not discussed. Once the court below is forming opinion for deciding the discharge application, it has to discuss the material of the charge sheet available before him but bare perusal of the order of the court below would indicate that case laws has been discussed and the facts narrated by the parties have been recorded but while taking the decision courts below have not taken note of the facts and material available on record. The said aspect is dealt in various judgment of Hon'ble Supreme Court. The Supreme Court has held in State of **Karanataka Vs. Muniswamy and others (1997) 2 SCC 699** that court while deciding discharge application has to record its reasons while rejecting the discharge application perusal of record and reasons to be recorded are must. Para 7 of the aforesaid judgment is herein under :

"The second limb of Mr. Mookerjee's argument is that I any event the High Court could not take upon itself the task of assessing or appreciating the weight of material on the record in order to find whether any charges could be legitimately framed against the respondents. So long as there is sme material on the record to connect the accused with the crime, says the learned counsel, the case must go on and the High Court has no jurisdiction to put a precipitate or premature end to the proceedings on the belief that the prosecution is not lively to succeed. This, in our opinion, is too broad a proposition to accept. Section 227 of the Code of Criminal Procedure, 2 of 1974, provides that :

If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the judge considers that there is not sufficient ground for proceeding against the accused, the shall discharge the accused and record his reasons for so doing.

This section is contained in Chapter XVII called "Trial Before a Court of Session". It is clear from the provision that the record and hearing the parties he comes to the conclusion, for reasons to be recorded, that there is not sufficient ground for proceeding against the accused. The object of the provision which requires the Sessions Judge to record his reasons is to enable the superior court to examine the correctness of the reasons for which the Sessions Judge has held that there is or is not sufficient ground for proceeding against the accused. The High Court therefore is entitled to go into the reasons given by the Sessions Judge in support of his order and to determine for itself whether the order is justified by the facts and circumstances of the case. Section 482 of New Code, which corresponds to Section 561-A of the Code of 1898, provides that :

Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed.

The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realisation of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice between the State and its subjects, it would be impossible to appreciate the width and contours of that salient jurisdiction."

13. Hon'ble Supreme Court has again discussed the scope of 227 and 228 Cr.P.C. in **Sunil Kumar Jha and Others Vs. State of Bihar in Crl. Misc. Case No. 22050 of 1996 decided on 5.2.1997**. Para 6 is herein under :

"From bare perusal and comparison of the aforesaid two provisions it appears that while in the case of discharge of an accused under Section 227 of the Code it is obligatory for the Judge to record his reasons for doing so. But while framing charge under Section 228 of the Code the provision does not say in a very specific word that the Court msut record reasons. Nevertheless Section 228 provides that while framing charge, the Court must be of the opinion that there is ground for presuming that the accused has committed an offence. In other words, there must be valid reasons and foundation for framing an opinion that the accused has committed an offence."

14. The case decided by Allahabad High Court in **Smt. Kalawati Vs. State of U.P. decided on 11.7.1990 passed in Crl. Revision No. 1012 of 1990** wherein it has been held that though the full statements of the witnesses need not be discussed but prima facie case should be briefly indicated. Para 3 is herein under :

"It is true that for determining prima facie case court need not weigh or sift the evidence or make roving enquiry. It need not give full statements of the witnesses. Evidently for a judicial speaking order it is necessary that the evidence constituting prima facie case should be briefly indicated and should not be substituted by vague words or by conclusion alone."

15. The court has to see whether the material placed before the court have been properly explained. If there are two views emerging then the court has to examine discharge application filed under Section 227 Cr.P.C. by discussing the evidences on record and then forming the opinion to pass order on the application. Both courts below have not discussed the evidences and material available before them and reasons have not been recorded. The order passed by the Sessions Court dated 16.3.2021 in Crl. Case No. 340 of 2019 (State Vs. Asha Rani and others) in Crl. Revision No. 27 of 2020 and the judgment and order dated 21.9.2019 passed by Judicial Magistrate, Chakia, District- Chandauli are set-aside.

16. The matter is remitted back to Judicial Magistrate, Chakia, District- Chandauli to take fresh decision in view of

the observation made above within a period of three months. The applicant will furnish the copy of the order passed by this Court before the court below within two weeks from today.

17. The application is accordingly, **allowed.**

(2022)03ILR A327
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.02.2022

BEFORE

THE HON'BLE BRIJ RAJ SINGH, .J.

Application U/S 482 No.26550 of 2021

Rajesh @ Rajeshwar & Ors. ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Anuj Bajpai

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

(A) Criminal Law - Indian Penal Code, 1860 - Sections 302 & 201 - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Section 311 - Power to summon material witness, or examine person present - discretionary power vested under Section 311 CrPC has to be exercised judiciously for strong and valid reasons and with caution and circumspection to meet the ends of justice - cardinal rule of law of evidence - best available evidence must be brought before the court to prove a fact, or a point in issue - object underlying Section 311 Cr.P.C . - there may not be failure of justice on account of mistake of either side in bringing the valuable evidence on record.(Para - 7,9,12)

Application under Section 311 Cr.P.C. - to call the witness - statement of witness under Section 161 Cr.P.C. recorded - not examined before court below - last witness of the incident - material witness to reach out the truth - to be examined in the interest of justice - allowed application under Section 311 Cr.P.C. - accused applicant filed an objection before court - ground - belated application filled to delay the trial.(Para - 2,3)

HELD:-Order passed in consonance with the provisions of Section 311 Cr.P.C. Summoning the witness by the court below is important whose statement has already been recorded under Section 161 Cr.P.C. which is part of charge sheet . Witness has to be examined, so that court can reach to the truth. No illegality or perversity in the observations and findings recorded by the trial court in the impugned order. (Para - 13,14)

Application u/s 482 Cr.P.C. dismissed. (E-7)

List of Cases cited:-

1. Natasha Singh Vs C.B.I., 2013(5) SCC 741

2. Mohanlal Shamji Soni Vs U.O.I. & anr., AIR 1991 SC 1346

3. Rajeswar Prasad Misra Vs The St. of W.B. & anr., AIR 1965 SC 1887

4. Rajendra Prasad Vs Narcotic Cell through its Officer-in- Charge, Delhi, AIR 1999 SC 2292 P

5. Sanjeeva Rao Vs St. of A.P., AIR 2012 SC 2242

6. Hoffman Andreas Vs Inspector of Customs, Amritsar, (2000) 10 SCC 430

7. T. Nagappa Vs Y.R. Muralidhar, AIR 2008 SC 2010

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

1. By means of this application under section 482 Cr.P.C., the applicant has invoked the inherent jurisdiction of this

Court for quashing the impugned order dated 28.10.2021 passed by the learned Additional Sessions Judge, Court No.42, Shahjahanpur in Sessions Trial No.395 of 2014 (State Vs. Rajesh) arising out of Case Crime No.189 of 2014, under Sections 302,201 IPC, P.S. Katra, District Shahjahanpur.

2. The prosecution submitted an application under Section 311 Cr.P.C. which has been annexed as Annexure-3 to this application to call the witness, namely, Ratipal with averment that Ratipal had gone to Bareilly Court with his personal assignment where he saw the accused Rajesh @ Rajeshwar at 4 P.M. and further statement was made that deceased Shyam Pal had also gone to District Court Bareily. The statement of Ratipal under Section 161 Cr.P.C. was recorded but he was not examined before the court below though he was last witness of the incident.

3. The Additional Sessions Judge after hearing both the parties passed the judgement on 28.10.2021 in which it was observed that Ratipal is the material witness to reach out the truth and he should be examined in the interest of justice; thus allowed the application under Section 311 Cr.P.C. The accused applicant filed an objection before the court below mentioning that the application under Section 311 Cr.P.C. is belated and it is filed only in order to delay the trial.

4. Learned A.G.A. does not dispute that application under Section 311 Cr.P.C. can be moved at any stage of the trial before the judgment is pronounced.

5. I have considered the submissions advanced by the learned counsel for the applicant and the learned A.G.A. and also perused the record.

6. Section 311 Code Of Criminal Procedure, 1973 is quoted below:

"311. Power to summon material witness, or examine person present. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or. recall and re- examine any person already examined; and the Court shall summon and examine or recall and re- examine any such person if his evidence appears to it to be essential to the just decision of the case."

7. The aim of every Court is to discover the truth. Section 311 CrPC is one of many such provisions which strengthen the arms of a court in its effort to unearth the truth by procedure sanctioned by law. At the same time, the discretionary power vested under Section 311 CrPC has to be exercised judiciously for strong and valid reasons and with caution and circumspection to meet the ends of justice.

8. The determinative factor is whether it is fundamental for the only choice of the case. The articulation that happens is ?at any phase of any request or trial or other continuing under this Code?. It is, however, to be borne as a primary concern that the optional power presented under Section 311 Cr.P.C. must be practiced sensibly, as it is constantly said ?more extensive the power, more noteworthy is the need of alert while exercise of reasonable caution?.

9. In the matter of **Natasha Singh Vs. CBI, reported in *2013(5) SCC 741,*** the Hon'ble Apex Court after analyzing the law

relating to Section 311 of the Cr.P.C. in paragraphs- 10, 11,12,13 & 14 has observed as under: -

10. In **Mohanlal Shamji Soni v. Union of India & Anr., AIR 1991 SC 1346,** this Court examined the scope of Section 311 Cr.P.C., and held that it is a cardinal rule of the law of evidence, that the best available evidence must be brought before the court to prove a fact, or a point in issue. However, the court is under an obligation to discharge its statutory functions, whether discretionary or obligatory, according to law and hence ensure that justice is done. The court has a duty to determine the truth, and to render a just decision. The same is also the object of Section 311 Cr.P.C., wherein the court may exercise its discretionary authority at any stage of the enquiry, trial or other proceedings, to summon any person as a witness though not yet summoned as a witness, or to recall or re- examine any person, though not yet summoned as a witness, who are expected to be able to throw light upon the matter in dispute, because if the judgments happen to be rendered on an inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated.

11. In **Rajeswar Prasad Misra v. The State of West Bengal & Anr., *AIR 1965 SC 1887,*** this Court dealt with the ample power and jurisdiction vested in the court, with respect to taking additional evidence, and observed, that it may not be possible for the legislature to foresee all situations and possibilities and therefore, the court must examine the facts and circumstances of each case before it, and if it comes to the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered, and if such an action on its part is justified, then the court must exercise such power. The Court further held as under:-

??..the Criminal Court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the Court must obviously be dictated by exigency of the situation, and fair play and good sense appear to be the only safe guides and that only the requirements of justice command the examination of any person which would depend on the facts and circumstances of each case.? (Emphasis added)

12. In **Rajendra Prasad v. Narcotic Cell through its Officer-in-Charge, Delhi, AIR 1999 SC 2292**, this Court considered a similar issue and held as under:-

?Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an over sight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting, errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.? (Emphasis added)

13. Similarly, in **P. Sanjeeva Rao v. State of A.P., AIR 2012 SC 2242,** this Court examined the scope of the provisions of Section 311 Cr.P.C. and held as under:-

?Grant of fairest opportunity to the accused to prove his innocence was the object of every fair trial, observed this Court in **Hoffman Andreas v. Inspector of Customs, Amritsar, *(2000) 10 SCC 430*.** The following passage is in this regard apposite:

10. `In such circumstances, if the new Counsel thought to have the material witnesses further examined, the Court could adopt latitude and a liberal view in the interest of justice, particularly when the Court has unbridled powers in the matter as enshrined in Section 311of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible.? xxx xxx xxx xxx

11. We are conscious of the fact that recall of the witnesses is being directed nearly four years after they were examined in chief about an incident that is nearly seven years old?.. we are of the opinion that on a parity of reasoning and looking to the consequences of denial of opportunity to cross-examine the witnesses, we would prefer to err in favour of the appellant getting an opportunity rather than protecting the prosecution against a possible prejudice at his cost. Fairness of the trial is a virtue that is sacrosanct in our judicial system and no price is too heavy to protect that virtue. A possible prejudice to prosecution is not even a price, leave alone one that would justify denial of a fair opportunity to the accused to defend himself.?

14. In **T. Nagappa v. Y.R. Muralidhar, AIR 2008 SC 2010,** this Court held, that while considering such an application, the court must not imagine or assume what the deposition of the witness would be, in the event that an application under Section 311 Cr.P.C. is allowed and appreciate in its entirety, the said anticipated evidence. The Court held as under:

?What should be the nature of evidence is not a matter which should be left only to the discretion of the court. It is the accused who knows how to prove his defence. It is true that the court being the master of the proceedings must determine as to whether the application filed by the accused in terms of sub- section (2) of Section 243 of the Code is bona fide or not or whether thereby he intends to bring on record a relevant material. But ordinarily an accused should be allowed to approach the court for obtaining its assistance with regard to summoning of witnesses, etc. If permitted to do so, steps therefore, however, must be taken within a limited time. There cannot be any doubt whatsoever that the accused should not be allowed to unnecessarily protract the trial or summon witnesses whose evidence would not be at all relevant.?

12. The The very use of the words in Section 311 Cr.P.C., such as 'any court', 'at any stage' or 'of any inquiry, trial or other proceedings', 'any person' and any such person' clearly spells out that this section is expressed in the widest possible terms and do not limit the discretion of the trial Court in any way. It is well settled that the object underlying Section 311 Cr.P.C .is that there may not be failure of justice on account of mistake of either side in bringing the valuable evidence on record. The determinative factor is whether it is essential to the just decision of the case. In

an appropriate case power under Section 311 Cr.P.C. can be invoked by the trial Court in order to meet the end of justice, which depends upon the facts and circumstances of each case.

13. In view of the aforesaid legal discussions and judgment of Hon?ble the Apex Court, I am of the opinion that the order dated 28.10.2021 has been passed by the learned Additional Sessions Judge, Court No.42, Shahjahanpur in consonance with the provisions of Section 311 Cr.P.C. Summoning the witness Ratipal by the court below is important whose statement has already been recorded under Section 161 Cr.P.C. which is part of charge sheet. The witness Ratipal has to be examined, so that the court can reach to the truth.

14. In such circumstances, I do not find any illegality or perversity in the observations and findings recorded by the trial court in the impugned order dated 28.10.2021 passed by the learned Additional Sessions Judge, Court No.42.

15. The instant application lacks merit and is accordingly dismissed.

16. Let a copy of this order be conveyed to the concerned Court below within two weeks for necessary compliance.

(2022)03ILR A331
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.02.2022

BEFORE

THE HON'BLE SANJAY KUMAR SINGH, J.

Application U/S 482 No.28742 of 2021

Niyaz Ahmad Khan ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Jitendra Kumar Srivastava

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Indian Penal Code, 1860 - Section 500 - Punishment of Defamation , Information Technology (Amendment) Act, 2008 - Section 67 - Punishment for publishing or transmitting obscene material in electronic form - power under Section 482 Cr.P.C. at pre-trial stage should not be used in a routine manner - it has to be used sparingly, only in such appropriate cases, where allegations made in First Information Report or charge-sheet and the materials relied in support of same, on taking their face value and accepting in their entirety do not disclose the commission of any offence against the accused .(Para - 6)

(B) Constitution of India - Right to freedom of expression - does not confer upon the citizens the right to speak without responsibility nor does it grant unfettered licence for every possible use of language - High Courts are sentinels of justice with extraordinary and inherent power to ensure that rights and reputation of people are duly protected. (Para - 9)

Allegation in FIR - Morphed photo showing Hon'ble Prime Minister - shaking hands with dreaded and wanted terrorist - posted on Facebook - shared by applicant - another post (a morphed photograph) - posted showing Hon'ble Prime Minister and Cabinet Minister - feeding biscuits to dogs, on whom "Aaj Tak TV", "Zee TV" and "India TV" was written - shared by applicant - objectionable photo viral - grounds in application - relate to disputed question of fact - charge sheet and summoning order under challenge .(Para - 6)

HELD:-Disputed question of facts and defence of the accused cannot be taken into consideration at the pre-trial stage, which can be more appropriately gone into by the trial court at the appropriate stage. Impugned criminal proceeding under the facts of the case cannot be said to be abuse of the process of the Court. No illegality or material irregularity in the impugned cognizance/summoning order. Relief sought by applicant through the instant application refused. Government directed to take appropriate remedial measures/steps in order to control and eradicate such proliferating and booming devastating menace, to stop the misuse of social media platforms. (Para - 6,7,10)

Application u/s 482 Cr.P.C. disposed of. (E-7)

List of Cases cited:-

1. Nikhil Racheti Vs St. of Mah., (2006) SCC Online Bom. 1650

2. Manoj Oswal Vs St. of Mah., (2013) SCC OnLine Bom 978

3. Ekta Kapoor Vs St. of M.P., (2020) SCC OnLine MP 4581

4. Chambers Vs Director of Public Prosecutions, (2013) 1 WLR 1833

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

1- By means of this application under Section 482 of the Code of Criminal Procedure, the applicant has invoked the inherent jurisdiction of this Court for quashing the charge-sheet dated 27.01.2020 arising out of Case Crime No. 296 of 2019, cognizance/summoning order dated 22.07.2020 and proceedings of Criminal Case No. 2887 of 2020 (State Vs. Niyaz Ahmad Khan), under Section 67 Information Technology (Amendment) Act, 2008 and Section 500 IPC, Police Station Mehndawal, District Sant Kabir Nagar pending in the court of Additional Chief Judicial Magistrate, Sant Kabir Nagar.

2- Heard Mr. Jitendra Kumar Srivastava, learned counsel for the applicant, Mr. Manish Goyal, learned Senior Advocate/Additional Advocate General, assisted by Mr. Rabindra Kumar Singh, learned Additional Government Advocate and Mr. Prashant Kumar Singh, learned Brief Holder, for the State of U.P./opposite party no.1 and perused the record.

3- A succinct recapitulation of the facts of the case are that on 28.11.2019, opposite party no. 2, namely, Awadesh Pandey (Senior Sub Inspector), has lodged a first information report against the applicant-Niyaz Ahmad Khan and two others, namely, Anil Sharma and Akhilesh Yadav Samarthak, which has been registered as Case Crime No. 0296 of 2019, under Section 67 Information Technology (Amendment) Act, 2008 and Section 500 IPC at Police Station Mehndawal, District Sant Kabir Nagar. The contents of the first information report, which are in Hindi, are also reproduced as under:-

"आज दिनांक 28.11.19 को मैं^ अवधेश पाण्डेय मय हमराह हे0का0 नुरूद्दीन खान व का0 संदीप चौहान मय सरकारी वाहन बोलेरो UP58G0214 चालक रामअचल के शिकायत प्रा0पत्र–59 ;ट्विटरद्ध 2019 दिनांक नवम्बर की जांच हेतु थाना हाजा से प्रस्थान कर सर्विलांस सेल सन्त कबीर नगर जा कर जांच कराया गया /DURGESH SAURABH द्वारा नियाज अहमद खान जो प्राथमिक विद्यालय समोगर विकाश क्षेत्र मेहदावल जनपद सन्त कबीर नगर उ0प्र0 में प्रधानाध्यापक है। इन्होंने आतंकवादी हाफिज सईद की पीएम /NARENDRA MODI जी के साथ हाथ मिलाते हुए एवं @AMITSHAH जी की भी फोटो का आपत्तिजनक तस्वीर अपने फेस बुक से

शेयर किया है जांच से पाया गया कि अनिल शर्मा द्वारा फेस बुक पर दिनांक 17 अक्टूबर 2017 को समय 21.46 बजे भारत का छुपा असली गद्दार कौन–? संघ और बी.जे.पी. क्यों है मौन आजम खान ने जारी की फोटो हाफिज सईद और मोदी पाकिस्तान में मिलते हुए देखो देश द्रोहियों गद्दार कौन कमेन्ट के साथ भारत के प्रधानमंत्री नरेन्द्र मोदी जी को आतंकवादी हाफिज सईद को हाथ मिलाते हुए फोटो इडिट किया हुआ पोस्ट डाला था जिसको नियाज अहमद खान द्वारा 24 अप्रैल 2018 को समय 19.58 बजे शेयर किया गया है। तथा दुसरी पोस्ट जिसको अखिलेश यादव समर्थक के नाम से दिनांक 1 अप्रैल 2018 को समय 15.23 बजे डाला गया है जिसमें भारत के प्रधानमंत्री मोदी जी एवं केन्द्रीय गृह मंत्री अमित शाह जी की फोटो है। जिसमें दोनों लोगों को कुत्तों को जिन पर इण्डिया टी.वी. आज तक टी.वी. जी टी.वी. लिखा है। बिस्किट खिलाते हुए फोटो शाप द्वारा इडित कर दर्शाया गया है। कमेन्ट में सारे देश की मिडिया का हाल कुछ ऐसा ही हो गया है लिखा गया है जिसको नियाज अहमद खान उपरोक्त द्वारा दिनांक 5 अप्रैल 2018 को समय 15.54 बजे अपनी आईडी पर शेयर किया गया है। भारत के प्रधानमंत्री जैसे सम्मानित पदों पर आसीन व्यक्तियों के उपर इस प्रकार का आपत्तिजनक फोटो एवं अपमानित टिप्पणी शेयर करना अन्तर्गत धारा 67 आई.टी. एक्ट व 500 भा0द0वि0 का दण्डनीय अपराध है। अतः भ्ड को निर्देशित किया जाता है कि उक्त के सम्बन्ध में अभियोग पंजीकृत करें।"

The Investigating Officer after investigation submitted charge-sheet on 27.01.2020 against the applicant, on which the learned Additional Chief Judicial Magistrate, Sant Kabir Nagar took cognizance on 22.07.2020 and summoned the applicant to face trial under Section 67 Information Technology (Amendment) Act, 2008 and Section 500 IPC. The said charge-sheet and summoning order are the subject matter of challenge in the present application.

4- The main substratum of argument of learned counsel for the applicant is that during the investigation, Inspector In-charge, Police Station Dharamsinghwa, District Sant Kabir Nagar submitted a surveillance report dated 13.01.2020 mentioning that on account of non-availability of Uniform Resource Locator (URL) of ID, it is not possible to trace the details of unknown person, who made the objectionable photo viral. As per the prosecution case, the applicant has only shared the objectionable posts in question. Charge-sheet has been submitted against the applicant without proper investigation. Lastly, it is submitted that the applicant has been falsely implicated in this case, therefore, aforesaid impugned charge-sheet and summoning order against the applicant is liable to be quashed.

5- Per contra, Mr. Manish Goyal, learned Senior Advocate/ Additional Advocate General for the State of U.P. vehemently opposed and refuting the submissions advanced on behalf of the applicant submitted that:-

(5.1)- The applicant-Niyaz Ahmad Khan is Headmaster, at Primary School, Samogar Development Area, Sant Kabir Nagar, Uttar Pradesh.

(5.2)- On 17.10.2017 at 21:46 hours, Anil Sharma posted a morphed photo on Facebook which showed the Hon'ble Prime Minister Narendra Modi shaking hands with dreaded and wanted terrorist Hafiz Saeed. The following comments were added to the photograph- *''भारत का छुपा असली गद्दार कौन–?'',''संघ और बी.जे.पी. क्यों है मौन'', ''आजम खान ने जारी की फोटो'', ''हाफिज सईद और मोदी पाकिस्तान में मिलते हुए देखो'', ''देश द्रोहियों गद्दार कौन''.*

(5.3)- The applicant, Niyaz Ahmad Khan, shared the post on 24.04.2018

at 19:58 hours. Another post (a photograph), in the name of the supporter of Akhilesh Yadav, was posted on 01.04.2018 at 15:23 hours. This photograph was also morphed, and it showed Hon'ble Prime Minister Narendra Modi ji and Cabinet Minister Amit Shah Ji are feeding biscuits to dogs, on whom "Aaj Tak TV", "Zee TV" and "India TV" was written. The following comment was added to the photograph, ''सारे देश की मीडिया का हाल कुछ ऐसा ही हो गया है''ण The applicant-Niyaz Ahmad Khan shared this post on 05.04.2018 at 15:54 hours on his Facebook ID.

(5.4)- the act of sharing such objectionable contents (morphed photo) regarding people holding esteemed positions like that of Prime Minister or a Cabinet Minister was deliberate and is an offence under Section 67 of Information Technology Act, 2000 and Section 500 of IPC, 1860.

(5.5)- upon perusal of F.I.R. and the allegations made therein as well as material against the applicant, as per prosecution case, the cognizable offence against the applicant is made out. The criminal proceedings against the applicant cannot said to be abuse of the process of the Court. Hence, this application is liable to be dismissed. Mr. Manish Goyal, learned Additional Advocate General in support of his submissions, placed reliance on the following judgments, which are quoted herein below :-

(i) Nikhil Racheti Vs. State of Maharastra, (2006) SCC Online Bom. 1650. The relevant para is reproduced herein below :-

"9. While considering the ingredients of Section 67 of the Information Technology Act, 2000, it can be said mat firstly there must be a publication or transmission of any material in the electronic form. Secondly, such material must be lascivious or appeals to the prurient interest. Thirdly such transmission and publication must be such as to tend to deprave and corrupt persons, who are likely to read, see or hear the matter contained or embodied in it While considering the terms "publication' and "transmission', it is to be established that the person charged with the offence, must have published or transmitted such material. The material, will include written material as well as the pictures, including photographs, cartoons and or drawn material. The nature of material, lascivious, however, needs to be taken into consideration as opposed to the standards of the decency. So far as the obscenity is concerned, such publication of material in the electronic form, will not cover only the internet, but also storage on floppy/CD and distribution thereof. In the internet, who is publisher assumes importance and is also complex. So far as Publication through print media is concerned it is easy to see in the index page, where the name and the address of the publisher and the editor is required to be given in accordance with the provisions of law."

(ii) Manoj Oswal v. State of Maharashtra, (2013) SCC OnLine Bom 978. *The relevant paras of the judgment are reproduced herein below :-*

"The freedom of speech and expression is not absolute, but subject to some restrictions. That freedom is subject to reasonable restrictions and anything that is indecent or contemptuous or defamatory cannot be said to be covered in this right or freedom, is too well settled to require any reference to either the Indian Constitution

or any case law. It is settled principle that just as every citizen is guaranteed freedom of speech and expression, every citizen also has a right to protect his reputation, which is regarded as a property. Hence, nobody can so use his freedom of speech and expression as to injure another's reputation. In the context of right to seek information or right to publish or circulate the views in periodicals, magazines, journals or through electronic media, what has been held is that this freedom must, however, be exercised with circumspection and care must be taken not to trench on the rights of other citizens or to jeopardise public interest. (See Life Insurance Corporation of India v. Manubhai D. Shah (1992) 3 SCC 637)."

39. In the above circumstances, we do not find that the present act of the Petitioner as termed by him is merely causing inconvenience and therefore, he is sought to be proceeded against. It is only a false information which causes inconvenience and if it is sent persistently and not otherwise. That is the offence. Such construction of the provision in question would avoid any person sending the messages being hauled up and punished unnecessarily as apprehended by the Petitioner. Ultimately, whether any offence within the meaning of this section has been committed or not will depend upon the facts and circumstances in each case. Whether the allegations in the complaint are proved beyond reasonable doubt will depend upon the evidence led by parties. It is open for the Trial Court to arrive at an independent conclusion in each case as to whether the charge is proved by satisfying itself that the essential ingredients of the section are established or not.

40. As a result of the above discussion and when we find that there is no material which would vitiate the registration of the First Information Report in this case nor can it be said to be lacking in particulars or vague, then, our discretionary and equitable jurisdiction under Article 226 of the Constitution of India r/w Section 482 of the Code of Criminal Procedure, 1973 cannot be invoked by the Petitioner. The Petitioner cannot request us to interfere in our such jurisdiction merely because in his opinion the First Information Report is delayed. That is a plea which the Petitioner can raise at appropriate stage and during the trial. Therefore, such general and vague plea need not detain us.

***(iii) Ekta Kapoor v. State of M.P., (2020) SCC OnLine MP 4581**. The relevant paras are reproduced herein below :-*

35. Before dwelling on the applicability of Section 294 of Penal Code, 1860, it would be appropriate to first consider as to whether provisions of Section 67 of Information Technology Act are attracted or not because Section 294 IPC talks of obscene acts etc and concept of obscenity figures in Section 292 of Penal Code, 1860 and Section 67 of Information Technology Act is based on the same principle as Section 292 of Penal Code, 1860. The Hon'ble Apex Court in the case of Sharat Babu Digumarti v. Government of Delhi (NCT), (2017) 2 SCC 18 has held that Information Technology Act, 2000, being a special legislation dealing with obscenity in electronic form has overriding effect on the proceedings under general provisions of Section 292 of Penal Code, 1860 and an activity emanating from electronic form which may be obscene is exclusively punishable under Section 67 of Information Technology Act and not under

Section 292 of Penal Code, 1860, nor both under Section 67 of Information Technology Act and Section 292 of Penal Code, 1860.

54. The aforesaid concept is importable while interpreting Section 67 of Information Technology Act, 2000. In the aforesaid provision, there are no such words that the person who publishes or transmits or caused to be published or transmitted in the electronic form any lascivious material or such material which appeals to prurient interest was having or supposed to be having the knowledge about the content of the material. Thus, even if the content is not known and a person publishes or transmits or caused to do so even without knowledge, provisions of Section 67 of Information Technology Act, 2000, would be attracted. Presumption of knowledge on the part of petitioner shall have to be assumed and onus will be upon the petitioner to rebut such presumption by leading evidence.

60. Reverting back to the consideration regarding applicability of Section 67 of I.T. Act, the prosecution should be able to show that the material which is published or transmitted in electronic form "is lascivious or appeals to the prurient interest or if its effect is such as tend to deprave and corrupt persons who are likely having regard to all relevant circumstances, to read, see or hear the matter content or embodied in it.....". As already seen, the aforesaid words contained in Section 67 of I.T. Act are imported from Section 292 of IPC, which deals with obscenity.

91. Regarding such disclaimer and the terms of use preventing the subscriber from complaining do not insulate the petitioner from action against her if the material itself invokes application of Section 67 of Information Technology Act, 2000. Section 67 of Information Technology Act is a cognizable offence and no condition such as disclaimer etc can prevent a person from lodging the FIR. in respect of such offence. In Ranjit D. Udeshi's case (supra), it has been observed by Hon'ble Apex Court that the offence of obscenity involves strict liability and once the material is primafacie considered to be obscene, there can be no escape from the liability.

96. Thus, at this stage it cannot be stated that provisions of Section 67 of IT Act arc not attracted. Regarding Section 67-A of IT Act also, one has to decide as to what is the true meaning of sexually explicit acts i.e. whether a graphic depiction would only constitute "explicit Act" or whether a simulated act of copulation may also result in invoking this provision.

110. After due consideration in view of the aforesaid discussions, it appears that the facts of the case are not such that this court may exercise its extraordinary powers under Section 482 of Cr.P.C. for quashing the FIR atleast in respect of Section 67, 67-A of I.T. Act and Section 294 of IPC. Although, it would be fair enough to state that provision of Section 298 of IPC and the provision of the State Emblem Act are not found to have been breached.

(iv) On the issue of impact of twitter handle, Mr. Manish Goyal, learned Senior Advocate cited the judgment of **Queen's Bench Division** in the case of **Chambers Vs. Director of Public Prosecutions, [(2013) 1 WLR 1833].** The

relevant observations made therein are as under :-

"Following an alert on the internet social network, Twitter, the defendant became aware that, due to adverse weather conditions, an airport from which he was due to travel nine days later was closed. He responded by posting several "tweets' on Twitter in his own name, including the following: "Crap! Robin Hood Airport is closed. You have got a week and a bit to get your shit together otherwise I am blowing the airport sky high!!' None of the defendant's "followers' who read the posting was alarmed by it at the time. Some five days after its posting the defendant's tweet was read by the duty manager responsible for security at the airport on a general internet search for tweets relating to the airport. Though not believed to be a credible threat the matter was reported to the police. In interview the defendant asserted that the tweet was a joke and not intended to be menacing. The defendant was charged with sending by a public electronic communications network a message of a menacing character contrary to Section 127(1)(a) of the Communications Act, 2003. He was convicted in a Magistrates' Court and, on appeal, the Crown Court upheld the conviction, being satisfied that the message was "menacing per se' and that the defendant was, at the very least, aware that his message was of a menacing character."

6- Considering the merit of this case, I find that as per allegations levelled in the F.I.R. on 17.10.2017 at 21:46 hours, a morphed photo showing Hon'ble Prime Minister Narendra Modi shaking hands with dreaded and wanted terrorist Hafiz Saeed was posted on Facebook in the name of Anil Sharma and said objectionable post in question was shared by the applicant Niyaz Ahmad Khan on 24.04.2018 at 19:58 hours. Similarly, another post (a morphed photograph), in the name of the supporter of Akhilesh Yadav, which was posted on 01.04.2018 at 15:23 hours showing Hon'ble Prime Minister Narendra Modi and Cabinet Minister Amit Shah are feeding biscuits to dogs, on whom "Aaj Tak TV", "Zee TV" and "India TV" was written was also shared by the applicant- Niyaz Ahmad Khan on 05.04.2018 at 15:54 hours on his Facebook ID. The grounds taken in the application reveal that many of them relate to disputed question of fact. This Court is of the view that at the stage of summoning the accused, the court below is not required to go into the merit and demerit of the case. Genuineness or otherwise of the allegations cannot be even determined at the stage of summoning the accused. The appreciation of evidence is a function of the trial court. This Court in exercise of power under Section 482 Cr.P.C. cannot assume such jurisdiction and put an end to the process of trial provided under the law. It is also settled by the Apex Court in catena of judgments that the power under Section 482 Cr.P.C. at pre-trial stage should not be used in a routine manner but it has to be used sparingly, only in such appropriate cases, where allegations made in First Information Report or charge-sheet and the materials relied in support of same, on taking their face value and accepting in their entirety do not disclose the commission of any offence against the accused. The disputed question of facts and defence of the accused cannot be taken into consideration at this pre-trial stage, which can be more appropriately gone into by the trial court at the appropriate stage.

7- This Court does not find this case falling in the categories as recognized by

the Apex Court for quashing the criminal proceeding of the trial court at pre-trial stage. Considering the facts, circumstances and nature of allegations against the applicant in this case, the cognizable offence is made out. At this stage, only prima facie satisfaction of the Court about the existence of sufficient ground to proceed in the matter is required. The impugned criminal proceeding under the facts of this case cannot be said to be abuse of the process of the Court. There is no good ground to invoke inherent power under Section 482 Cr.P.C. by this Court.

8- I find no illegality or material irregularity in the impugned cognizance/summoning order dated 22.07.2020 to intervene. Consequently, the relief as sought by the applicant through the instant application is hereby refused.

9- Having examined the matter in its entirety, here it would be apposite to mention that this Court is of the view that it is beyond the shadow of doubt that social media is a global platform for exchange of thoughts, opinions and ideas. The internet and social media has become an important tool through which individuals can exercise their right to freedom of expression but the right to freedom of expression comes with its own set of special responsibilities and duties. It does not confer upon the citizens the right to speak without responsibility nor does it grant unfettered licence for every possible use of language. There is an immediate need to check the exploitation of social media platforms that has political and societal reverberations that go well beyond hacked systems and stolen identities. Use of Cyberspace by some people to vent out their anger and frustration by travestying the Prime Minister, Key-figures holding the highest office in the country or any other individual is abhorrent and violates the right to reputation of others. These kind of acts, posting and sharing unhealthy materials with unparliamentary language and remarks, etc. on social media without any solid basis cause a deleterious effect on the society at large, ergo in order to protect the reputation and character of individuals, it should be completely stopped. Since such incidents are on rise in a civilized society day by day and are polluting the minds of people, therefore, now it is high time to evolve some more and full proof screening mechanism to regulate, check and control the unhealthy posts on social media. It would be fair enough to state that such persons who are deliberately involved in such acts directly or behind the curtain with oblique motive or to settle their score adopting different modus-operandi are hazardous to the civilized society and they are not entitled for any sympathy in justice delivery system. High Courts are sentinels of justice with extraordinary and inherent power to ensure that rights and reputation of people are duly protected. Considering the gravity and nature of offence as well as misuse of social media platforms, this Court cannot shut its eyes. The Government is also not expected to act as a silent spectator.

10- Accordingly, Government is directed to take appropriate remedial measures/steps in order to control and eradicate such proliferating and booming devastating menace, to stop the misuse of social media platforms

and to maintain healthy atmosphere in the society, which is the most important and essential factor for a civilized society.

11- With the aforesaid observations and directions, this application is **disposed of.**

12- Registrar General of this Court is directed to communicate the facsimile of this order to the Secretary, Ministry of Information and Technology, Government of India, New Delhi, Chief Secretary, State of U.P. and the concerned Court below within a week.

(2022)03ILR A339
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.12.2017

BEFORE

THE HON'BLE SHAILENDRA KUMAR AGRAWAL, J.

Criminal Appeal No.220 of 1991

Mohsin Ali Khan ...Appellant (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri S.K. Verma, Sri Mithilesh Kumar Gupta

Counsel for the Respondent:
A.G.A.

Criminal Law- The Essential Commodities Act- Section 3/7- Conviction and sentenced to undergo six months' rigorous imprisonment- Modification of Sentence- Proportionate punishment- The appellant has spent in jail 86 days i.e. about half sentence awarded by the learned trial court- The appeal is very old one and the sentence is only for six months and more than 26 years have elapsed- There is nothing on record that the appellant has any criminal history. Prosecution has failed to bring on record any material which disqualifies the appellant from his sentence being modified- The conviction of the appellant by impugned judgment and order is hereby maintained. His sentence is reduced to the period of imprisonment already undergone by him with fine of Rs.20,000/-.

Settled law that sentence should be commensurate with the gravity of the offence and the manner of its commission as well as other mitigating circumstances. Where the accused has served out half the sentence, the offence is not grave or heinous and much time has elapsed, hence appropriate to modify the sentence with the period undergone in judicial custody alongwith enhancement of fine while maintaining the conviction. (Para 16, 17, 18)

Criminal Appeal partly allowed. (E-3)

Judgements/ Case law relied upon :-

1. Sevaka Perumal etc. Vs St. of T.N, AIR 1991 SC 1463

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

(Delivered by Hon'ble Shailendra Kumar Agrawal, J.)

1. This Criminal Appeal has been preferred by the appellant Mohsin Ali Khan against the judgment and order dated 07.02.1991 passed by the learned Special Judge, Ghazipur in Criminal Case No.9 of 1990 (State Vs. Mohsin Ali Khan), arising out of case crime no.122 of 1989, under Section 3/7 of the Essential Commodities Act, P.S. Kasamabad, District Ghazipur, whereby the appellant was convicted and sentenced under Section 3/7 of the Essential Commodities Act for six months' rigorous imprisonment.

2. Filtering out the unnecessary details, the prosecution story in brief is that a complaint was jointly made to the District Magistrate, Ghazipur by Sri Abdul Sattar Nomani, President, Nagar Congress Committee, Bahadurganj and Sri Imtiyaz Ahmad, Mohd. Murtaza, Mohd. Zakariya, A. Salam, Shivnath, Gayasuddin, Members of Town Area Bahadurganj against the appellant Mohasin Ali Khan, Dealer of Fair Price Shop Bahadurganj regarding the irregularities committed by him in distribution of sugar and on the basis of said complaint, an enquiry was conducted by the Supply Inspector regarding distribution of sugar. Finding certain irregularities in the distribution of sugar by making forged entries in the distribution register and black-marketing of the same, a report Ex. Ka-1 was made to the In-charge, Police Chowki, Bahadurganj, District Ghazipur. As the appellant/ Dealer of Fair Price Shop by showing forged sale of sugar, committed black-marketing, hence he has violated the provisions of U.P. Food Grains and other Essential Articles Distribution Order, 1977, which is an offence under Section 3/7 of the Essential Commodities Act, 1955 and it was requested to lodge an FIR against the appellant Mohasin Ali Khan.

3. On the basis of the written report Ex. Ka-1, a case in crime no.122 of 1989 was registered under Section 3/7 of the Essential Commodities Act against the appellant and the investigation was handed over to Sub-Inspector Gyan Prakash Tripathi. The Investigating Officer recorded the statements of the witnesses under Section 161 Cr.P.C., prepared the site plan Ex. Ka-41 of the place of occurrence, obtained sanction Ex. Ka-42 from the District Magistrate, Ghazipur and after completing other necessary formalities, submitted charge sheet Ex. Ka-43 against the appellant.

4. Thereafter, the learned trial judge recorded the statement of the appellant regarding the offence under Section 3/7 of the Essential Commodities Act, in which he has accepted that on 26.03.1989 and 08.04.1989 he was the licensee of Fair Price Shop, Bahadurganj, District Ghazipur and denied the factum of enquiry done by the Supply Inspector. He has also denied the factum of prosecution that any enquiry was made by the Supply Inspector on 26.03.1989 or 08.04.1989, in which it was found that the names of 18 card holders were twice entered in the same month regarding distribution of sugar and in the cards of some card holders, entries regarding distribution of sugar have not been made. He has also stated that this case has been initiated against him due to enmity by his enemies in collusion with the Supply Inspector.

5. To prove its case, the prosecution has examined as many as three witnesses namely PW-1 Yaar Mohammad; PW-2 Ram Daras Singh, Supply Inspector; and PW-3 S.I. Gyan Prakash Tripathi, Investigating Officer and also got proved the documents by respective witnesses as written report Ex. Ka-1, chik FIR Ex. Ka-22, copy of G.D. Ex. Ka-23, site plan Ex. Ka-41, sanction of District Magistrate, Ghazipur Ex. Ka-42, charge sheet Ex. Ka-43 and the pages of distribution register as Ex. Ka-26, Ka-27, Ka-20 & Ka-21 and the ration cards as Ex. Ka-2 to Ka-19.

6. The accused-appellant in his statements u/s 313 Cr.P.C. has denied all material facts of the prosecution and stated that this case has been initiated against him due to enmity.

7. After scrutinizing and appreciating the evidence available on record, the learned trial court recorded a finding of conviction of accused-appellant Mohsin Ali Khan for the offence under Section 3/7 of the Essential Commodities Act.

8. Heard Sri S.K. Verma, learned counsel for the appellant and Ms. Anjum Haq, learned A.G.A. for the State.

9. Learned counsel for the appellant did not make any argument regarding merit of the case and did not challenge the findings recorded by the learned trial court. Learned counsel for the appellant at the very outset conceded that so far as conviction part of the appellant is concerned, the opinion by the learned trial court does not suffer from any error.

10. Learned counsel for the appellant did not harp much so far as the conviction of the appellant under Section 3/7 of the Essential Commodities Act is concerned, hence the detailed examination of evidences is hereby eschewed. The main thrust of the arguments of the learned counsel for the appellant is that the sentence be reduced to the period of undergone imprisonment and to fine only as the matter is very old one.

11. It has also been stated that the incident took place on 26.03.1989 and 08.04.1989 and the judgment by the trial court was pronounced on 07.02.1991 and today this is December, 2017 and at the time of recording the statement u/s 313 Cr.P.C., the appellant was at the age of 24 years and presently he is aged about 50 years and moreover the appellant has spent in jail 86 days i.e. about half sentence awarded by the learned trial court.

12. Learned A.G.A. also had no serious arguments on the said score as she has also conceded to the fact that the appeal is very old one and the sentence is only for six months and more than 26 years have elapsed, but the appeal could not be decided.

13. Not pressing the criminal appeal after the conviction of the accused by the Court below is like the confession of the offence by the accused. The Courts generally take lenient view in the matter of awarding sentence to an accused in criminal trial, where he voluntarily confesses his guilt, unless the facts of the case warrants severe sentence

14. In case of ***Sevaka Perumal etc. Vs. State of Tamil Nadu, AIR 1991 SC 1463,*** the Hon'ble Apex Court in the matter of awarding proper sentence to the accused in a criminal trial has cautioned the Courts as under:-

"Undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc."

15. In ***Jameel vs. State of Uttar Pradesh, (2010) 12 SCC 532,*** the Hon'ble Apex Court has reiterated the principle by stating that the punishment must be appropriate and proportional to the gravity of the offence committed. Speaking about the concept of sentencing, this Court observed thus:-

"15. In operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration.

16. 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."

16. I have given a thoughtful consideration on the overall facts and circumstances. There is nothing on record that the appellant has any criminal history. Prosecution has failed to bring on record any material which disqualifies the appellant from his sentence being modified.

17. In these circumstances, I agree with the arguments of the learned counsel for the appellant that only by sending the appellant to jail will not serve the purpose and on an overall consideration of above and other attending facts and circumstance, I am of the view that the period of imprisonment awarded by the learned trial court for six months under Section 3/7 of the Essential Commodities Act, may be reduced to the period of imprisonment already undergone and also with a fine of Rs.20,000/-.

18. In view of the above, the appeal filed by the appellant is allowed **in part,** whereas the conviction of the appellant by impugned judgment and order is hereby maintained. His sentence is reduced to the period of imprisonment already undergone by him with fine of Rs.20,000/-. The appellant Mohsin Ali Khan is permitted to deposit fine within a period of one month from today, failing which he has to undergo three months' simple imprisonment. Concerned court will take all possible steps for realization of fine.

19. Let a certified copy of this judgment be sent to the concerned court immediately for intimation and immediate compliance. The concerned court shall send its report immediately after the compliance of the order of this Court.

(2022)03ILR A342
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.03.2022

BEFORE

THE HON'BLE SUNEET KUMAR , J.
THE HON'BLE OM PRAKASH TRIPATHI, J.

Criminal Appeal No. 745 of 2014

Bhura @ Bhure ...Appellant (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Sharad Malviya, Sri J.H. Khan, Sri M.I. Farooqui, Sri Gulrej Khan

Counsel for the Respondent:
A.G.A.

Criminal Law- Indian Penal Code- Section 376G, Section 506- Conviction for life imprisonment- Code of Criminal Procedure, 1973- Section 389- Criminal Appeal- Conviction upheld- Point of Sentence- It is admitted fact that at the time of incident the prosecutrix was about 14 years and accused was 19 years. At the time of incident accused was married person and prosecutrix married later on and is leading a peaceful married life. The appellant is at present 32 years and is incarceration for 13 years for charge under Section 376(G) I.P.C. In the present case life imprisonment would be excessive punishment and punishment for 13 years would be adequate punishment which the appellant has already served out. Therefore the sentence is reduced to R.I. 13 years in place of life imprisonment.

As the appellant has already undergone incarceration of thirteen years and the prosecutrix has married, sentence reduced to the period undergone by the appellant as the minimum punishment prescribed is of 10 years, which does not per se become life sentence. (Para 31, 32)

Criminal Appeal disposed of. (E-3)

Judgements/ Case law relied upon:-

1. Dinesh @ Buddha Vs St. of Raj., 2006 Lawsuit SC 162

2. Bavo@Manubhai Ambalal Thakore Vs St. of Guj. 2012 (2) SCC 684

3. Rajendra Datta Zarekar Vs St. of Goa, (2007) 14 SCC 560

(Delivered by Hon'ble Om Prakash Tripathi, J.)

1. Heard Shri J.H. Khan, learned counsel for the appellant, learned A.G.A. for the State and perused the material on record.

2. The appellant has preferred this criminal appeal aggrieved by judgment and order dated 21.12.2013 passed by Additional Sessions Judge, Court No. 3, District- Meerut, in Session Trial No. 758 of 2011 (State Vs. Bhura @ Bhure) arising out of Case Crime No. 112 of 2009, under Section 376G and 506 I.P.C., Police Station- Daurala, District- Meerut, convicting and sentencing the appellant to undergo imprisonment for life under Section 376G I.P.C. with a fine of Rs. 5000/-, in default of payment of fine to undergo one year additional imprisonment and one year rigorous imprisonment for an offence punishable under Section 506 I.P.C. with a file of Rs. 1000/- in default of payment of fine two month additional imprisonment. All the sentences shall run concurrently.

3. The case of Rahul was separated from this case as Rahul was juvenile and matter has been sent to Juvenile Justice Board for trial.

4. The prosecution case is as follows:

5. On 03.03.2009 at around 9:00 p.m. "P' (daughter of complainant), aged about 14 years, went to attend the call of nature in the vacant residence of M.D.A., where Rahul and Bhura S/o Virendra, R/o Village- Palhaida came there and forcibly picked up complainant's daughter by holding her face and took her to the fields and after smelling the intoxicant material, raped her forcibly. On hearing the noise of victim, Roshan S/o Samay Singh and Santari W/o Rajkumar went towards the fields then both the accused ran away threatening that if told to any one, they would kill.

6. On the basis of the written report (Exhibit Ka-1), the police registered Case Crime No. 412 of 2009, under Sections 376, 506 I.P.C. against accused Rahul and Bhura. Investigation of the case was taken over by Sub- Inspector Alok Kumar Sharma. Site inspection was prepared by the investigator, the relevant documents were recorded in the case diary and recorded the statements of the witnesses.

7. After completing the investigation, Investigating Officer has filed charge sheet against Rahul and Bhura, under Section 376, 506 I.P.C. Cognizance was taken by the Chief Judicial Magistrate and committed to the court of sessions on 29.06.2021 for trial and thereafter the said sessions trial has been transferred to the court of Additional Sessions Judge, Court No. 3, Meerut for trial.

8. Charge under Sections 376G and 506 I.P.C. has been framed by Additional Sessions Judge, Court No. 15, Meerut. Charge was denied by the accused Bhura @ Bhure. The accused- appellant pleaded not guilty and claimed to be tried.

9. In order to prove the charges framed against the appellant, the prosecution has examined witnesses, detailed as under:-

1.	Smt. Jagwati (complainant)	PW-1
2.	Sushil Jain	PW-2
3.	Prosecutrix	PW-3
4.	Dr. Anju Jodha	PW-4
5.	Constable Harpal Singh	PW-5
6.	S.I. Tulsiram Goswami	PW-6
7.	Rajhans (Clerk, C.M.O. Office)	PW-7
8.	Dr. Pramila Gaud	PW-8

10. In spite of ocular version of the witnesses, following documents were produced and contents were proved by leading evidence:-

1.	Written Report	Ext. Ka-1
2.	Recovery of memo of clothes	Ext. Ka-2
3.	Statement under Section 164 Cr.P.C.	Ext. Ka-3
4.	Medical examination report	Ext. Ka-4
5.	Supplementary medical report	Ext. Ka-5
6.	First Information Report	Ext. Ka-6
7.	Kayami G.D.	Ext. Ka-7
8.	Charge-sheet	Ext. Ka-8
9.	Medical examination of prosecutrix	Ext. Ka-9
10.	Pathology report	Ext. Ka-10
11.	X-ray report	Ext. Ka-11
12.	Spot map	Ext. Ka-12 & 13

11. In statement under Section 313 Cr.P.C. the accused has stated that he had made love marriage with Mausi of victim due to this enmity he was falsely implicated in this case.

12. The main question is that whether accused Bhura @ Bhure has committed rape with prosecutrix on 03.03.2009 at 9:00 p.m. when she has gone to attend the nature's call with help of Rahul after smelling her intoxicant material raped her forcefully.

13. In F.I.R. the age of the prosecutrix has been stated as 14 years, after medical examination the age of the prosecutrix was found at 16 years as shown in Ex- KA-9. No spermatozoa seen in the vagina smear, in Exh. KA-5 shows that no opinion regarding can be given hymen torn, bleeding present inside vagina and torn edge vagina admits two fingers with difficulty and painful.

14. Prosecutrix PW-3 had deposed in her statement on oath that she knows accused Bhura @ Bhure who is her neighbour. Incident took place prior four years at about 9:00 p.m, she went for nature's call in the vacant house of M.D.A. then Rahul and Bhura came there and by holding her face took her to the field and after subjecting her to the smell of intoxicant material raped her forcefully. Rape was committed by both the accused. She was unable to oppose them due to intoxication, she made noise then they threatened her and if this fact was told to anyone then she shall be killed. After hearing the scream of PW-3 her maternal uncle Roshan and Mausi Santari came on the spot and took her home. She told them about the incident committed by the accused. PW-3 was medically examined and recovery memo of her Salwar, Kurta and underwear as prepared by the police as Exhibit Ka-2. Her statement was also recorded before the Magistrate. She narrated entire story before the court. Witness has also proved the statement under Section 164 Cr.P.C. as Exhibit Ka-3. This witness was not cross examined by the defence despite ample opportunity, consequently the cross examination of the witness was closed by the court. As the statement of witness is not rebutted by the defence so the evidence is admissible and relevant for the disposal of this case.

15. PW-2 is the witness of recovery, before this witness clothes of the prosecutrix was sealed and recovery memo was prepared. He has proved the recovery memo. In the cross examination the witness has stated that clothes related to the case are not before him in the court, at present prosecutrix has been married.

16. PW-1 mother of the prosecutrix has deposed on oath that incident took place prior two and a half year, her daughter had gone for nature's call at 9:00 p.m. behind the house. Accused Bhura and Rahul R/o Village-Palhaida carried my daughter forcefully by holding her mouth and took her to the field and inhaled her intoxicating substance, thereafter, both committed rape with her daughter. On hue and cry made by her daughter, Roshan, Santari and other members of the village came on the spot, seeing them accused Rahul and Bhura fled away. Her daughter told the witness about the incident. First day she was silent due to fear and on second day lodged F.I.R. The age of her daughter was 14 years. Witness has proved written report as Exhibit Ka-1. Police had also taken the clothes of her daughter and sealed it.

17. PW-4 Dr. Anju Jodha has proved medical report and supplementary report as exhibit Ka-4 & Ka-5.

18. PW-5 Constable Harpal formal witness has proved chik F.I.R. as exhibit Ka-6 and Kayami G.D. Ka-7.

19. PW-6 I.O. who had proved charge sheet as exhibit Ka-8 and others witnesses also proved spot map as exhibit Ka-12 & Ka-13 as secondary evidence.

20. PW-7 senior clerk in C.M.O. office, Meerut has proved X-ray report as exhibit Ka-10 and X-ray material as exhibited 1,2 & 3.

21. PW-8 Dr. Pramila Gond has also proved slide report as exhibit Ka-11 and stated that there was no spermatozoa in the slide.

22. Prosecutrix PW-3 had supported the prosecution case in her statement under Section 164 Cr.P.C. proved as exhibit Ka-3, statement of prosecutrix under Section 164 Cr.P.C. is as follows:-

" On 03.03.2009 at about 9:00 p.m., she went for nature's call behind her home then suddenly Rahul and Bhura came there. Rahul gagged her mouth so she could not make a noise. They took her in the field and put a handkerchief on her face so she became unconscious, Rahul and Bhura committed rape with her. After sometime she became conscious she make hue and cry then accused threatened her that they will kill her, if, she told about the incident. After hue and cry, her maternal uncle and aunt came there and brought her to the house where she told the story to her mother."

23. Prosecutrix after marriage had also supported the prosecution version in her examination-in-chief before the trial court, but despite ample opportunity to the defence for cross examination, no cross examination was done by the accused. After closing the cross examination no application for recall was moved for cross examination of the witness. No revision has been filed against the said order so in absence of rebuttal entire evidence of PW-3 is fully reliable. PW-1 had also supported the prosecution case and there is nothing in her cross examination by which prosecution evidence can be belied. PW-1 is also an illiterate lady, she has supported the prosecution case and stated that what was told by her daughter on the date of incident.

24. Incident took place on 03.03.2009, F.I.R. was lodged on 04.03.2009. Medical examination of the prosecutrix was conducted on 04.03.2009 in which it has been opined that no mark of injury of external part of the body, hymen torn, bleeding present from inside vagina and edge vagina admits two fingers with difficulty and painful as shown in Exhibit Ka-4 & Ka-5. Ka-9 is her age certificate by which it is evident that age of the prosecutrix was 16 years. From the perusal of the supplementary report, it appears that no spermatozoa seen in the slide taken from vagina smear. Thus medical report exhibit Ka-4 & Ka-5 supports and corroborates prosecution case. Evidence of PW-3 is corroborated by medical evidence exhibit Ka-4 & Ka-5.

25. From the perusal of the record, it appears that in this case defence counsel had cross examined PW-1, PW-2, PW-6, PW-7, PW-8 but the learned counsel for defence had not cross examined PW-3, PW-4, PW-5 after been given ample opportunity. He had not also participated in the argument knowingly with intent to delay the trial. It is also praiseworthy that prosecutrix had fully supported prosecution version even after marriage. Such sort of courage is appreciated. Her evidence is like an injured witness and is fully credible and

trustworthy supported by medical evidence. We do place confidence in the deposition of PW-1 and PW-3. F.I.R. was promptly lodged on the next day from the date of incident, there is no grudge to falsely implicate accused appellant. On the basis of fully reliable evidence prosecution has proved beyond reasonable doubt that accused Bhura @ Bhure has committed rape with prosecutrix on 03.03.2009 at 9:00 p.m. when she had gone to attend the nature's call as narrated by the prosecutrix. Thus the trial court had rightly held the accused guilty for the charges under Section 376(G) and 506 I.P.C. Thus we confirm the conviction of the appellant. It is evident that in judgment of the trial court at page 1 & 17, the date of incident has been typed inadvertently 08.03.2009 which shall be read as 03.03.2009.

26. The main emphasis placed before us is on the point of sentence by the learned counsel for appellant. The submission is that at the time of incident accused was 19 years of age, he is a labour and is in incarceration for about 13 years and at present he is 32 years. He is married person. Prosecutrix has also married and living peaceful happy married life.

27. Learned counsel for the appellant relied on ***Dinesh @ Buddha Vs. State of Rajasthan, 2006 Lawsuit SC 162,*** decided on 28.02.2006 by Supreme Court of India in which it has been held that the sentence provided in Section 376(2)(f) I.P.C. does not per se become life sentence. Learned counsel for State submitted that even in a case covered under Section 376 (2) (f) I.P.C., imprisonment for life can be awarded. It is to be noted that minimum sentence of ten years has been statutorily provided and considering the attendant circumstances the imprisonment for life in a given case is permissible. Neither the trial court nor the High Court has indicated any such factor. Only by applying Section 3(2)(v) of the Atrocities Act the life sentence was awarded. Therefore, the sentence of life imprisonment was reduced to 10 years.

28. In the case of ***Bavo@Manubhai Ambalal Thakore Vs. State of Gurarat 2012 (2) SCC 684*** decided on 03.02.2012 by Supreme Court in which it has been held that on the date of incident victim was seven years age and accused was in the age of 18/19 years and that the incident occurred ten years ago, the award of life imprisonment which is maximum prescribed was not warranted and also in view of the mandate of Section 376 (2)(f) I.P.C., the court felt that the ends of justice would be met by imposing rigorous imprisonment for ten years. The appellant had already served nearly ten years. The sentence of life imprisonment was modified to rigorous imprisonment for ten years.

29. ***Rajendra Datta Zarekar Vs. State of Goa, (2007) 14 SCC 560***, the victim was aged about six years and the accused was aged about 20 years. Ultimately, the Supreme Court confirmed the conviction and sentence of 10 years as awarded by the High Court. However, the fine amount of Rs.10,000/- awarded under Section 376 (2)(f) being found to be excessive was reduced to Rs.1000/-.

30. Learned A.G.A. submitted that accused appellant should be punished severely without relaxation. The offence of rape is serious offence. The physical scar may heal, but the mental scar will always remain. When a woman is ravished, what is inflicted is not merely physical injury but the deep sense of some deathless shame.

Judicial response to human rights cannot be blunted by legal jugglery. A girl of 14 years who is raped is not an accomplice. The measure of punishment in a case of rape cannot depend upon the social status of the victim or that accused. It must depend upon the conduct of the accused, the state and age of the sexually assaulted female and the gravity of the criminal act. Crimes of violence upon women need to severely dealt with. Protection of society and deterring the criminal is the avowed object of law and this is required to be achieved by imposing appropriate sentence. 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 hear the loud cry for justice by the society in cases of the heinous crime of rape on innocent helpless girl of tender years. Public abhorrence of the crime needs reflection through imposition of appropriate sentence by the court. To show mercy in the case of such heinous crime would be travesty of justice and the plea for leniency is wholly misplaced.

31. It is admitted fact that at the time of incident the prosecutrix was about 14 years and accused was 19 years. At the time of incident accused was married person and prosecutrix married later on and is leading a peaceful married life. The appellant is at present 32 years and is incarceration for 13 years for charge under Section 376(G) I.P.C. So in the present facts and circumstances and the law laid down by the Apex Court, we are of the view that in the present case life imprisonment would be excessive punishment and punishment for 13 years would be adequate punishment which the appellant has already served out. Therefore the sentence is reduced to R.I. 13 years in place of life imprisonment. We feel that ends of justice would suffice by imposing R.I. for 13 years which has been served by the appellant already. However, fine amount of Rs.5000/- being found to be excessive reduced to Rs.3000/- in default, to further undergo R.I. for one month.

32. In view of the above discussion the conviction imposed on the appellant herein is confirmed. However, the sentence of life imprisonment is modified to R.I. for 13 years with a fine of Rs.3000/- in default of further undergo R.I. for one month. The conviction and sentence imposed on the appellant under Section 506 I.P.C. is confirmed. All the sentences shall run concurrently.

33. With the above modification of sentence, the appeal stands disposed of.

34. Office is directed to send copy of this judgment alongwith original record to the Court concerned for necessary action and compliance in accordance with law.

(2022)03ILR A348
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.03.2022

BEFORE

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

Criminal Appeal No. 1268 of 2015

Jeetu Niranjan ...Appellant (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri S.C. Dwivedi, Sri M.C. Chaturvedi,Sri Prabhat Kumar, Sri Siddharth Niranjan, Mrs. Swati

Agrawal Srivastava, Sri Jitendra Kumar, Sri Dharampal Singh

Counsel for the Respondent:
A.G.A.

Evidence Law - Indian Evidence Act, 1872- Sections 102 & 106- Circumstantial evidence - The circumstance that the deceased was seen entering the temple with co-accused Raju, followed by the appellant and, thereafter, the appellant, followed by the co-accused, were noticed exiting the temple, short while thereafter, minus the deceased, is not proved beyond reasonable doubt-The prosecution seeks to discharge its burden by leading circumstantial evidence and once it comes in the evidence that the room from where the body was recovered is under the control of a person who is not an accused, then the burden is on the prosecution to explain as to how access to that room could be had by the accused.

Burden of proof lies upon the accused only when the prosecution establishes that the deceased was exclusively in the company of the accused.

Evidence Law - Indian Evidence Act, 1872 - Sections 24, 25 & 26- Extra judicial confession of the accused-appellant- It is well settled that before a confession is acted upon, the court must be satisfied that it is voluntary and truthful. Unless it is proved to the satisfaction of the court that the confession is voluntary, the same cannot be acted upon- One is before the villagers of which PW-10 is a witness and the other is before the police - In so far as the latter is concerned, that would be hit by section 25 and 26 of the Evidence Act. In so far as the former is concerned, from the testimony of PW-10 it is clear that it was made when the villagers threatened them-The so-called extra judicial confession cannot form the basis of conviction.

Settled law that an extra- judicial confession cannot be relied upon unless it is proved to the satisfaction of the court that the same is voluntary while the confession of an accused in police custody is wholly inadmissible in evidence. (Para 21, 22, 23, 24)

Criminal Appeal allowed. (E-3)

Judgements/Case law relied upon:-

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

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

3. Bablu Vs St. of Raj. (2006) 13 SCC 116

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

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

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

1. This appeal is against the judgment and order of conviction and punishment dated 10.03.2015 and 11.03.2015, respectively, passed by Additional Sessions Judge/F.T.C., Orai, District Jalaun in S.T. No.243 of 2009 whereby, the appellant (Jeetu Niranjan) has been convicted under Sections 302 and 376 read with Section 511 IPC and sentenced to imprisonment for life with fine of Rs.10,000/-, under section 302 IPC, and a default sentence of one year S.I.; and seven years R.I. with fine of Rs.2,000/-, under Section 376/511 IPC, and a default sentence of two months S.I.

INTRODUCTORY FACTS

2. In brief, the facts giving rise to this appeal are as follows:-

A missing report (Ex. Ka-1) was lodged by PW-1 (father of the victim) on 01.08.2004 at 1.30 pm of which GD entry

was made by PW-6. In the report it was alleged that PW-1's daughter (the victim-the deceased), aged about three years, who was last seen playing outside the house at about 11.00 AM on 31.07.2004, has gone missing. This missing report suspects none. Thereafter, on 02.08.2004 (Ex. Ka-2), at 14.45 hrs, PW-2, a neighbour of PW-1, gave information that the body of the missing daughter of PW-1 has been recovered from a room next to Radha Krishna temple and, therefore, necessary action be taken. This report also suspects none. On this report (Ex-Ka-2), an inquest is conducted and completed at the spot by 17.45 hrs on 02.08.2004, of which an inquest report (Ex. Ka-10) is prepared by PW-7, thereafter, on 03.08.2004, by about 2.20 pm, autopsy is completed by PW-5. The autopsy report (Ex. Ka-3) notices marks around the neck of the deceased and, as per the the doctor, opines that death was due to asphyxia as a result of ante mortem throttling. The estimated time of death, as per the autopsy report, which was completed at around 2.20 pm of 03.08.2004, is three days before. In between, plain earth and blood-stained earth was lifted from the spot and a piece of paper (a wrapper of Hello Kismis toffee) was found on the floor, near the right hand of the deceased. A composite recovery memo (Ex. Ka-12) of plain/blood-stained earth and toffee wrapper was prepared by PW-9 and, later, vide GD Report No.28 (Ex. Ka-13), dated 02.08.2204, at 22.30 hrs, case crime no.120 of 2004 was registered at P.S. Sirsa Kalar, district Jalaun, under section 302 IPC, against an unknown person. Subsequently, on 03.08.2004 statement of PW-1 (father of the deceased- informant); PW-8 (mother of the deceased) and others including PW-4 (uncle of the deceased) were recorded under section 161 CrPC and, thereafter, the accused-appellant and co-accused Raju were arrested, who, reportedly, confessed their guilt. After carrying out usual steps of investigation and after completing the investigation, PW-9 (the investigating officer - I.O) submitted a charge sheet (Ex. Ka-14) against two persons, namely, Raju Yadav (non appellant) and Jeetu (the appellant). On 10.02.2005, Raju Yadav (co-accused) was declared juvenile and his trial was separated, whereas the trial proceeded against the appellant after framing of charges, under Section 376 read with Section 511 IPC and Section 302 IPC, vide order dated 25.04.2005, on pleading not guilty and claiming for a trial.

PROSECUTION EVIDENCE

3. During the course of trial, as many as 10 prosecution witnesses were examined. They are as follows:-

4. ***PW-1*** - the father of the deceased-victim. He proved lodging of the missing report as also that the deceased was seen alive on or about 10-11 am of 31.07.2004. Note:- Admittedly, PW-1 is not an eye witness of any incriminating circumstance against the accused-appellant therefore, we do not propose to notice his testimony in detail.

5. ***PW-2*** - a neighbour, who gave information, vide written report (Ex. Ka-2), to the police on discovery of the body of the victim. He proved Ex. Ka-2. He is also not an eye witness of any incriminating circumstance against the accused-appellant therefore, we do not propose to notice his testimony in detail except the reason as to why he had come to give the information, which, according to PW-2, was that PW-1 requested PW-2 to give information because PW-1 was in a state of shock.

6. ***PW-3*** - He is the uncle (Chacha) of the deceased. He stated that, in all, they are four brothers who have a joint living. The deceased was his niece. On 31.07.2004 he had arrived at the house on his tractor at about 10 am to take its trolley, then he saw the victim outside the house playing under a Neem tree. Thereafter, he took the trolley and went away. When he returned in the afternoon, he came to know that the victim is missing. A search was made for the victim but she could not be found. Information of the victim having gone missing was given by his brother on 01.08.2004 at the police station concerned. On 02.08.2004, the servant of his house, namely, Raju Yadav (co-accused), informed that foul odour was coming from the *Kothri* (small room) adjoining the temple. When lock of that *Kothri* was opened by PW-3 in the presence of other villagers, near a cement bag which was kept in the *Kothri*, the body of the deceased in a decomposed state was noticed with her tongue and eyes protruding out and blood scattered on the floor. He stated that the Kothri from where the body was recovered was used to store goods and was always locked but the key of that lock used to be hanged on the wall. He stated that when Raju Yadav (co-accused) was interrogated with strictness by the villagers, he disclosed that he (Raju Yadav) and Jeetu alias Jitendra (the present appellant) have killed the victim. He stated that after getting information about the death of the deceased, information was given to the police at his instance by PW-2 because PW-1 was not there.

During cross-examination, he stated that co-accused Raju, a resident of Bihar, was working as a help in the house. He used to sleep, eat and live in the house and was, therefore, familiar with all members of the family. He stated that the temple is a public temple and his family manages its affair. Villagers, daily, visit the temple; worshipers visit the temple since the morning and the temple is never kept locked. The temple has three rooms. The middle main room has diety installed, adjoining the main room, there are two rooms, one on each side. One room is kept vacant and in the other he keeps his goods, which is towards west of the main temple room. All the three rooms open towards north. PW-3 admitted that this temple is public and was not built by his ancestors but his ancestor used to be a Pujari in the temple. PW-3 denied the suggestions that his family had forcibly occupied the temple; that accused and his family used to protest illegal occupation of PW-3 and his family over the temple and its property therefore, he is lying; and that he has made false statement about confession, because of tutoring.

7. PW-4 - grand father of the deceased-victim. He states that his house is in front of the temple where there is a statue of Radha Krishna Ji Maharaj installed; that the temple is open to the public where they worship daily; that Jeetu alias Jitendra (the appellant) is a resident of the village; that between 11-11.30 am, he saw Jeetu alias Jitendra (the appellant) entering the temple. At that time, he went to urinate and when he returned 10-15 minutes later, he saw Jeetu (the appellant) exiting the temple in a hurry, following Jeetu, he saw Raju Yadav (co-accused), help in the house, exiting the temple; and heard his daughter-in-law (mother of the deceased - PW-8) calling for her daughter (the victim) to give her a bath and when a search for her (the victim) was made, she could not be found. PW-4 added that the appellant does not have a good character

and he had developed friendship with Raju (the help).

During cross examination, he also stated what PW-2 had stated about the temple having three rooms all opening towards north. He added that victim's body was recovered from the room located towards west of the main room of the temple. He clarified that if one enters the temple premises, the room from where the body was recovered falls first. Thereafter, there is main temple room where deity has been established, which is followed by another room which does not have a door. He stated that the other room which does not have a door is vacant. Further, during cross examination, he stated that agricultural implements are kept in the room which is locked; and this room is used by his son (PW-3), who uses a tractor; and that PW-3 opens and shuts the lock of that room and maintains control over the key of that lock. He stated that on 02.08.2004 and 03.08.2004 he was interrogated by the I.O. He had informed the I.O. that he was sitting outside on a chair placed at the Chabutra (a raised platform used for sitting) just outside the temple, but, if that was not written he cannot tell its reason. He states that he has six grandchildren. They all play with each other. He states that on 02.08.2004, between 1.30 and 2.00 pm, Raju had informed PW-3 about foul odour coming from the room; at that time, PW-4 was not there. When he returned after herding cattle, at about 4 pm, he saw people gathered around and the police had also arrived. In respect of the place of residence of the appellant, PW-4 stated that appellant's house is just three four houses away. PW-4 stated that only after the incident he came to know that the appellant had friendship with co-accused Raju; PW-4 also admitted that for the first time in court he stated that the appellant does not have a good character. He denied the suggestion that he made this statement on legal advise. But admitted that there is caste related party-bandi (politics) in the village; that the temple was not built by his ancestors; that he and his family are in control of the temple. He denied the suggestion that father of the appellant used to oppose PW-4's control of the temple and, therefore, out of animosity, appellant has been implicated. He denied the suggestions that PW-4 was not there at the time of the incident; that he did not see appellant entering and leaving the temple; and that he is telling lies.

8. **PW-5 (Dr. Y.K. Sharma)** is the doctor, who conducted autopsy. He proved the autopsy report and confirmed that death was due to asphyxia as a result of ante mortem strangulation. He accepts the possibility of death being caused at or about 11-11.30 am on 31.07.2004.

In his cross examination, he stated that no injuries were noticed on the private parts of the deceased; that no sign of sexual assault were noticed; that the estimation in the time of death of the deceased could vary by 10 hours either way; that the death could also be in the night of 31.07.2004 between 1.00 am and 10 am.

9. **PW-6 (Tulsi Ram Chand)** - a constable who proved GD entries of the missing report, dated 01.08.2004, at 1.30 pm, as well as conversion report, dated 02.08.2004, at 22.30 hrs.

10. **PW-7 (Rajeshwari Prasad Mishra)** is the police personnel who conducted inquest and prepared documents

in reference thereto as well as for autopsy. He proved those documents. He stated that there were no signs of sexual assault therefore there was no mention of it in the inquest report

11. **PW-8 -** the mother of the deceased. She stated that on 31.07.2004 her daughter (the deceased) was playing outside the house. When PW-8 went to call her father-in-law (PW-4) for his meal, she noticed that co-accused Raju Yadav was holding the victim by her finger and going towards the temple and Jeetu Niranjan (the appellant) was following him. At that time, it must be 11 am. PW-4, who was sitting outside the door, stated that he would not have his meal therefore, PW-8 thought of giving her daughter (the victim) a bath. When PW-8 came out 5-10 minutes later, gave a call for her daughter, she saw Jeetu leaving the temple premises in a hurry and Raju following him. When she asked Raju about the victim, he did not respond and went away in a haste. She stated that thereafter she made a search for her daughter (the victim) but could not find her.

In her cross examination, she admitted that Raju was a help of the house and used to reside there for about a year. But she could not tell whether he was given salary. She stated that her husband's elder brother had employed him. She also admitted that her family is a joint family. She stated that the temple is a public temple and that she never had an occasion to speak to the appellant. She stated that so many people visit the temple that she cannot tell their name. She stated that her house is 20 to 25 paces away from the temple. The door of her house opens towards east. In front of her house, there is Chabutra but no verandah. She stated that her father in law (PW-4) was sitting at the door of the house. She stated that she had shown the spot from where she and her father in law witnessed the accused entering and leaving but if that had not been shown in the site plan then she cannot tell the reason for it. Similarly, when she was confronted with an omission in her statement, recorded under Section 161 CrPC, regarding having noticed Raju Yadav (co-accused) holding a finger of her daughter (the deceased) and going towards the temple, followed by Jeetu Niranjan (the appellant), she stated that she had disclosed that to the I.O. but if that was not written, she cannot tell the reason. She was also confronted with an omission in her statement, recorded under Section 161 CrPC, that when she came out of the house 5-10 minutes later, she saw Jeetu exiting the temple premises in a hurry followed by Raju (co-accused). To this also, she stated that she had informed the I.O. but if that was not written, she cannot tell the reason. She was also confronted with an omission in her statement recorded under Section 161 CrPC of having questioned Raju regarding the whereabouts of her daughter while he was exiting the temple. She however denied the suggestion that all of what she was saying is for the first time, on legal advise. On being questioned whether all of this was disclosed by her to her husband and brother in law, she stated that they were not promptly informed but were told later. She stated that she does not know whether her husband and brother in law had gone inside the temple to search out the victim. She clarified that, probably, they had gone there but may not have opened the door. She reiterated that key of the lock put on that door is usually hanged on a hook placed on the wall. She stated that, third day, Raju informed her brother in law of foul odour coming from the room

adjoining the temple. She denied the suggestion of not seeing the appellant entering the temple with co-accused and the victim. She denied the suggestion that her statement is tutored and made because of animosity between her family and family of the appellant. She also denied that what she is telling is a lie.

12. **PW-9 (Prem Singh -I.O.).** He proved the various stages of investigation and the preparation of site plan at the instance of family members of the deceased, who were found present at the spot, which was exhibited as Ex. Ka-11. He stated that on 3.8.2004 he recorded the statement of witnesses including PW-1, PW-4 and PW-8. After which, it was considered necessary to interrogate both the accused. Thereafter, the accused were found near Milan Kendra, where they were stopped in the presence of Sudarshan and Ram Kumar, there, on interrogation, the accused confessed their guilt and were accordingly arrested. Thereafter, on 23.08.2004 charge sheet was submitted under section 302 IPC. He produced the plain earth, blood-stained earth and toffee wrapper recovered from the spot which were marked material exhibits 1, 2 and 3.

During the course of cross examination, he admitted that in the site plan he had not shown the place from where the witnesses saw the accused entering and leaving the temple nor he disclosed the way of the accused entering and leaving temple. He also stated that in Parch No.1, which indicates preparation of site plan, prepared on 02.08.2004, he did not record the name of the accused because by that time their identity was not known. He admitted that there was no eye witness of Jeetu (the appellant) committing murder of the deceased. PW-9 stated that PW-3, during the course of investigation, had not disclosed to him that on interrogation, Raju Yadav confessed his guilt as well as the guilt of the appellant. PW-9 also stated that PW-4, during the course of investigation, did not make any statement that when he returned after urinating, he saw Jeetu alias Jitendra Niranjan (the appellant) exiting the temple in a hurry and with him there was Raju; that PW-4 also did not inform that Raju Yadav (co-accused) and Jitendra alias Jeetu (the appellant) were close friends and used to meet each other often and that the appellant was of bad character; that PW-8 had not informed, during investigation, that she saw Jitendra exiting the temple in a hurry followed by Raju. He also stated that during investigation he found no evidence with regard to commission of offence punishable under Section 376 IPC. PW-9 denied the suggestion that he did not properly investigate the matter and filled up papers sitting at his table and, without evidence, submitted charge-sheet.

PW-9 was recalled and re-examined on 29.01.2015. On recall, he proved the arrest memorandum of the accused dated 03.08.2004, which was witnessed by Sudharshan and PW-10, the same was marked Ex. Ka-16. He could not, however, remember the time of arrest but stated that the arrested accused were interrogated in the presence of witnesses Sudarshan (not examined) and PW-10. PW-9, however, stated that PW-10, during investigation, did not disclose that the accused had confessed their guilt. PW-9 denied the suggestion that the accused were arrested in the village.

13. **PW-10 (Raj Kumar)**. He stated that he knows PW-1. He stated that information about the place from where the body of the deceased was recovered was

provided by co-accused Raju (servant). That information was given, when Raju was threatened and interrogated by the villagers. Only then, he disclosed that foul odour was coming from the room next to the temple. Thereafter, Raju confessed his guilt as also the hand of the accused-appellant in the murder of the deceased. Thereafter, both Raju and the appellant, when threatened by the villagers to come out with the truth, confessed their guilt. Soon thereafter, police arrived and arrested them.

On being queried by the court, he stated that co-accused Raju and Jeetu (the appellant) had also confessed that they attempted a rape on the deceased and to hide the same, they killed the deceased and hid her body in that room.

During his cross examination, he was confronted with his previous statement made during the course of investigation wherein he had stated that when, in the presence of the I.O., Raju Yadav and Jeetu were interrogated they had confessed their guilt. He was also confronted with the omission in his statement, recorded during the course of investigation, with regard to confession of guilt by the accused other than the confession noticed above. He admitted that that part of his statement has been given for the first time in court. He denied the suggestion that what all he has stated in court is on account of tutoring. He denied the suggestion that the accused did not confess their guilt in his presence.

14. After the prosecution evidence was recorded, the incriminating circumstances appearing in the prosecution evidence were put to the accused-appellant under Section 313 CrPC. The accused-appellant denied his guilt and claimed that he has been falsely implicated on account of dispute with regard to management of the temple. He also stated that there is a dispute between his family and the complainant family in respect of the temple and, therefore, he has been falsely implicated. However, no defence evidence was led.

TRIAL COURT FINDINGS

15. The trial court by placing reliance on the testimony of the prosecution witnesses that the accused-appellant with co-accused Raju Yadav were seen entering the temple with the deceased on or about the probable time of her death and thereafter they were seen exiting in a hurry without the deceased; whereafter, the deceased was not seen alive and, later, her body was recovered from a room in the temple on the confessional statement of co-accused Raju therefore, by keeping in mind that there was an extra judicial confession before PW-10, found the chain of incriminating circumstances complete, pointing towards the guilt of the accused-appellant, ruling out all hypothesis other than the guilt of the accused-appellant, convicted the appellant for the charged offences and punished him, accordingly.

16. We have heard Ms. Swati Agrawal for the appellant; Sri J.K. Upadhyay, learned AGA, for the State; and have perused the record.

SUBMISSIONS ON BEHALF OF THE APPELLANT

17. The learned counsel for the appellant submitted that from the prosecution evidence it is clear that the temple was open to all. The members of

public could offer their prayers and the entry in the temple was not restricted. The site plan of the temple (Ex. Ka-11), which has been proved by the I.O. and its lay out has been confirmed by the testimony of PW-4, would suggest that running from the west to east there are three rooms. The first room towards extreme left (west) is the room from where the body of the deceased was recovered. This room has a door, which remains locked. The second room from west is the main temple, where the deity is installed; and the third room is a Kothri with no door. From the testimony of PW-4, it is clear that the key of the lock put on that room from where the body of the deceased has been recovered is under the control of PW-4's son. Admittedly, the room was locked and only when foul odour was sensed the lock was opened and body was discovered. Notably, the girl (the victim) went missing on 31.07.2004 at about 11 am of which no missing report is lodged till 1.30 pm of 01.08.2004. It is unacceptable that inquiries would not be made from the servant with whom, according to the prosecution, the victim was last seen alive, had it been so. In so far as the testimony of the victim being last seen alive with the co-accused Raju is concerned, that is for the first time coming during the course of trial and it is at variance with the statement made during the course of investigation, therefore, not much reliance can be placed on it. It has been submitted that other than the sketchy evidence of the deceased entering the temple with the co-accused and the appellant; and, after some time, the accused seen leaving the temple, without the deceased, there is no evidence to connect the appellant with the crime. In so far as the evidence of appellant entering the temple is concerned, admittedly, the victim was not holding the finger of the appellant but of her servant i.e. co-accused Raju. Notably, the temple is accessible to all and, therefore, if the accused-appellant had entered the temple that by itself is not an incriminating circumstance. Leaving the temple is also not an incriminating circumstance because if the temple is for all there would be free ingress and egress. Interestingly, there is no evidence that the accused-appellant or the co-accused were seen entering the room from where the body of the deceased was recovered. As, admittedly, the temple had three separate rooms and there was no ingress and egress point connecting one room to the other and, as per site plan, ingress and egress to each room was from a common verandah outside the three rooms, if any of the accused was seen entering the temple it cannot be assumed that he entered the room from where the body was recovered. Therefore, unless there is cogent and specific evidence that the accused were seen entering and leaving the room from where the body was recovered, no inference can be drawn that the accused appellant were guilty of murder. Further, extra judicial confession before PW-10 is for the first time set up in court and was not there during investigation and, other than that, confession before police, vide Ex. Ka-16, is not admissible. Hence, it is a case of no worthwhile evidence against the appellant; whereas, the trial court without properly scrutinising and analysing the evidence recorded conviction, which deserves to be set aside.

SUBMISSIONS ON BEHALF OF THE STATE

18. Sri J.K. Upadhay, learned AGA, supported the findings returned by the trial court by submitting that this is a case where there could be no other culprit than the co-

accused Raju Yadav, who has been declared juvenile and was residing in the house, and the appellant who were seen together with the deceased about the relevant time. As there is evidence that the deceased was seen holding the finger of co-accused and entering the temple on or about probable time of death of the deceased and thereafter the appellant was also seen entering the temple and the appellant thereafter was seen exiting the temple in a hurry, followed by co-accused, and, thereafter, the deceased was not seen alive, a very heavy burden lies on the accused-appellant to explain as to in what circumstances he entered the temple and as to why he left the temple in a hurry with the co-accused Raju. In absence of such explanation, the culpability of the accused-appellant stands established more so, when there is an extra judicial confession to corroborate the prosecution story therefore, the conviction recorded by the trial court cannot be faulted.

ANALYSIS

19. Before we proceed to analyse the submissions in the context of the prosecution evidence, considering that we are dealing with a case which is to be decided on the basis of circumstantial evidence, it would be useful to notice the legal principles to be borne in mind when the court has to decide a criminal trial on the basis of circumstantial evidence. In **Vijay Shankar V. State of Haryana, (2015) 12 SCC 644**, the Supreme Court following its earlier decisions in **Sharad Birdhichand Sarda V. State of Maharashtra, (1984) 4 SCC 116 and Bablu V. State of Rajasthan, (2006) 13 SCC 116**, in respect of a case based on circumstantial evidence, held that *"the normal principle is that in a case based on circumstantial evidence the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that these circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation of any hypothesis other than that of the guilt of the accused and inconsistent with their innocence"*. Further, the circumstances from which the conclusion of guilt is to be drawn should be fully established meaning thereby they 'must or should' and not 'may be' established. In addition to above, we must bear in mind that the most fundamental principle of criminal jurisprudence is that *the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions* **(vide Shivaji Sahabrao Bobade & Another v. State of Maharashtra, (1973) 2 SCC 793)**. These settled legal principles have again been reiterated in a three-judge Bench decision of the Supreme Court in **Devi Lal v. State of Rajasthan, (2019) 19 SCC 447** wherein, in paragraphs 18 and 19 of the judgment, it was held as follows:-

"18. On an analysis of the overall fact situation in the instant case, and considering the chain of circumstantial evidence relied upon by the prosecution and noticed by the High Court in the impugned judgment, to prove the charge is visibly incomplete and incoherent to permit conviction of the appellants on the basis thereof without any trace of doubt. Though

the materials on record hold some suspicion towards them, but the prosecution has failed to elevate its case from the realm of "may be true" to the plane of "must be true" as is indispensably required in law for conviction on a criminal charge. It is trite to state that in a criminal trial, suspicion, howsoever grave, cannot substitute proof.

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

(Emphasis Supplied)

20. Having noticed the legal principles as to when an accused can be convicted on circumstantial evidence, we shall now proceed to notice the circumstances on which the prosecution proposes to prove the accused appellant guilty. These circumstances are: (i) the deceased was alive and seen playing near the temple by or about 10.30 -11.00 am on 31.07.2004; (ii) at about 11.00 am the deceased was seen holding finger of co-accused Raju (a help /servant of the informant party) and entering temple, following them was the accused-appellant; (iii) at about 11.15 am, appellant was seen exiting the temple, following him was co-accused Raju minus the deceased; (iv) the deceased was not seen alive thereafter; (v) on 01.08.2004, the father of the deceased (PW-1) lodged a missing report; (vi) on 02.08.2014, upon sensing foul odour, from a locked room adjoining the main room of the temple, body of the deceased was discovered; (vii) autopsy disclosed death was due to asphyxia as a result of ante-mortem strangulation and could have had occurred on or about the probable time when the deceased went missing; and (viii) on 03.08.2004, the accused were apprehended and they confessed their guilt.

21. We shall now examine whether the prosecution has been successful in proving these circumstances beyond reasonable doubt. When we carefully scrutinise the evidence on record, we find that there is no challenge by the defence to the prosecution testimony in respect of engagement of co-accused Raju by the complainant family as their help. Further, co-accused Raju was living there with the complainant family for about one year and therefore, it can be presumed that the deceased-child was friendly with co-accused Raju. Accordingly, seeing co-accused Raju holding finger of the child (deceased) and leading her towards the temple, which was just 20-25 paces away, by itself, is not a circumstance that may create suspicion. But, had this circumstance been noticed and the deceased thereafter was not seen alive, the same would have assumed importance and would have surely been put across the suspect or reported to the police at the earliest. Notably, the missing report (Ex. Ka-1), dated 01.08.2004, as well as report relating to discovery of body (Ex. Ka-2), dated 02.08.2004, reports no suspect. Most importantly, CD Parcha No.1, dated 02.08.2004, which incorporates preparation of site plan (Ex. Ka-11), prepared by PW-9 at the instance of the family members of the deceased, neither discloses the ingress -

egress path of the suspects nor reveals the position of the witnesses. The story about the complicity of co-accused-Raju and the appellant gains momentum on 03.08.2004 on which date the accused are arrested and their confessional statement is taken. In this background, we would have to be cautious in scrutinising the testimony of PW-8, the mother of the deceased who, along with the grand father of the deceased (PW-4), were witnesses of this circumstance. Notably, PW-8, during cross-examination, was confronted with an omission in her statement, recorded under section 161 CrPC, about this circumstance. In so far as PW-4 is concerned, he, during cross-examination, stated that he was interrogated on 2.8.2004 and 3.8.2004 by the I.O. but if the I.O. had not recorded his statement that he was sitting outside on a chair and had noticed that circumstance, he cannot give the reason for it. Importantly, PW-4's location is not disclosed in the site plan prepared by I.O. on 2.8.2004. Thus, it appears, this incriminating circumstance was put across at a later stage, which raises a serious doubt about its existence. Therefore, it is held that the circumstance that the deceased was seen entering the temple with co-accused Raju, followed by the appellant and, thereafter, the appellant, followed by the co-accused, were noticed exiting the temple, short while thereafter, minus the deceased, is not proved beyond reasonable doubt.

22. Even assuming that the above circumstance has been satisfactorily proved, the question that arises is whether it is of a definite tendency pointing towards the guilt of the appellant. In this regard it be noticed that the deceased was not seen holding the hand of the appellant, rather, she was with the co-accused Raju. The temple where the appellant allegedly entered is a public temple where entry is not restricted, rather it is open to all. Therefore, even if we assume that the appellant entered the temple, that, by itself, is not an incriminating circumstance because any body could go and come out. Another important aspect is that the prosecution evidence is not that the appellant was seen entering or exiting the room from where the body was recovered. Interestingly, the site plan (Ex. Ka-11) and the statement of PW-4 confirms that the room from where the body of the deceased was recovered has a door, which remains locked, whereas, the deity is in the middle room, which remains open, providing access to all. The prosecution witnesses (PW-3 and PW-8) have tried to develop a story that though the room from where body was recovered remains locked but the key of that lock hangs on a hook placed on the wall. However, this part of the prosecution story is at variance with the deposition of PW-4 who, during the course of cross examination, stated that the key of that lock is under the control of his own son (PW-3). Once this is position, the entire prosecution case falls to the ground and throws multiple questions. Admittedly, the prosecution seeks to discharge its burden by leading circumstantial evidence and once it comes in the evidence that the room from where the body was recovered is under the control of a person who is not an accused, then the burden is on the prosecution to explain as to how access to that room could be had by the accused. No doubt, the prosecution did set up a story that the key of that lock use to be there on the hook placed on the wall but all the prosecution witnesses are not consistent in that regard. Rather, PW-4 states that the key of that lock was under the control of PW-3 (uncle of the deceased). There is also another aspect of the matter, which is, that

the main accused Raju had not absconded. Interestingly, he was the one who sensed foul odour and at his instance the room was opened on 02.08.2004. No doubt, prosecution has tried to explain this by setting up a story that first he (Raju) confessed, on strict interrogation, and then the room was opened. But had this been the case, the name of the accused must have figured in the CD (Case Diary) Parcha prepared on 2.08.2004. But, interestingly, the name of the accused surfaced only on 03.08.2004. Thus, the theory of extra judicial confession made by co-accused Raju leading to discovery of body appears doubtful.

23. In so far as the extra judicial confession of the accused-appellant is concerned, firstly, PW-10, the witness of it is also a witness of such confession recorded in the memorandum of arrest (Ex. Ka-16). PW-10 states that as soon as the confession was made before the villagers, the police had arrived. Not only that, he stated that the villagers had gathered and had threatened the accused to come out with the truth. In that context, we have to examine the worth of the alleged confession. It is well settled that before a confession is acted upon, the court must be satisfied that it is voluntary and truthful. Unless it is proved to the satisfaction of the court that the confession is voluntary, the same cannot be acted upon. In the instant case, the prosecution is relying upon two joint confessions made by the appellant and the co-accused Raju. One is before the villagers of which PW-10 is a witness and the other is before the police, finding its reference in the memorandum of arrest (Ex. Ka-16), of which also, PW-10 is a witness. In so far as the latter is concerned, that would be hit by section 25 and 26 of the Evidence Act. In so far as the former is concerned, from the testimony of PW-10 it is clear that it was made when the villagers threatened them. Further, PW-10 does not state as to who stated what. May be the confession was by the co-accused Raju only; whereas, the appellant may be a mute spectator nodding in approval to save himself from the wrath of the villagers around. Be that as it may, in that kind of a scenario, the alleged confession cannot be considered voluntary. Notably, making of any such confession has been denied by the appellant in his statement under section 313 CrPC recorded on 7.11.2014. For all the above reasons, the so-called extra judicial confession cannot form the basis of conviction.

24. At this stage, we may observe that we have noticed in the prosecution evidence that the informant party had a joint living. PW-4, the patriarch, had multiple sons and multiple grandchildren. Admittedly, the temple had free access to public. Co-accused Raju was a help and was a part of that commune. In that kind of a scenario, who did it is difficult to prove. More so, when the room from where the body was recovered was locked. No doubt, explanation has come in the prosecution evidence that the key of that lock was available as it used to be hanged on the hook placed on the wall. But, PW-4 says that the key was in the control of PW-3. Interestingly, the motive for the crime i.e. rape or its attempt, has not at all been substantiated by medical or forensic evidence and there is no incriminating evidence such as semen stain or blood or hair of the appellant found on the spot to connect the appellant with the crime by forensic evidence. In these circumstances, and for all the reasons recorded above, we have no hesitation in holding that the prosecution has not only failed to prove

that the chain of incriminating circumstances was complete, pointing towards the guilt of the accused-appellant, but has even failed to prove those incriminating circumstances as against the accused-appellant beyond the pale of doubt.

25. Consequently, the appeal is **allowed.** The judgment and order of conviction and sentence recorded by the trial court is set aside. The appellant is acquitted of the charges for which he has been tried and convicted. The appellant shall be released from jail forthwith, unless wanted in any other case, subject to compliance of the provisions of Section 437-A Cr.P.C. to the satisfaction of the trial court.

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

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(2022)03ILR A361
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.03.2022

BEFORE

THE HON'BLE MOHD. ASLAM, J.

Criminal Appeal No.2085 of 2020

Jay Prakash Verma & Anr. ...Appellants
Versus
State of U.P & Anr. ...Respondent

Counsel for the Appellants:
Sri Himanshu Srivastava

Counsel for the Respondent:
A.G.A., Sri Purushottam Mani Tripathi

Criminal Law- - Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989- Section 14-A- Summoning Order passed on printed proforma - Impugned order of taking cognizance is passed merely by filling up the blanks in the proforma - The order of taking cognizance of offences is an intermediate order against which appeal would lie under Section 14-A (1) of SC/ST Act. The impugned summoning order has been passed on a printed proforma by filling the blanks without application of judicial mind and as such, it is not sustainable in the eyes of law.

As the word occurring in Section 14-A of the Sc/St Act would also mean an intermediate order hence an Appeal would be maintainable against a summoning order. A summoning order passed on a printed proforma reflects non-application of mind and is therefore wholly illegal.

Criminal Appeal - Code of Criminal Procedure, 1973- Section 5 & 386 (d),(e) - Procedure and power of appellant court while hearing appeal under Section 14-A of SC/ST Act- according to Section 5 Cr.P.C. that relates to "saving" will apply in such matter- From the reading of Section 386 of Cr.P.C., it is clear that appeal under Section 14-A SC/ST Act will fall within clause (d) and (e) of the Cr.P.C.

As no procedure of hearing an appeal has been provided under the Sc/ St Act, 1989, hence in view of the provisions of Section 5 of the CrPc, such appeal shall be heard in accordance with the provisions of Section 386 of the CrPc.(Para 10, 11, 14)

Criminal appeal allowed. (E-3)

Judgements/ Case law relied upon:-

1. In re : Provision of Section 14-A of SC/ST (Prevention of Atrocities) Amendment Act, 2015 & Others Vs. Nil & ors, 2018 0 CrLJ 5010

2. Saurabh Dewana Vs St. of U.P. 2010 (3) ADJ 622

3. Ankit Vs St. of UP & anr. 2009 (9) ADJ 778

(Delivered by Hon'ble Mohd. Aslam, J.)

1. This criminal appeal is preferred under Section 14-A (1) of SC/ST Act for quashing the further proceedings of Special Session Trial No. 419 of 2019 (State vs. Jai Prakash and another), arising out of Case Crime No. 96 of 2017, under Sections 323, 504, 506, 427 of I.P.C. and Section 3 (1) (Da) of SC/ST Act, Police Station- Ramkola, District- Kushinagar, pending in the court of Additional Sessions Judge/Special Judge, SC/ST (PA) Act, Kushinagar at Padrauna as well as the summoning order dated 16.10.2019.

2. The brief facts necessary for disposal of this appeal is that opposite party no.2 has lodged the first information report on the basis of written complaint on 13.04.2019 at 23:21 P.M. against five named and one unknown accused persons including the appellant with the allegation that on 13.04.2019 at about 7:30 P.M. accused persons had snatched the key of his motorcycle due to old trivial issue using caste indicating words like Khattik, Chamaria abused him with filthy language and had also beaten him with fists, kicks, lathi, danda and damaged his motorcycle. The accused had also snatched the mobile of his companion Aditya Govind Rao. The informant has sustained multiple injuries on his body and got his injuries medically examined at Government Hospital Ramkola and keeping in view the seriousness of the injuries the doctor has referred him to the District Hospital.

3. The injured/informant Rajkumar Maurya was medically examined on 13.04.2019 at 8 P.M. at CHC Ramkola wherein six injuries were found on the body of the injured. The injury nos.1 and 3 were kept under observation and referred to CHC, Kushinagar for expert opinion. Rest injuries were found simple in nature. Duration of the injuries was found fresh. The investigation of the case was conducted by Circle Officer Naveen Kumar Nayak who recorded the statement of witnesses, visited the place of occurrence and prepared the site-plan. After completion of investigation, he has submitted the charge-sheet against accused-appellant Jai Prakash Verma and Sunil Verma under Sections 323, 504, 506, 427 I.P.C. and Section 3 (1) (Da) of SC/ST Act.

4. Heard learned counsel for the accused-appellant, learned counsel for opposite party no.2 as well as learned A.G.A. for the State-respondent and perused the record.

5. It is submitted by learned counsel for the accused-appellant that the impugned order dated 16.10.2019, by which cognizance of offence was taken by the court below, is illegal, arbitrary and is based on surmises and conjectures. It is further submitted that some dispute has taken place between the informant and accused-appellant and the informant has abused the appellant and only on mere asking not to abuse the first information report has been lodged against the appellant and other accused persons on the basis of false and concocted story. The accused-appellant neither has abused the opposite party no.2 using cast indicating words nor has beaten him as alleged in the first information report. In fact, on the day of incident the informant was drunken and fell down near the shop of accused-appellant on account of which he has sustained injuries. It is also submitted that the cognizance order on the charge-sheet was passed merely by filling up the printed proforma. Learned court below has not applied its

mind before taking cognizance of the offence, therefore, the impugned order is liable to be set-aside.

6. Per contra, learned A.G.A. has vehemently opposed the submissions of learned counsel for the accused-appellant and supported the order of lower court, but he could not dispute that the impugned order of taking cognizance is passed merely by filling up the blanks in the proforma.

7. After service of notice, opposite party no.2 has put in appearance and has filed counter affidavit contending therein that learned lower court has passed the impugned order according to law. Learned counsel for opposite party no.2 has further submitted that merely because the order is passed on printed proforma by filling up the blanks does not make the order illegal or without jurisdiction and the impugned order cannot be set-aside on this ground only. It is further submitted that the genuineness of the occurrence can only be decided after taking the evidence of the parties, therefore, it cannot be looked at this stage and the appeal is liable to be dismissed.

8. In this case only cognizance of the offence has been taken by the court below and the charges have not been framed, therefore, pros and cons of the evidence cannot be considered at this stage while deciding the appeal under Section 14-A (1) of SC/ST Act. The first information report, prima facie, discloses the commission of offences punishable under the SC/ST Act.

9. Full Bench of this Court in re: ***Provision of Section 14-A of SC/ST (Prevention of Atrocities) Amendment Act, 2015 and Others vs Nil and others*** *[reported in* ***2018 0 CrLJ 5010]*** has held that "a petition under the provisions of Article 226/227 of the Constitution of India cannot invoke in cases and situations where an appeal would lie under Section 14-A. In so far as the powers of the Court with respect to the revisional jurisdiction is concerned, we find that the provisions of Section 397 Cr.P.C. stand impliedly excluded by virtue of special provisions made in Section 14-A. This, we hold also in light of our finding that the word "order" as occurring in sub-section (1) of Section 14-A would also include intermediate orders."

10. From the Full Bench decision of this court, it is abundantly clear that appeal under Section 14-A (1) of SC/ST Act would lie against intermediate order. The order of taking cognizance of offences is an intermediate order against which appeal would lie under Section 14-A (1) of SC/ST Act.

11. Now the question arises what would be the fate of order of the cognizance passed by court below by filing up blanks on printed proforma. This court in ***Saurabh Dewana versus State of UP [2010 (3) ADJ 622]*** has held that order of taking cognizance of offence and charge-sheet on printed proforma is illegal and is liable to be quashed on this ground only. The law on this point is well settled also in ***Ankit vs State of UP and another*** *[reported in* ***2009 (9) ADJ 778].*** Thus, the impugned summoning order has been passed on a printed proforma by filling the blanks without application of judicial mind and as such, it is not sustainable in the eyes of law. The copy of impugned order dated 16.10.2019 passed in Session Trial No. 419 of 2019 (State vs. Jai Prakash Verma and others), arising out of Case Crime No. 96 of 2017, under Sections 323, 504, 506, 427

I.P.C. and Section 3 (1) Da SC/ST Act is placed at page nos. 12-15 which shows that the order of taking cognizance of offence was written by handwriting on printed proforma which is liable to be set-aside on this ground only.

12. Now the question arises what is the procedure and power of appellant court while hearing appeal under Section 14-A of SC/ST Act? No procedure and power of appellate court has been provided in SC/ST Act. Therefore, according to Section 5 Cr.P.C. that relates to "saving" will apply in such matter. Section 5 of Code of Criminal Procedure reads as follows:

*"**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."*

13. From the perusal of Section 5 of Code of Criminal Procedure, it is clear that in absence of it's posting provisions in special act the provision of the Cr.P.C. will apply. The power of the appellate court is enshrined under Section 386 of Cr.P.C. which reads as follows :

*"386. **Powers of the Appellate Court.** -After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and in case of an appeal under Section 377 or Section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may - (a) in an appeal from an order of acquittal, reverse such order and direct that further enquiry be made, or that the accused be retried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law. (b) in an appeal from a conviction -*

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be retried by a court of competent jurisdiction subordinate to such Appellate Court or committed for trial, Or

(ii) alter the finding, maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same;

(c) in an appeal for enhancement of sentence -

(i) reverse the finding and sentence and acquit or discharge the accused or order him to be retried by a court competent to try the offence, Or

(ii) alter the finding maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, so as to enhance or reduce the same;

(d) in an appeal from any other order, alter or reverse such order;

(e) make any amendment or any consequential or incidental order that maybe just or proper.

Provided that the sentence shall not be enhanced unless the accused has

had an opportunity of showing cause against such enhancement.

Provided further that the appellate court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the court passing the order or sentence under appeal."

14. From the reading of Section 386 of Cr.P.C., it is clear that appeal under Section 14-A SC/ST Act will fall within clause (d) and (e) of the Cr.P.C. Therefore, the appeal is liable to be allowed and order dated 16. 10.2019 passed by Special Judge SC/ST (PA) Act, Kushinagar at Padrauna is liable to set-aside and directions be issued to learned Special Judge SC/ST Act to pass fresh order on charge-sheet in the aforesaid case after applying its judicial mind.

15. The appeal is, accordingly, **allowed** and the impugned order dated 16.10.2019 passed by Additional Sessions Judge/Special Judge, SC/ST (PA) Act, Kushinagar at Padrauna in Special Session Trial No. 419 of 2019 (State vs. Jai Prakash and another), arising out of Case Crime No. 96 of 2017, under Sections 323, 504, 506, 427 of I.P.C. and Section 3 (1) (Da) of SC/ST Act, Police Station- Ramkola, District- Kushinagar, is set-aside.

16. Learned Additional Sessions Judge/Special Judge, SC/ST (PA) Act, Kushinagar at Padrauna is directed to pass fresh order on the point of taking cognizance on the charge-sheet in the aforesaid case after applying its judicial mind.

(2022)03ILR A365
APPELLATE JURISDICTION

CRIMINAL SIDE
DATED: ALLAHABAD 08.02.2022

BEFORE

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

Criminal Appeal No. 4759 of 2007

Munawwar ...Appellant (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri R.P.S. Chauhan, Sri Amir Khan, Sri Beena Mishra, Sri K.D. Tiwari, Sri Mohd. Asad, Sri Mohd. Samiuzzaman Khan, Sri Mukhtar Alam, Sri Noor Mohammad, Sri Zahid Ali, Sri R.B. Singh, Sri N.K. Singh

Counsel for the Respondent:
A.G.A.

Evidence Law - Indian Evidence Act- Section 134- Conviction on basis of solitary witness- When an incident of the nature as is in the instant case occurs, graphic description of each and every detail with regard to each part of the incident is humanly not possible and therefore what is to be ascertained is whether the incident was actually witnessed or not by the person who seeks to prove its occurrence and whether the ocular account is corroborated with other evidences - The presence of PW-1 with the deceased at the time of incident cannot be doubted- The discrepancy pointed out by the learned counsel for appellant in the ocular account with the medical evidence is not such that renders the ocular account improbable or contrived- The ocular account rendered by PW-1 trustworthy, natural and acceptable more so because, it finds corroboration from the surrounding circumstances as well as medical evidence.

Although it is not humanely possible for a witness to narrate the occurrence with

exactitude, but where the testimony is corroborated with medical and other evidence and the same is, trustworthy and credible then such testimony can be relied upon.

Keeping in mind that this is a broad day light murder of which a prompt named first information report was lodged, which is supported by an ocular account that finds corroboration from the medical evidence as well as other surrounding circumstances, the prosecution has succeeded in proving the guilt of the appellant beyond reasonable doubt and therefore, we do not find any merit in this appeal. (Para 27, 29. 30, 32)

Criminal Appeal rejected. (E-3)

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

1. We have heard Mohd. Samiuzzaman Khan along with Ms. Beena Mishra for the appellant - Munawwar; Sri J.K. Upadhyaya, learned AGA, for the State and have perused the record.

2. This appeal is against the judgment and order dated 12.07.2007, passed by Additional Sessions Judge, Court No.7, Badaun in Sessions Trial No.544 of 2006 connected with Sessions Trial No.545 of 2006. In Sessions Trial No.544 of 2006, the appellant was prosecuted for offence punishable under Section 302 read with Section 34 IPC, arising out of Case Crime No.18 of 2006, police station Bisauli, district Badaun; whereas, in Sessions Trial No.545 of 2006 the appellant was prosecuted for offence punishable under Section 25 of the Arms Act, arising out of Case Crime No.94 of 2006, police station Bisauli, district Badaun. By the impugned judgment and order, in Sessions Trial No.544 of 2006, the appellant has been convicted under Section 302 read with Section 34 IPC and sentenced to imprisonment for life with fine of Rs.5,000/- and a default sentence of one year; whereas, in Sessions Trial No.545 of 2006, the appellant has been acquitted of the charge of offence punishable under Section 25 of the Arms Act. Consequently, this appeal assails the judgment and order of conviction and sentence recorded under Section 302 read with Section 34 IPC in Sessions Trial No.544 of 2006.

Introductory facts

3. The prosecution case in a nutshell, instituted on a written report (Exb. Ka-1), lodged by the informant - Jalaluddin (PW-1), at 16.30 hours, on 03.01.2006, at police station Bisauli, district Badaun (of which check report no.03 of 2006 (Ex. Ka-13) and GD Entry No.31 (Ex. Ka-14), giving rise to case crime no.18 of 2006, was made by PW-6), is that while PW-1 and his brother Raees Khan (the deceased) were returning on a motor cycle, after taking medicine for the deceased, at about 3.00 pm, when they took a turn to Bahoran's place of residence, on way, the accused, namely, Harvir, Iliyas (both not put to trial as they had died in a police encounter) and Munawwar (the present appellant), were noticed with firearms, coming from front. As soon as they (accused) saw the informant and his brother, they shouted that after a long time they could get an opportunity to finish off the deceased. Hearing their shouts, the deceased jumped off from the motorcycle, as a result whereof, the licensed gun which he was carrying on his shoulder fell and was lifted by co-accused Iliyas. All of them (accused) chased the deceased who ran towards the house of Sardar Mewa; there, the deceased was surrounded and killed by the accused persons. It is alleged that Iliyas shot the deceased from the gun which fell

off the shoulder of the deceased and the other two accused fired at the deceased from their own country made pistols. It was alleged that the body of the deceased was lying at the spot and that the incident was witnessed by several persons of the village including Shamshad (PW-2) and Rahmat Khan (PW-3). The motive disclosed for the crime was animosity on account of the deceased being elected Gram Pradhan.

4. The inquest proceedings were completed at the spot by 17.40 hours on 03.01.2006 of which report (Ex. Ka-3A) was prepared. The informant (PW-1) is one of the inquest witnesses. Autopsy was conducted on 04.01.2006 at about 3.30 p.m. Autopsy report (Ex Ka-3) prepared by PW-4 reveals following external ante-mortem injuries on the body of the deceased:

1. An abrasion of 3 cm x 3.5 cm over left side of hip, 12 cm below from pelvic bone.

2. An abrasion of 1.5 cm x 1 cm, 12 cm above from injury no.1.

3. An entry wound of firearm of 1 cm x 1 cm x cavity deep on right side of back of chest, 9.5 cm below from inferior angle of right scapula. Margins inverted burning present with clotted blood.

4. An exit wound of firearm 4 cm x 3.5 cm on right side of lateral aspect of trunk, 21 cm below from apex of Axilla. Injury no.(3) and (4) communicates each other.

5. An entry wound 1.5 cm x 1 cm on right side of front of chest, 9 cm above from right nipple at 11 'O' clock position. Burning present. Margin inverted. This communicates to its exit wound described below as injury no.6.

6. A wound of exit of firearm 2 cm x 1.5 cm on right side of back of chest, 5.5 cm lateral from injury no.(3).

7. A wound of entry of firearm 3 cm x 1.5 cm on right side of front of abdomen 3 cm above from umbilicus at 10 'O' clock position margin inverted. Burning present with clotted blood.

8. An exit wound 3.5 cm x 2 cm on right side of back of trunk, 17 cm above from upper end of (sic). Injury no. (7) & (8) communicate each other.

The internal examination of the body of the deceased revealed:

Both lungs with pleura lacerated; and the stomach contained 75 gm of semi-digested semi-solid food material.

According to the Doctor, the death was a result of haemorrhage and shock due to ante-mortem firearm injuries; and the death could have occurred about one day before.

It be noted that 17 metallic pellets were recovered from the body of the deceased.

5. During the course of investigation, a seizure cum supardgi memo (Ex. Ka-2) of 12 bore DBBL gun lifted from the spot, which allegedly fell off deceased's shoulder and was used to fire at him, was prepared on 03.01.2006. The memo mentions that the barrel of the gun smells of burnt explosive. The Investigating Officer (I.O.) also lifted plain earth and blood stained earth from the spot of which recovery memo (Ex. Ka-10) dated 03.01.2006 was prepared. The I.O. also prepared the site plan (Ex. Ka-9) of the place of occurrence

on 03.01.2006 and on 07.02.2006 recovered a .315 bore country made pistol from the appellant; of which seizure memo (Ex. Ka-11) was prepared. In respect of recovery of country made pistol from the appellant, a separate case was registered, namely, Case Crime No.94 of 2006, which gave rise to Sessions Trial No.545 of 2006.

6. After completing the investigation, the police submitted two charge-sheets. In Case Crime No.18 of 2006, charge-sheet (Ex. Ka-12) was submitted by PW-5 against the appellant under Section 302 read with Section 34 IPC, whereas in Case Crime No.94 of 2006 a separate charge-sheet (Ex. Ka-16) was prepared and submitted by PW-7. In the charge-sheet submitted against the appellant in Case Crime No.18 of 2006 it was mentioned that the other two co-accused, namely, Iliyas and Harvir have been killed in a police encounter and therefore, they have not been sent for trial. After taking cognizance on the two charge-sheets, the two cases were committed to the Court of Session resulting in two separate trials, namely, Sessions Trial No.544 of 2006 where the appellant was charged under Section 302 read with Section 34 IPC and Sessions Trial No.545 of 2006 where the appellant was charged for offence punishable under Section 25 of the Arms Act. Upon denial of the charge, both these trials commenced and were connected. Ultimately, they were decided by common impugned judgment and order.

7. During the course of trial, the prosecution examined as many as eight prosecution witnesses. PW -1 - Jalaluddin i.e. the informant who is also an eye-witness of the incident; PW-2 - Shamshad, also alleged to be an eye-witness but was declared hostile. PW-3 - Rahmat Khan, another eye witness, who, though, proved the occurrence and participation of three assailants including co-accused Harvir in the murder of the deceased but, except Harvir, he could not recognise the other two assailants, as they were not known to him. PW-4 - Dr. Satyapal Singh proved the autopsy report and stated that he found two liters of blood and 17 metallic pellets inside the body at the time of autopsy and that looking to the presence of semi-digested food in the stomach there was a possibility that the deceased might have consumed food material 2½ to 5 hours before his death. PW-4 also disclosed that there were three entry wounds and those wounds were not likely to have been caused by same firearm. PW-4 accepted the possibility of death having occurred at or about 3.30 p.m. on 03.01.2006. PW-5 is the I. O. of Case Crime No.18 of 2006, who proved various stages of the investigation such as: inquest including preparation of its report (Ex. Ka-3A); preparation of photo nash (Ex. Ka-4), challan nash (Ex Ka-6, letter to R.I. (Ex. Ka-7) and CMO (Ex. Ka-8) for autopsy; preparation of site plan (Ex. Ka-9); lifting of blood stained earth and plain earth from the spot (Ex. Ka-10); taking possession and handing over possession of DBBL gun (Ex. Ka-2) including the thumb mark / signature appearing there on; recording statement of witnesses during the course of investigation; arrest of appellant and recovery of a country made pistol from the pocket of his trouser worn by him at the time of arrest of which memo (Ex. Ka11), dated 07.02.2006, was prepared; and submission of charge-sheet (Ex. Ka-12) in case crime no.18 of 2006. He produced the country made pistol and cartridge recovered by him which were marked material exhibits 1 & 2 respectively. He also stated that the recovered items were sent for forensic examination. PW-6, constable Rajesh Kumar, proved the G.D. Entry of the written report /FIR in Case

Crime No.18 of 2006 at 16.30 hours as well as preparation of its check FIR, which were exhibited as Ex. Ka-14 and Ex. Ka-13 respectively; PW-7 Sub-Inspector V.P. Singh is the Investigating Officer of Case Crime No.94 of 2006, under Section 25 of the Arms Act, he proved the various stages of investigation of that case with which we are not concerned in the present appeal as the appellant has been acquitted in that case and no Government Appeal against the order of acquittal has been filed by the State. Similarly, testimony of PW-8 - Head Constable Jai Prakash, who is a witness of recovery of country made pistol/ cartridge, is not relevant in the context of the present appeal as the appellant has been acquitted of the charge under section 25 of the Arms Act.

8. The report of forensic laboratory, U P, at Agra was obtained in respect of blood stained earth / plain earth lifted from the spot; and also the clothes worn by the deceased worn at the time of incident. The report (Ex. Ka-20) indicated that on the blood stained articles there was presence of blood though its origin, due to disintegration, could not be determined in the soil; whereas, in the clothes sent for forensic examination presence of human blood was found.

9. Incriminating materials appearing in the prosecution evidence were put to the accused for recording his statement under Section 313 CrPC. The accused denied his involvement in the crime; claimed that the recovery of country made pistol at the time of arrest is false. A defence witness, namely, Bashir, was examined to discredit the recovery and arrest at the date and time alleged, which we do not propose to address as the appellant has been acquitted of the charge under section 25 of the Arms Act.

10. The trial court after considering the prosecution evidence found that the prosecution was successful in proving the charge of offence punishable under Section 302 read with Section 34 IPC but failed to prove the charge under Section 25 of the Arms Act.

11. As the current appeal is limited to questioning the conviction and sentence recorded by the trial court under Section 302 read with Section 34 IPC in Sessions Trial No.544 of 2006, learned counsel for the parties have confined their submissions in respect thereof.

Submissions on behalf of the Appellant

12. Sri Mohd. Samiuzzaman Khan, learned counsel for the appellant, submitted as follows :

(a) It is a case where there is a solitary eye-witness to support the prosecution case as against the appellant because the other two eye-witnesses, namely, PW-2 and PW-3, have not supported the prosecution case therefore, unless and until the testimony of solitary eye-witness is of an unimpeachable character and is wholly reliable, conviction ought not to be based on the same. He submits that in so far as PW-1 is concerned, if his testimony is read as a whole it would suggest that as soon as the assailants were spotted, the deceased alighted from the motorcycle to run away from the spot and PW-1 escaped on his motorcycle therefore, PW-1 had no opportunity to witness the incident. The presence of PW-1 is also doubtful for the reason that, according to him the deceased was not well and had no

food intake since the morning whereas the autopsy report suggested presence of food material in the stomach, which means that PW-1 and the deceased were not together. The statement of PW-1 that he had gone to fetch medicines with the deceased is not truthful because PW-1 could not disclose the shop from where medicines were purchased. Moreover, PW-1 could not disclose the reason as to why they took a turn to the spot where they were attacked by the accused party. Absence of reason to take a turn to reach the place of incident also suggests that PW-1 was not with the deceased at the time of the incident.

(b) PW-3, though discloses the presence of Harvir as one of the assailants amongst the three who attacked the deceased with firearms but, does not disclose the presence of the appellant at the spot therefore, there is a doubt with regard to the participation of the appellant in the incident.

(c) According to PW-1 after lifting the DBBL gun that fell on the spot, Iliyas fired two DBBL gunshots on the abdomen of the deceased but there appears single gunshot wound on the abdomen. Thus, the ocular account rendered by PW-1 being in conflict with medical evidence is unworthy of acceptance.

(d) PW-2, who has been declared hostile in his cross-examination has stated that Raees Khan (deceased) was chased by few miscreants who killed him. This suggests that some unknown persons committed the crime.

(e) From the statement of PW-1, it appears, within twenty minutes of the incident the police had arrived at the spot and one Gaus Mohammad had gone to inform the police, which suggests that the first information report was not lodged at the first opportunity but was lodged much later, which renders the presence of PW-1 at the spot doubtful.

(f) Summing up his submissions, learned counsel for the appellant submitted that this is a case where unknown assailants killed the deceased and the first information report was lodged by guess work on past enmity and political rivalry and therefore, it is a fit case where the appellant should be extended benefit of doubt more so when he has been acquitted of the charge under section 25 of the Arms Act.

Submissions on behalf of the State

13. **Per contra**, learned AGA submits that this is a case where the occurrence took place in broad day light; the first information report was promptly lodged; the inquest was conducted on the same day and the inquest papers reveal that the case had been registered; there is no dispute or challenge to the spot where the occurrence took place; no suggestion has been put to PW-1 that he was not with the deceased at the time of the incident and even PW-3, declared hostile, has disclosed that PW-1 and the deceased were seen together at the spot therefore, there is no doubt as to the presence of PW-1 at the spot; the ocular account finds support from the medical evidence which not only suggests that the incident could have occurred on or about the time when it is stated to have occurred by the prosecution but also that the injuries were sustained by the deceased in the manner suggested by the prosecution and from three weapons, suggesting participation of three assailants as is the prosecution story. It was submitted that although it might not have been disclosed as to for what purpose the deceased and PW-1 were there at the spot when

they were attacked but that, by itself, is not a ground to disbelieve the ocular account because neither suggestion has been put to the eye-witness to challenge the spot where the incident occurred nor suggestion is there to challenge the presence of PW-1 at the spot. Further, mere presence of semi-digested food in the stomach of the deceased would not render the presence of PW-1 doubtful as it is possible that PW-1 might not have been aware with regard to consumption of food article by the deceased before they had left their house. In so far as the statement of PW-2 is cornered, in his cross-examination, he stated that: "MAIN NISHCHIT RUP SE NAHI KAH SAKTA KI FAYAR KARNE WALON ME ILIYAS, HARVIR, MUNAWWAR ME KOI THA YA NAHI", which means that, firstly, he admits the incident, and, secondly, he is not sure with regard to the presence or absence of the accused persons at the spot. He submits that, under the circumstances, the testimony of PW-2 cannot be utilised to discredit the testimony of PW-1 and, similarly, the testimony of PW-3 cannot be utilised to discredit the testimony of PW-1 because PW-3 also discloses participation of three persons though, out of them, he could recognise only Harvir as the other two were not known to him. Seen in that context, rather, both PW-2 and PW-3 support the prosecution story with regard to the manner in which the incident occurred as narrated by PW-1 and their testimony corroborates the statement of PW-1 to that extent and also certifies his presence at the spot. Learned AGA therefore submits that this is a case where the prosecution has been able to prove the charge against the appellant beyond reasonable doubt hence the appeal is liable to be dismissed.

Prosecution evidence

14. Having noticed the rival submissions, before we proceed to assess and appreciate their respective merit, it would be apposite to notice the testimony of the prosecution witnesses in some detail.

15. **PW-1** is the brother of the deceased and the informant of the case. He states specifically that he knew the accused Munawwar (the appellant) as he used to visit PW-1's village. PW-1 also states that he knows the other two co-accused Iliyas and Harvir, who have been killed in police encounter. There is no challenge to this part of PW-1's testimony. In respect of the incident, PW-1 states that he and his brother - the deceased (Raees Khan) had gone to Sangrampur to fetch medicine as his brother -the deceased was not feeling well. While they were returning on a motorcycle, which was being driven by PW-1, the deceased, who was a pillion rider and holding the licensed DBBL gun of the informant, on reaching village Sirsawar, told PW-1 to take a turn to visit Bahoran. As soon as PW-1 took the turn towards Bahoran's house, near Chhavi Lal's house, they were spotted by the accused Iliyas, Harvir and Munawar (appellant) who came in front of the motorcycle and shouted that they had been in search for them (the victims) and therefore the victims be not let off. Seeing the accused persons, the victim (Raees Khan) jumped off from the motorcycle and ran; in that process, the DBBL gun which he was carrying fell off his shoulder, which was picked up by co-accused Iliyas. Raees Khan (victim) to save himself ran towards the house of Sardar Mewa whereas the three accused chased him and fired at him and, after surrounding him killed him in front of the house of Sardar Mewa. PW-1 stated that Iliyas fired from the DBBL gun which he had picked from the spot whereas Harvir and Munawwar fired from their respective country made pistols. PW-1 stated that the incident was also witnessed by Shamshad

(PW-2) and Rahmat Khan (PW-3). Elaborating upon his narration of the incident, PW-1 stated that on being challenged by the villagers, the accused persons escaped towards the east by leaving the DBBL gun at the spot. PW-1 stated that the first information report of the incident was scribed by Hasan Khan on which he had put his thumb impression after the same was readout to him and understood by him. He proved the written report, which was marked as Ex .Ka-1. PW-1 also stated that the police had arrived at the spot and conducted inquest; the report of which, bears his signature. PW-1 also stated that the DBBL gun was handed over to the police by him at the spot of which custody was handed over to PW-1 and a recovery / custody memo (Ex . Ka-2) was prepared.

In his cross-examination, PW-1 stated that the distance of his house from the place of occurrence is about 3-4 kms or may be 1.5 - 2 kms. He could not tell the name of the Doctor from whom the deceased took medicine at Sangrampur because he was sitting outside the Doctor's shop. PW-1 stated that the deceased had been a Pradhan for three months. He admitted that the accused Munawwar's vote did not fall in his constituency. He stated that he does not know the name of the father of Munawwar but he knows Munawwar from before. On further cross-examination, he stated that PW-1 and his brother had left home at about quarter to 3 pm to take medicine; and as the deceased was having fever, he had not consumed any food material since the morning though, had consumed tea in the morning at about 8.00 a.m. On being questioned whether money for the medicines was paid by the deceased, PW-1 stated that the deceased had money. In respect of arrival of the police at the spot, PW-1 stated that the police arrived at the spot in twenty minutes. Gaus Mohammad, a fellow villager, took PW-1's motorcycle to inform the police. Investigating Officer upon arrival stayed there for about half an hour and inspected the spot, sealed the body of the deceased and took the body to Chowki Davtari where it was kept overnight. He reiterated that he had lodged the report on the date of occurrence and that report was written in the village where the incident took place. He also stated that when I.O. had left the place he had got the report (Ex .Ka-1) written and had it lodged at the police station.

In respect of the presence of Shamshad (PW-2) and Rahmat (PW-3) at the spot he stated that they were present at the spot to take delivery of a buffalo. In respect of the arrival of Hasan Khan, scribe of the first information report, he stated that he arrived twenty minutes later. He stated that the distance between Bahoran's Chabutara and the spot where the deceased was surrounded is about 30 paces. He further stated that at the time when shots were fired, the witnesses were sitting on the Chabutara. He stated that he had pointed out to the I.O. the place of the incident.

On further cross-examination, PW-1 stated that the deceased after alighting from the motorcycle must have ran 50 paces. He stated that on or about the spot there are houses all around and many people had witnessed the incident. In respect of the nature of the weapons used to cause injury, PW-1 stated that his licensed DBBL 12 bore gun was picked up from the spot and used by accused Iliyas to fire two shots at the abdomen of the deceased; and the remaining two accused had fired from .315 bore country made pistol. On further

cross-examination, at one place, PW-1 stated that as soon as Raees Khan (the deceased) jumped off the motorcycle and ran, he escaped on his motorcycle and returned back after collecting men from his village and by the time he returned, he found Raees Khan lying dead. Immediately, after stating as above, PW-1 clarified that Raees Khan was shot in his presence. This portion of PW-1's statement is extracted below: "*JAISE HI RAEES KHAN MOTORCYCLE SE UTARKAR BHAGE MAI MOTORCYCLE LEKAR BHAG GAYA. GAON PAHUNCHKAR LOGON KO LIWAKAR LAYA. JAB LAUTKAR AYA TO RAEES KHAN MARE PADE THE. RAEES KHAN KE FAYAR MERE SAMNE MARE THE".*

On being questioned about the distance from which shots were fired, PW-1 stated that the distance between the deceased and the accused at the time when shots were fired at the deceased must have been 2 - 4 paces. He also stated that when his brother ran towards the Chhappar of Sardar Mewa, there also, he was shot at. PW-1 clarified that one shot was fired while the deceased was running and two were fired when he fell near the Chhappar. He added that after running about 50 paces the deceased fell. He stated that the deceased ran towards north and the accused chased him from south. PW-1 stated that when the deceased was running he was shot at the chest region by .315 bore pistol. He also stated that where the deceased fell, blood had spilled there. He added that the deceased was wearing slippers and while running his slippers slipped away, which were later lifted by the police. He denied the suggestion that the deceased was killed by unknown assailants.

16. **PW-2** Shamshad, who was declared hostile, stated that he had not witnessed the murder. When the prosecution cross-examined him and confronted him with his statement under section 161 CrPC, he denied having given any such statement. But, stated that Harvir, Iliyas and Munawwar are hardened criminals and that Iliyas and Harvir have been killed in police encounter. PW-2, however, denied the suggestion that he is not disclosing the truth because he is afraid.

On being cross-examined by the defence, he stated that the police had searched the body of the deceased in his presence and had found a 12 bore pistol in a broken condition. He added that the police arrived after an hour of the incident. He further added that the first information report was written by Hasan Khan on his dictation and when the report was being written, the informant was outside the police station. He added that Munnawar used to look after agricultural work of Raees and Raees had dues payable to Munnawwar. He stated that miscreants use to visit Raees and he saw few miscreants chasing the deceased (Raees) and firing at him upon which, the villagers returned fire and in that exchange of fire the deceased died. He further stated that he cannot with certainty say that Iliyas, Harvir and Munawwar were not amongst them who fired at the deceased.

17. **PW-3** Rahmat Khan stated that he knows Harvir but does not know Iliyas and Munawwar. He stated that he and Shamshad had gone to purchase buffalo at village Sirsawar where they met Jalaluddin (PW-1) and Raees Khan (the deceased). He stated that in his presence Harvir and two of his associates had killed the deceased. He stated that except Harvir he was not able to identify the other two accused. He stated that he had not seen the present

appellant (Munawwar) at the spot. He also stated that he had not seen Munawwar firing at the deceased.

At this stage, the witness was declared hostile by the prosecution and was cross-examined. On being confronted with the statement recorded under Section 161 CrPC, he denied having given any such statement and he also denied the suggestion that he has resiled from his earlier statement because of fear.

18. **PW-4** proved the autopsy report, the contents of which have already been noticed above. He stated that there were three gunshot wounds of entry and the dimensions of injury no.7 indicated that it was from a different weapon though, in respect of other injuries, he could not tell whether they were from different firearms. He stated that death could have occurred on or about 3.30 p.m. on 03.01.2006 though, the estimated time of death could vary by six hours either side. He also stated that stomach of the deceased contained 75 gms of semi-digested food material suggesting that he may have eaten 2.30 hours to 5.00 hours before his death.

19. **PW-5** Hariram Nimla is the Investigating Officer who proved various stages of investigation already noticed above including preparation of site plan at the pointing out of the informant which tallied with what he saw at the spot. In cross-examination, he stated that he does not clearly remember whether he visited the spot with the informant though, as far as he remembers, he directly visited the spot. He stated that he did not record the statement of the Doctor at Sangrampur and he also did not record the statement of Bahoran. He also stated that from the body of the deceased he did not recover any medical parcha (prescription) or medicines and that from deceased's body except for the clothes that he had worn nothing else was recovered. He stated that in the site plan he had not shown the place where the accused were standing because the deceased was shot while he was running and the accused were chasing him. He also stated that at the time of the incident there was none present in the house of Sardar Mewa. He denied the suggestion that at the time when the investigation started the sun had set.

In respect of taking possession of the gun and handing it back to the informant, PW-5 stated that he is not sure whether the informant had come with the gun at the police station. Then he stated that the gun was produced before him at the time of inquest. He did not rule out the possibility that the gun might have been discovered lying at the spot after the informant had arrived at the police station to lodge the report. He reiterated that the informant had come to the police station to lodge the report but had not asked the informant with whom he left the body because it is natural to expect that family members of the deceased would have had arrived at the spot. PW-5 stated that he had inspected the gun, which had no empty cartridge, and that, at the spot, he did not discover empty cartridge.

In respect of collecting information about the motor cycle, PW-5 stated that he did not collect any information in respect thereof.

In respect of the case under section 25 Arms Act, he stated that he had got the first information report of that case registered but he did not investigate that case. He denied the suggestion that the

accused-appellant was arrested on same day. On recall, he produced clothes etc. which the deceased had worn at the time of the incident, which were marked material exhibits.

20. **PW-6** Rajesh Kumar proved registration of the first information report and denied the suggestion that the first information report was lodged after the post-mortem.

21. **PW-7** Sub-Inspector V.P. Singh proved the various stages of investigation of Case Crime No.94 of 2006 under Section 25 of the Arms Act and submission of the charge-sheet in that case. Note : *As the appellant has been acquitted of the said charge, we do not propose to notice his testimony.*

22. PW-8 Head Constable Jai Prakash sought to prove the recovery of the country made pistol from the appellant in connection with Case crime No.94 of 2006 under Section 25 of the Arms Act. **Note** : *As the appellant has been acquitted of the said charge, we do not propose to notice his testimony.*

Analysis

23. Having noticed the entire prosecution evidence and the submissions advanced by the learned counsel for the parties, we notice that the thrust of the submissions of learned counsel for the appellant is on following aspects : (a) that PW-1 was not present with the deceased at the time of occurrence; (b) that even if PW-1 was present with the deceased at the time of the incident, as soon as the deceased alighted from the motorcycle, PW-1 effected his escape and therefore, he cannot be considered an eye-witness of the incident; and (c) the incident did not occur in the manner alleged as from the statement of PW-2 it appears that there were some unknown assailants along with named accused Harvir and that the villagers had also fired at the assailants and in that exchange of fire, the deceased was killed.

24. Before we embark upon to analyse the submissions, it would be useful to notice the key features of the prosecution case on which there appears no serious challenge. These are: (i) the place of the incident i.e. the spot where the incident occurred as depicted in the site plan, which has been duly proved and exhibited and also finds support from oral testimony; (ii) the time of the incident; and (iii) that the deceased suffered a minimum of three gun shot wounds of entry and exit which communicate with each other. In fact, there is no challenge to the autopsy report which also notices that 17 metallic pellets were recovered from the body of the deceased.

25. We have carefully scrutinised the testimony of witnesses of fact. From the testimony of PW-1, we notice that he was with the deceased as a driver of the motorcycle on which the deceased was a pillion rider holding the licensed DBBL gun of the informant on his shoulder. When the accused party spotted them and launched an attack, the deceased jumped off from the motorcycle and ran towards the *Basti* (places where houses are located). The deceased was chased and fired at by the assailants and when he fell, after running few paces, near Sardar Mewa's *Chhhappar*, he was surrounded and killed. The site plan of the spot (Ex. Ka-9) prepared by the I. O. discloses spot 'B' on the *Khadanja* (a path laid by bricks) road where the motorcycle of the deceased, coming from east, stopped and the

deceased jumped off the motorcycle to run and escape the assailants, who were coming from the west. This spot B is at a junction where the village *Basti Gali* (narrow lane) coming from north meets the *Khadanja* road. As the accused were right in front of the victim party, the deceased ran in that *Gali* of the village, perhaps to have safety of people around him, but, he was chased by the assailants. The deceased ran towards north west in that Gali where he was cornered and killed at the *Chhappar* of Sardar Mewa.

26. From the testimony of PW-1, it appears, one shot was fired at the deceased while he was either running or about to run and the remaining two shots were fired when he had reached the Chhappar of the house of Sardar Mewa at the end of that Basti Gali. When we notice the autopsy report, we find that there is an entry wound on the right side of back chest. There is also an entry wound on front side of chest and there is an entry wound on the abdomen. The entry wound of the abdomen is of much larger dimension and appears to be a result of .12 bore weapon whereas the other entry wounds are of lesser dimensions. The Doctor also disclosed that the injuries could have been caused by different weapons. The ocular account narrated by PW-1 also discloses use of three weapons. Learned counsel for the appellant submits that the ocular account is specific in respect of causing two gunshot injuries with DBBL gun on the abdomen region whereas there is single gunshot injury on the abdomen and therefore it appears that the PW-1 had not witnessed the incident.

27. When an incident of the nature as is in the instant case occurs, graphic description of each and every detail with regard to each part of the incident is humanly not possible and therefore what is to be ascertained is whether the incident was actually witnessed or not by the person who seeks to prove its occurrence and whether the ocular account is corroborated with other evidences. In the instant case, we find that there is virtually no suggestion to PW-1 to challenge his presence with his brother at the time of the incident. Even the other two witnesses who were declared hostile have not denied the presence of PW-1 at the spot and have not disputed the spot. The argument that PW-1 made an incorrect statement that the deceased had not consumed any food since the morning therefore, he had not been with the deceased is also liable to be rejected. Because, according to PW-4's opinion, the deceased had consumed some food material 2.30 to 5.00 hours before his death. As the deceased left home with PW-1 at quarter to 3.00 p.m. and he died on or about 3.00 p.m., he may have consumed some thing at home of which PW-1 was not aware of. Thus, on this ground alone, the presence of PW-1 with the deceased at the time of incident cannot be doubted.

28. The defence has also not succeeded in proving that the first information report was ante-timed. Though, however, learned counsel for the appellant did argue that as the police had arrived at the spot even before lodging of the first information report therefore, no one had seen the incident and, later, the first information report was lodged on guess-work.

29. The above argument does not appeal to us because PW-1 in his statement had stated that he had offered his motorcycle to Gaus Mohammad to call the police and when the police had arrived within half an

hour thereafter, he had gone to lodge the report. This statement is acceptable and believable because it is quite natural that the police takes rounds in an area within its jurisdiction and whenever an incident occurs the police often arrives at the spot even before lodging of the first information report. Under the circumstances, since the report has been lodged within an hour and PW-1 had motorcycle with him, it cannot be said that the first information report was either too prompt to be called ante-timed or too delayed to generate a feeling that the prosecution story is based on guess work. Otherwise also, there is no doubt with regard to the place of the incident and the manner in which the incident occurred because, even according to PW-3 who could not recognise Munawwar, as he was not known to him, Harvir had two other associates who participated with him in the killing of the deceased. Importantly, no suggestion has been given to PW-3 to demonstrate that he knew Munawwar from before and therefore, if Munawwar had been present at the spot, he would have been recognised by him. Importantly, PW-3 deposed that Munawwar was not known to him. Under the circumstances, if PW-3 only knew Harvir (the other co-accused) and could not recognise Munawwar at the spot, particularly, when bullets were raining, his testimony, in our view, cannot be utilised to discredit the testimony of PW-1 with regard to appellant's participation in the crime. Similarly, PW-2's testimony, who was declared hostile, cannot be utilised to discredit PW-1 or to infer that the incident occurred in some other manner because at the very beginning of his deposition he stated that he had not witnessed the murder.

30. In so far as PW-1's testimony being in conflict with medical evidence is concerned, suffice it to say that the medical evidence does not at all discredit the ocular account as there appears an injury of DBBL gun shot on the abdomen of the deceased. Importantly, the dimension of entry wound on the abdomen is much larger and in addition thereto 17 metallic pellets were recovered from the body at the time of autopsy. Interestingly, there was a corresponding exit wound communicating with the entry wound on the abdomen. All of this not only proves that a 12 bore shot was made on the abdomen but also gives rise to a possibility that the 12 bore DBBL weapon may have had two cartridges of different nature, one with pellets and the other without. Thus, it could also be possible that both shots may have gained entry into the body from the same spot, particularly, when the two shots were fired from the same weapon in quick succession from a close distance. It is equally possible that the second shot may have missed the body but not noticed by the witness while he was in a state of panic. Under the circumstances, the discrepancy pointed out by the learned counsel for appellant in the ocular account with the medical evidence is not such that renders the ocular account improbable or contrived.

31. Another submission of the appellant's counsel was that DBBL gun was not forensically examined and that no empty cartridges were recovered from the spot. In this regard it be submitted that it is well settled that lapses in investigation by itself are not sufficient to defeat an otherwise credible and trustworthy ocular account. We find the ocular account rendered by PW-1 trustworthy, natural and acceptable more so because, it finds corroboration from the surrounding circumstances as well as medical evidence.

32. At this stage, we may notice to reject another submission of the learned

counsel for the appellant, which is, that, according to the statement of PW-1 (extracted in paragraph 15 above), during cross-examination, he escaped when he spotted the assailants and, therefore, he could not be a witness of the incident. In this regard, we may observe that the statement of a witness is to be appreciated after reading it in its entirety and not by reading a sentence in isolation. Notably, the question in reference to which the statement was made during cross-examination is not noted; and, otherwise also, that statement is immediately followed by PW-1's assertion that he witnessed all the shots fired at the deceased. In our view, therefore, keeping in mind that this is a broad day light murder of which a prompt named first information report was lodged, which is supported by an ocular account that finds corroboration from the medical evidence as well as other surrounding circumstances, the prosecution has succeeded in proving the guilt of the appellant beyond reasonable doubt and therefore, we do not find any merit in this appeal. The appeal is consequently **dismissed.** The accused-appellant, who is in jail, shall serve out the sentence awarded to him by the trial court.

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

(2022)03ILR A378
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.11.2021

BEFORE

THE HON'BLE ANIL KUMAR OJHA, J.

Criminal Appeal No. 5681 of 2016

Aftab ...Appellant (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Rajesh Dwivedi

Counsel for the Respondent:
A.G.A.

Criminal Law- Code of Criminal Procedure- Section 154- Delayed First Information Report- From the perusal of the aforesaid, it is clear that F.I.R. was lodged just within five hours of the alleged incident, this cannot be said to be delay in loding of the F.I.R. In the facts and circumstances, it is held that F.I.R. has been lodged with full promptitude. Therefore, it is held that under the circumstances of the present case five hours delay in lodgement of the F.I.R. would not create doubt in the prosecution case.

Mere delay of five hours in lodging the F.I.R shows that the same is prompt rather than delayed.

Evidence Law - Indian Evidence Act- 1872- Sections 3 & 134- Non examination of eye witnesses cannot be pressed into service for discarding the prosecution case with a stroke of pen.

Where the testimony of a witness is credible and reliable, then there is no requirement in law to examine further witnesses to prove the same fact.

Contradictions, Embellishments and Improvements- The testimony of the victim must be appreciated in the background of the entire case and the Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the victim, which are not of a fatal nature, to throw out an otherwise reliable prosecution case -There is no contradiction or inconsistency between medical and oral evidence rather medical

evidence corroborates the oral evidence - PW4 Dr. Naresh Kumar, Surgeon, District Hospital, Hamirpur, has tendered evidence that at the time of alleged incident victim was 14 to 16 years of age, thus at the time of alleged incident, victim was minor.

Settled law that the case of the prosecution is discredited only where the contradictions are major and go to the root of the matter but where such contradictions are minor or trivial in nature, the testimony of the witness is corroborated by the medical and other evidence and is credible and trustworthy, then such minor contradictions are irrelevant. (Para 13, 14, 15, 16)

Criminal Appeal rejected. (E-3)

Case law/ Judgements relied upon:-

1. Mukesh & anr. Vs St. of NCT of Del. & ors. AIR 2017 SC 2161

2. Hukum Singh Vs St. of Raj., 2000 (41) ACC 662 (SC)

3. St. of H.P. Vs Gian Chand, 2001(2) JIC 305 (SC)

4. Komal Vs St. of U.P., (2002) 7 SCC 82

5. Babu Ram Vs St. of U.P. 2002(2) JIC 649 (SC)

6. Ram Narain Singh Vs St. of U.P., 2003(46) ACC 953(All-D.B.).

7. The St. of Punj. Vs Gurmit Singh & Ors, 1996 JIC 611 (SC)

8. St. of H.P Vs Gian Chand (2001) 2 JIC 305 (SC)

9. Raja & ors Vs St. of Kar. (2016) 10 SCC 506

10. Shivasharanappa Vs St. of Kar., (2013) 5 SCC 705

(Delivered by Hon'ble Anil Kumar Ojha, J.)

Heard learned counsel for the appellant, learned A.G.A. for the State and perused the records.

2. Feeling aggrieved and dissatisfied with the judgment and order dated 06.10.2016 passed by Additional Sessions Judge/Court No. 1, Hamirpur in Special Sessions Trial No. 98 of 2013 (State v. Aftab), arising out of Case Crime No. 819 of 2013, under Section 376(2)(I)(J) I.P.C. and Section 6 of P.O.C.S.O. Act, P.S. Kotwali Hamirpur, District Harmirpur whereby the learned Additional Sessions Judge/Court No. 1, Hamirpur has convicted and sentenced the appellant under Section 376(2)(I)(J) I.P.C. to undergo rigorous imprisonment for a period of 14 years with fine of Rs. 20,000/-, in default of payment of fine, one year additional rigorous imprisonment, under Section 6 of P.O.C.S.O. Act, rigorous imprisonment for a period of 12 years with fine of Rs. 10,000/-, in default of payment of fine, six months rigorous imprisonment.

All the sentences have been ordered to run concurrently.

3. Tersely put, the case of the prosecution is that the complainant Ahmad Khan lodged an F.I.R. at P.S. Kotwali Hamirpur, District Hamirpur on 08.04.2013 at 22:15 hours, stating therein that on 08.04.2013 at about 05:30PM, complainant's daughter victim aged about 9 years was playing in the locality. At the same time, the appellant who is resident of the same locality took the victim to his house and committed rape upon her. Owing to rape, blood was continuouly oozing out from the private part of the victim.

4. On the written report submited by complainant, a case was registered against the appellant at P.S. Kotwali Hamirpur, District Hamirpur in Case Crime No. 819 of 2013, under Section 376(2)(I)(J) I.P.C.

and Section 6 of P.O.C.S.O. Act, P.S. Kotwali Hamirpur, District Harmirpur.

5. Investigation was entrusted to R. K. Mishra, S.H.O. of Kotwali Hamirpur who recorded statement of victim through lady constable Radha, got done the medical examination of the victim, visited the place of occurrence and prepared the site plan, got recorded the statement of victim under Section 164 Cr.P.C., took the blood stained nekar of the victim and prepared Ex. ka-8, took possession of underwear of the vcitim and prepared fard Ex. ka-2 and after completion of investigation, submitted charge sheet against the appellant under Section 376(2)(I)(J) I.P.C. and Section 6 of P.O.C.S.O. Act.

6. The then Additional Sessions Judge, Court No. 1, Hamirpur on 24.08.2013, framed the charges against the appellant under Section 376(2)(I)(J) of I.P.C. and Section 6 of P.O.C.S.O. Act. Appellant denied the charges and claimed trial.

7. To prove the charges against the appellant, prosecution produced PW1 Ahmad Khan, who lodged the F.I.R., has supported the prosecution case and proved the chick FIR Ex. Ka-1. PW2 is the victim, she has supported the prosecution version. PW3 Dr. Asha Sachan, Medical Officer has proved Ex. Ka-2 & Medical report Ex. Ka-3. PW4 Dr. Naresh Kumar, Radiologist has proved the Ex. Ka-4 and has opined that age of victim at the time of alleged incident was about 14 to 16 years. PW5 CP Anurag Tripathi has proved the chick F.I.R. Ex. Ka-5 and carbon copy of the GD Ex. Ka-6. PW6 R. K. Mishra, is the I.O. of the case and he has proved the site plan Ex. Ka-7, blood stained nekar Ex. Ka-8, arrest memo Ex. Ka-9, recovery memo Ex. Ka-10 and supplementary charge sheet Ex. Ka-11.

8. After completion of evidence, statement of appellant under Section 313 Cr.P.C. was recorded. Appellant denied the evidence and stated that the police in collusion with the complainant has lodged false case on account of enmity. Further stated that complainant Ahmad Khan used to take money from his sister-in-law Reshma (Bhabi) to deposit in Sahara Bank and when the money was not returned, complainant threatened to lodge F.I.R.

9. After hearing the learned counsel for the prosecution and defence, learned Additional Sessions Judge, Court No. 1, Hamirpur convicted and sentenced the appellant as aforesaid.

10. Aggrieved by the aforesaid judgment and order appellant has preferred this appeal before this Court.

11. Submission of the learned counsel for the appellant is that there is unexplained delay of five hours in lodgement of the F.I.R. Star witnesses Ameen and Raj Kumar have not been produced for evidence. Appellant has been falsely implicated. Appellant is entitled to benefit of doubt and deserves acquittal. Appeal should be allowed and appellant should be acquitted.

12. Per contra, learned A.G.A. for the State vehemently opposed the above submission and contended that the victim has supported the prosecution story. The evidence of victim is supported by medical evidence. On the basis of five hours delay in lodging the F.I.R., prosecution case cannot be thrown out. Proseuction has established its case beyond reasonable doubt against the appellant. Appeal has no legs to stand and deserves dismissal.

13. First submission of learned counsel for the appellant is that there is unexplained delay in lodgment of the F.I.R. Perusal of the Ex. Ka-5 Chick F.I.R. reveals that alleged incident took place on 08.04.2013 at about 05:30PM in the evening. F.I.R. was lodged on the same day at about 22:15 hours nearly four hours forty five minutes after the occurrence. Place of occurrence is five hundred meters south from the Police Station Kotwali Hamirpur where the F.I.R. was lodged. From the perusal of the aforesaid, it is clear that F.I.R. was lodged just within five hours of the alleged incident, this cannot be said to be delay in loding of the F.I.R. In the facts and circumstances, it is held that F.I.R. has been lodged with full promptitude. Therefore, it is held that under the circumstances of the present case five hours delay in lodgement of the F.I.R. would not create doubt in the prosecution case. Thus, the submission of the learned counsel for the appellant that lodgement of F.I.R. is delayed, is rejected.

14. Second submission of learned counsel for the appellant is that star witnesses Ameen and Raj Kumar have not been produced, hence, prosecution case becomes doubtful. I do not agree with the above submission of learned counsel for the appellant.

In ***Mukesh and another v. State of NCT of Delhi and others AIR 2017 SC 2161,*** Hon'ble Apex Court has held that the if a witness examined in the court is otherwise found reliable and trustworthy, the fact sought to be proved by the witness need not be further proved through other witnesses though there may be other witnesses available who could have been examined but were not examined. Non-examination of material witnesses is not a mathematical formula for discarding the weight of the testimony available on record however natural, trustworthy and convincing it may be. It is settled law that non-examination of eye-witness cannot be pressed into service like a ritualistic formula for discarding the prosecution case with a stroke of pen. Court can convict an accused on statement of sole witness even if he is relative of the deceased and non examination of independent witness would not be fatal to the case of prosecution.

Thus, law on the point is that non examination of eye witnesses cannot be pressed into service for discarding the prosecution case with a stroke of pen. Following other authorities may also be cited on the above point.

Hukum Singh v. State of Rajasthan, 2000 (41) ACC 662 (SC); State of H.P. v. Gian Chand, 2001(2) JIC 305 (SC); Komal v. State of U.P., (2002) 7 SCC 82: Babu Ram v. State of U.P. 2002(2) JIC 649 (SC) and Ram Narain Singh v. State of U.P., 2003(46) ACC 953(All-D.B.).

In view of the above settled legal position, the contention of the learned counsel for the appellant with regard to non production of eye witnesses Ameen and Raj Kumar, is rejected.

15. Next submission of the learned counsel for the appellant is that the appellant has been falsely implicated in the present case.

In ***The State of Punjab v. Gurmit Singh & Others, 1996 JIC 611 (SC),*** the Hon'ble Apex Court has held as follows:

"OF late, crime against women in general and rape in particular is on the

increase. It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations."

In ***State of Himachal Pradesh v. Gian Chand (2001) 2 JIC 305 (SC),*** the Hon'ble Apex Court has held as follows:

"In State of Punjab Vs. Gurmit Singh & Ors., (1996) 2 SCC 384, one of us, Dr. A.S. Anand, J. (as His Lordship then was) has thus spoken for the court __ A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. The approach adopted by the High Court runs into the teeth of law so stated and hence stands vitiated."

In ***Raja and others v. State of Karnataka (2016) 10 SCC 506***, Hon'ble Apex Court has held as follows:

".....It was exposited that insofar as the allegation of rape is concerned, the evidence of the prosecutrix must be examined as that of a injured witness whose presence at the spot is probable but it can never be presumed that her statement should always without exception, be taken as gospel truth.

The essence of this verdict which has stood the test of time proclaims that though generally the testimony of a victim of rape or non- consensual physical assault ought to be accepted as true and unblemished, it would still be subject to judicial scrutiny lest a casual, routine and automatic acceptance thereof results in unwarranted conviction of the person charged."

In ***Shivasharanappa v. State of Karnataka, (2013) 5 SCC 705,*** Hon'ble Apex Court has held that the corroboration of testimony of child witness is not required if credible. Relevant portion of the of the aforesaid judgment is quoted hereinbelow:

"15. In Dattu Ramrao Sakhare and others v. State of Maharashtra, while dealing with the reliability of witness who was ten years old, this Court opined that a child witness, if found competent to depose to the facts and reliable, such evidence could form the basis of conviction. The evidence of a child witness and the credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored. Thereafter, the Court proceeded to lay down that there is no rule or practice that in every case the evidence of such a witness should be corroborated before a conviction can be allowed to stand but, as a rule of prudence, the court always finds it desirable to seek the corroboration to such evidence from other dependable evidence on record.

16. In Panchhi and others v. State of U.P., it has been held thus: -

oration before it is relied on. It is more a rule of practical wisdom than of law (vide Prakash v. State of M.P. Baby Kandayanathil v. State of Kerala, Raja Ram Yadav v. State of Bihar and Dattu Ramrao Sakhare v. State of Maharashtra (supra)."

A similar view has been expressed in State of U.P. v. Ashok Dixit and another.

17. Thus, it is well settled in law that the court can rely upon the testimony of a child witness and it can form the basis of conviction if the same is credible, truthful and is corroborated by other evidence brought on record. Needless to say, the corroboration is not a must to record a conviction, but as a rule of prudence, the court thinks it desirable to see the corroboration from other reliable evidence placed on record. The principles that apply for placing reliance on the solitary statement of witness, namely, that the statement is true and correct and is of quality and cannot be discarded solely on the ground of lack of corroboration, applies to a child witness who is competent and whose version is reliable."

Settled law on the point is that the testimony of the victim must be appreciated in the background of the entire case and the Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the victim, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. In view of above settled legal position, the evidence of PW2 victim is being evaluated.

PW2 victim has supported the prosecution version in her examination-in-chief. Relevant portion of her examination is quoted hereinbelow:

"मैं आइसक्रीम लेने जा रही थी तो रास्ते में आफताब मिला था। उसने कहा था कि आइसक्रीम वाला मेरे घर के पास है। तब मैं आइसक्रीम लेने उसके घर के पास गई थी। जब

मैं उसके घर के पास पहुंची तो वह मेरा मुहं दबा कर मुझे जानवरों वाले कमरे में, जो उसके घर के पास ही है, ले गया था. वहां उसने मेरे सारे कपड़े उतार दिये थे और मेरे साथ गन्दा काम किया था।"

Learned counsel for defence, extensively cross-examined this witness but could not shake the credibility of this witness. Relevant portion of her cross-examination is quoted hereinbelow:

"मेरे गुप्तांग में चोट आफताब के गंदा काम करने के कारण आई थी। गंदा काम करने से मेरा मतलब है कि आफताब ने अपनी पेशाब की नली मेरी पेशाब की जगह डाली थी।"

From the careful scrutiny of the victim PW2 who is a minor girl, it is held that her statement is probable and credible.

In view of the above, contention of false implication by learned counsel for the applicant is rejected.

16. PW3 Dr. Asha Sachan, Medical Officer, Sadar, Mahila Hospital, Hamirpur, conducted the medical examination of the victim and has stated that there was no mark of injury on the outer side of the private part of the victim. Hymen was fresh torn at several places and blood was oozing out from the private part of the victim. Relevant portion of her cross-examination is quoted hereinbelow:

"प्रश्न- क्या दिनांक 08.04.2013 को समय करीब 5:30 P.M. पर किसी वयस्क पुरुष द्वारा अवयस्क लड़की के गुप्तांग में जबरदस्ती सम्भोग करने पर उक्त चोट आना सम्भव है?

उत्तर- जी हां।"

Thus, there is no contradiction or inconsistency between medical and oral evidence rather medical evidence corroborates the oral evidence of PW-2 Victim.

Thus, from the evidence of victim PW2 Victim and PW3 Dr. Asha Sachan, it is manifest that appellant committed rape upon the victim and blood was oozing out after rape. Dr. Asha Sachan has further stated in her evidence before the court that hymen was fresh torn at several places and blood was oozing out. Thus, oral evidence of PW2 victim is corroborated by medical evidence of PW3 Dr. Asha Sachan.

17. PW4 Dr. Naresh Kumar, Surgeon, District Hospital, Hamirpur, has tendered evidence that at the time of alleged incident victim was 14 to 16 years of age, thus at the time of alleged incident, victim was minor.

18. The upshot of the above discussion is that the prosecution has established its case beyond reasonable doubt against the appellant Aftab.

19. From the perusal of the impugned judgment passed by the court below, it is evident that that appellant has been convicted under Section 376(2)(I)(J) I.P.C. to undergo rigorous imprisonment for a period of 14 years with fine of Rs. 20,000/-, in default of payment of fine, one year additional rigorous imprisonment, under Section 6 of P.O.C.S.O. Act, rigorous imprisonment for a period of 12 years with fine of Rs. 10,000/-, in default of payment of fine, six months rigorous imprisonment.

20. The impugned judgment and order passed by lower court is within four corners of law. There is no illegality in the judgment and order dated 06.10.2016 passed by Additional Sessions Judge/Court No. 1, Hamirpur in Special Sessions Trial No. 98 of 2013 (State v. Aftab), arising out of Case Crime No. 819 of 2013, under Section 376(2)(I)(J) I.P.C. and Section 6 of P.O.C.S.O. Act, P.S. Kotwali Hamirpur, District Harmirpur and the same is hereby confirmed. Appeal lacks merit and is liable to be dismissed.

21. Accordingly, this appeal is **dismissed.**

22. Copy of this judgment be certified to the court below for compliance. Lower court record be transmitted to the District Court, concerned forthwith.

(2022)03ILR A385
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.03.2022

BEFORE

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

Criminal Appeal No. 5769 of 2013

Banwari Lal & Anr. ...Appellants (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri Krishna Gopal

Counsel for the Respondent:
A.G.A.

Evidence Law- Indian Evidence Act, 1872- Section 102- Burden of Proof- Section 3- Chance Witness- The prosecution set out twin motive for the crime but failed to proved either of them. Two eye-witnesses were set up. Both were chance witnesses, one, out of the two, did not support the prosecution case during cross-examination and denied the presence of the other at the spot and claimed it to be elsewhere. The other eyewitness, apart from being chance witness, discloses that he witnessed the incident in the light of a torch from a distance of about 45-50 paces.

Settled law that the evidence of a chance witness does not only require a close and cautious scrutiny by the court, but also the Chance witness has to adequately explain his presence at the spot in absence of which his evidence may not be relied upon by the court.

Evidence Law - Indian Evidence Act, 1872- Section 3- Section 45- Contradiction between ocular and medical evidence- The ocular account rendered by PW-2, if accepted, would indicate that the deceased was being assaulted when PW-2 arrived at the spot to give a challenge to the accused from a distance of about 50 paces, where after, the accused dragged the deceased and dumped him in a pit, which had water. But no water was found in the lungs of the deceased which is indicative of a dead person having been dumped there. This suggests that the deceased was either killed at the spot where he was noticed being assaulted or elsewhere. Presence of pasty food in the stomach, as per the autopsy report, in absence of any evidence as to when the deceased was served food, by rural standards and habits, consumption of food might have been early, say by 8:00 PM, the possibility of death taking place on or about midnight, much earlier to the specified time, also cannot be ruled out.

Where the prosecution witnesses are chance witnesses and their evidence is contradicted by the medical evidence and other materials then the said evidence cannot be held to be trustworthy or reliable. (Para 20, 21, 22, 23)

Criminal Appeal allowed. (E-3)

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

1. We have heard Sri Krishna Gopal, learned counsel for the appellants and Sri J.K.Upadhyay, learned AGA for the State and have perused the record.

2. This appeal has been filed against the judgment and order of conviction and punishment, dated 18.11.2013 and 19.11.2013, respectively, passed by Additional District and Sessions Judge (Court No.6), Bareilly, in Sessions Trial No. 885 of 2011, convicting the appellants under Section 302 read with Section 34 IPC and sentencing them to imprisonment for life with fine of Rs.10,000/- each and a default sentence of two months.

INTRODUCTORY FACTS

3. The prosecution case is based on a written report (Ext.Ka-1) submitted by PW-1 at Police Station Kyolaria, District Bareilly on 5.5.2011, at about 10.30 AM, of which, Chik Report (Ext.Ka-2) and G.D.Entry No.14 (Ext.Ka-3) was prepared by PW-4. The allegation in the report is that the deceased Ram Swaroop had no issues; his wife had also died and after the death of his wife, the deceased was staying with the informant. The deceased had 18 Bighas of land. 15 days before the incident, the nephews of the deceased had dismantled the "Med" (field demarcation boundary) of the field of the deceased, which resulted in an altercation of the deceased with his nephews. On that ground, the deceased took a decision to transfer his land in favour of sons of the informant and, to arrange for the funds, to effect a transfer, had applied to the Bank. In the night of 4/5.5.2011 while the deceased Ram Swaroop to protect his watermelon crop (watermelon), was sleeping in his field, at about 4.00 AM in the morning of 5.5.2011, the deceased's nephews, namely, Banwari Lal (the appellant no.1) and Ram Naresh (appellant no.2), were noticed assaulting the deceased by PW-2 and PW-3 and when they were challenged, they threw the body of the deceased in a pit and ran away. It is alleged that body of the deceased was taken out from the pit, which had water, and injuries on neck, left ear and left knee of the deceased were noticed. By alleging that the appellants (i.e.,nephews of the deceased) have killed the deceased, the first information report was lodged.

4. The inquest was completed at the spot by 12.30 hours on 5.5.2011, of which, inquest report (Ext.Ka-4) was prepared by Ashutosh Kumar (PW-5). Autopsy was conducted on 5.5.2011 by PW-6 at about 4.45 PM. The autopsy report (Ext.Ka-12) notices:- A thin built body smeared over by mud with rigor mortis fully developed all over body; eyes half open; fist clenched, nails blue, face deeply congested; beard and moustaches smeared with blood that had trickled from nose to left ear back; and blood in nose and ear present. **The external ante mortem injuries noticed were as follows:**

(i) Multiple (3) abrasion with contusion on right side front of neck in an area 6 cm x 4cm with subcutaneous ecchymosis extreme over larynx in an area, 1.5 cm x 0.8cm; individual size of wound vary from 0.8 cm x0.2 cm.

(ii)Multiple (2)abrasion with contusion on left side front and side of neck in an area of 8 cm x 6 cm with subcutaneous ecchymosis over larynx plus

trachea individual size of wound varying from 0.8 cm x 0.2 cm to 1.8cm x 1cm subject over wind pipe and voice box.

(iii) Multiple (3) abrasion back of left elbow joint 4.5cm x.02cm.

(iv)Multiple abrasion on left knee back of joint 0.5 cmx 1.5 cmx1.2cm.

(v)Abraded contusion on left knee joint 5cmx3cm.

(vi)Abraded contusion left leg, 4cm below knee of size 6cmx4cm.

The internal examination revealed larynx fractured; Hyoid bone fractured; extensive ecchymosis and bleeding in different layer of neck muscles; both lungs congested. The stomach contained 100gm of pasty food. Small intestine had semi digested food with gases; and large intestine had faecal matter and gases.

Cause of death, as per the report, was on account of asphyxia as a result of ante mortem throat strangulation.

Note:Autopsy report has not disclosed the estimated time of death.

5. After investigation PW-5 submitted charge sheet (Ext.Ka-11) on which, after taking cognizance, the case was committed to the court of session where, on 29.11.2011, both the appellants were charged with offence punishable under Section 302 IPC read with Section 34 IPC. The appellants pleaded not guilty and claimed for trial.

PROSECUTION EVIDENCE

6. During the course of trial, the prosecution examined as many as six witnesses. Their testimony is as follows:

7. **PW-1-Indrapal-informant.** He stated that the deceased were three brothers. The elder brother of the deceased, namely, Khushali Ram had three sons-Banwari (the appellant no.1), Ram Naresh (the appellant no.2) and Ram Das whereas the other brother Puran Lal had died leaving no issue. The property was thus partitioned between the deceased and his other brother Khushali Ram. The relationship between the deceased, his brother and his nephews was not cordial. After the death of his wife, the deceased, who had no issues, used to stay and eat with PW-1 for the last 25-30 years. The elder brother of the deceased, namely, Khushali Ram had died several years ago and the deceased's agricultural field was on "Batayee",i.e., sharing basis with his nephews Banwari (the appellant no.1), Ram Naresh (the appellant no.2) and Ram Das. The profits arising from the land used to to be shared by the deceased with the sons of the informant. About 15 days prior to the incident, the accused-appellants had dismantled the "Med" of deceased's field, as a consequence whereof, the deceased took a decision to transfer his land (field) in favour of the informant's sons. This decision of the deceased came to the knowledge of the accused. But as there no money to effect the transfer of the land, the deceased applied to the bank for loan. In the night of the incident, like usual, the deceased was sleeping in his hut located in his field, which also helped him to keep a night vigil to protect his watermelon crop, at about 4.00 AM, on 05.05.2011, when PW-1's son Godhan Lal (PW-2) and PW's brother Nathoo Lal (PW-3) were out to pluck watermelons, they saw the deceased

being assaulted by the accused-appellants. When PW-2 and PW-3 challenged the accused-appellants, they threw the deceased in a pit and escaped. PW-1 stated that PW-2 and PW-3 witnessed the incident in the light of their torches. He added that a large number of persons arrived at the spot and they saw the accused running away and that he (PW-1) also arrived there on alarm in the village. PW-1 also stated that they all took out the body of the deceased from the pit and noticed that the deceased had injuries on the neck and ear region as well as on knee. PW-1 stated that thereafter he went to the Police Station where, at Kyolaria Bazar, he got the report written by Rakesh Kumar and, after affixing his thumb impression, lodged the same. He proved the written report, which was exhibited as Ext Ka-1. He also stated that the site plan was prepared at his instance.

In his cross-examination, PW-1 admitted that he has his own 30 Bighas of land whereas the land of the deceased was on 'Batai ' (sharing basis) with the accused-appellants. The deceased and the accused had a common field which was shared half-half. Profits out of 'Batai' used to be collected by the deceased. The deceased used to stay with PW-1 and use to keep the profit with PW-1. In the night of the incident PW-1 was sleeping in his house whereas the deceased was sleeping in his field. That night the deceased was served dinner by PW-1 by getting it to the field; that the spot is about 1 KM away from PW-1's house; that before PW-2 and PW-3 had gone to the field that night, they had woken up PW-1 and had informed PW-1 that they were going to the field. PW-1 stated that he went to the spot when he got information of the incident. PW-1 could not disclose as to who gave him the information. He clarified by stating that when there was information about the incident in the village, then he came to know about the incident and when he arrived at the spot already several persons were there. He stated that when he arrived at the spot the body was lying at the spot where the incident had occurred.

In his cross-examination on 27.3.2012 he stated that when he arrived at the spot, the body of the deceased was found just 2 to 4 paces away from his usual spot of sleeping. PW-1 stated that the police arrived at the spot only after PW-1 had gone to the Police Station. PW-1 stated that they had left for the Police Station between 7-8 AM. PW-1 stated that his son Godhan Lal (PW-2); and PW-1's wife Chameli Devi (not examined) had accompanied him to the Police Station. They reached there, on a motorcycle by 10.00 AM. PW-1 stated that they all were on a single motor cycle. He denied the suggestion that the report was lodged at the suggestion of the Investigating Officer. PW-1 stated that while getting the FIR written, he had informed its writer that his sons had seen the accused in the light of torches but if that was not written in the FIR, he cannot tell the reason. PW-1 stated that he was interrogated after the autopsy was over. PW-1 stated that the place of occurrence was shown by him to the Investigating Officer; the body was found south of the place where the deceased had slept; that if the Investigating Officer in the site plan had shown that the body was found 32 paces away from the place where the deceased had slept, then it is incorrect. He denied the suggestion that PW-1's son Babu Ram is an accused in a case relating to attempt on the life of a villager's (Om Karan's) son. PW-1 also denied the suggestion that the deceased Ram Swaroop had illicit relations with his wife and, therefore, when PW-1's sons came to know

about it, they killed the deceased. PW-1 also denied the suggestion that to save his sons, he lodged first information report against the accused-appellants. PW-1 admitted the suggestion that except him and his sons there is no other witness of the incident available in the village.

8. **PW-2-Godhan Lal-son of the informant**. PW-2 stated that the deceased used to stay with PW-1 for the last 30 years; and that they all used to look after the deceased and serve him food, etc. The accused-appellants are nephews of the deceased. In respect of motive for the crime, PW-2 narrated the same story as narrated by PW-1. In respect of the incident, PW-2 stated that in the intervening night of 4/5.5.2011 the deceased as usual was sleeping in his field to protect his (watermelon) crop whereas, PW-2, his brothers and mother/father were at home. At about 4.00 AM, in the morning of 5.5.2011, when PW-2 and his uncle Nathoo Lal (PW-3) went to the field to collect watermelon, they saw the accused-appellants assaulting the deceased after pinning him down. They saw all of that in the light of their torches and when they challenged the accused, the accused threw the deceased in an adjoining pit, which had water, and ran away. PW-2 stated that he and his uncle (PW-3) witnessed the entire incident in the light of torches and on their alarm number of villagers including his father arrived at the spot. He stated that his father (PW-1), his mother, his uncle (PW-3) and others accompanied the informant to Kyolaria where a written report was scribed by Rakesh Kumar and was lodged by PW-1. He stated that on the date of lodging the first information report, the Investigating Officer had not asked him any question and his statement was recorded in the village after 15-16 days.

In his cross-examination PW-2 admitted that the deceased used to stay with his father and mother since before his birth and that deceased's agricultural operations were looked after by the accused. He stated that in the night of the incident he and his brothers Munna Lal and Babu Ram including his father and mother were in their house whereas the deceased was sleeping in his field which had watermelon crop. He stated that in that field there is a hut; that field was not on "Batayee" (sharing basis) and that crop was looked after by the deceased himself. PW-2 stated that, that field was about half a Kilometre from his house; that, as usual, in the evening of the night of the incident, PW-2's, father (PW-1) had gone to serve dinner to the deceased though, he could not tell the time when he went to serve the dinner and returned. He stated that in the night of the incident, the deceased was sleeping alone in the field; that there were other watermelon fields including that of the accused adjoining the field of the deceased though, some of the fields were vacant. With reference to the incident, PW-2 stated that in the night of the incident, he woke up at 3.30 AM; thereafter, he woke up his father (PW-1), his uncle Nathoo Lal (PW-3) and went to the field with PW-3. They had their torches but had no "Lathi/danda". They arrived there, on foot, at 4.00 AM, where, from a distance of 50-60 paces, they spotted the accused in the light of torches and when they raised an alarm the accused dragged the deceased and threw him in a pit, which was about 10-15 paces away south of the spot where the deceased had slept and was about 45 paces away from the wooden bridge of 'Doha River' from where the incident was witnessed. PW-2 stated that the accused were assaulting the deceased with kicks and fists and one was pressing the neck of the deceased. PW-2,

however, could not tell as to how many fists/kicks were inflicted upon the deceased and by whom. PW-2 stated that though he shouted but he did not make any attempt to save the deceased. PW-2 stated that in the pit there was two feet deep water. PW-2 stated that he did not go to inform his family but they arrived there, within 10-15 minutes, and when PW-1 arrived at the spot, the body of the deceased was lying in that pit. Nobody came to the spot from the family of the deceased though a cousin of the deceased had arrived. PW-2 stated that the accused were in their house but then, immediately, clarified that they had escaped. PW-2 stated that the body of the deceased was taken out from the pit by about 7.00 AM and, thereafter, they left for the Police Station by about 8.00 AM. PW-2 added that after the body was taken out from the pit, it was kept towards the north of the pit. PW-2 stated that when the body was scanned, blood was oozing out from the nose and ear and there were nail marks on the neck apart from an injury on the leg. He denied the suggestion that the report was lodged after deliberation. PW-2 stated that he had informed his father about the presence of torches, but if that was not written he cannot tell the reason. PW-2 stated that the first information report was lodged by about 10.30 hours whereas the police arrived at the spot between 11-11.30 hours. PW-2 stated that he had not shown the torches to the Investigating Officer; and that the site plan was not prepared at his instance but at the instance of his father PW-1. PW-2 stated that the Investigating Officer had interrogated him after 15-16 days; at that time, the Investigating Officer was informed about the torches but the torches were not handed over to the Investigating Officer as it was not demanded by him. PW-2 admitted that a case of murder was instituted against his brother Babu Ram but claimed that it has come to an end. In respect of the application for loan by the deceased to effect transfer of the land, PW-2 stated that he had not shown the papers of that loan application to the Investigating Officer because there was no such loan file. He also stated that he is not aware when the accused came to know about the application for loan. He also could not tell as to when the deceased developed a desire to transfer the land. He also could not tell as to how many days before, the 'Med' of the field of the deceased was dismantled. He stated that he had not visited the spot to see whether the 'Med' was broken. PW-2 denied the suggestion that the deceased had developed illicit relations with his mother, while staying at his house. PW-2 also denied the suggestion that because of illicit relations of the deceased with his mother, the deceased used to stay in the house of PW-2. He denied the suggestion that because of discovery of illicit relation of the deceased with PW-2's mother, PW-2 and his brother got infuriated and killed the deceased. He denied the suggestion that there was no dispute between the deceased and the accused in respect of the 'Med' of deceased's field. He denied the suggestions that the incident did not occur in the manner alleged; that he was not present at the spot; and that he had made false allegations, therefore, no independent witness of the village has come to support the prosecution case.

9. **PW-3-Nathoo Lal**. PW-3 supported the prosecution case in the manner narrated by PW-2 in his statement-in chief but in his cross-examination he stated that in the night of the incident, PW-3 and Godhan Lal (PW-2) were both sleeping in their own fields; that on that day he had visited his own field and not the

field of the deceased and that he did not witness any incident. PW-3 also stated that his nephew Madan Lal (should be read as Godhan Lal) also did not witness any incident. He added that earlier, he made his statement on the suggestion of his brother Indra Pal (PW-1). PW-3 stated that when the sun had come out, following the night of the incident, when news about the incident had spread in the village, then he had visited the spot. PW-3 stated that the Investigating Officer had not interrogated him. When PW-3 was confronted with his statement under Section 161 Cr.P.C., he stated that he does not know as to how the statement was recorded because such statement was never given by him. He denied the suggestion that he was not disclosing the truth under pressure from the accused.

10. **PW-4-Head Constable Pradeep Kumar.** He proved the GD entry of the written report and the preparation of chik FIR. GD entry was exhibited as Ext.Ka-3 and the chik FIR was exhibited as Ext.Ka-2.

In his cross-examination, he stated that the scribe of FIR was not there at the time of lodging of the report; that the chik FIR was prepared at about 10.30 AM and it must have taken 10-15 minutes to prepare it but the time of the GD entry is the same as in the chik FIR. He stated that the IO had recorded his statement that very day but he does not remember the time of its recording. He stated that the IO had recorded his statement after the IO had returned from the spot. He also stated that he had given information to the higher officers on his wireless set, though, he does not remember its number. On being confronted with the error in his statement recorded by the IO with respect to report number 16 in place of 14, PW-4 stated that he had disclosed No.14 to the IO but if that was entered as 16 then he cannot tell the reason.

11. **PW-5-Station House Officer-Ashutosh Kumar-Investigating Officer.** He stated that he took over the investigation of the case on 5.5.2021 and after taking the copy of the chik, copy of the report, he recorded the statement of the persons, who made the GD entry of the FIR and thereafter he visited the spot and under his direction and supervision the inquest report was prepared, which was exhibited as Ext.Ka-4. He stated that he sealed the body and sent the same for post mortem. He proved the papers in connection therewith. He stated that he prepared the site plan on the instructions of the informant, which was exhibited as Ext.Ka-10. He arrested the accused-appellants on 10.05.2011; and that on 21.5.2011 he recorded the statement of the eye witnesses, PW-2 and PW-3 and, after completing the investigation, submitted the charge sheet (Ext.Ka-11).

In the cross-examination he stated that at the time when the first information report was registered, he was at the Police Station and after taking over the investigation, first, he recorded the statement of the informant and the person, who prepared the chik FIR. PW-5 stated that in that process it took him 40-45 minutes and he left the Police Station to visit the spot by about 11.00 AM. He stated that he reached the spot at quarter to twelve. He stated that when he reached the spot, several persons of the village had gathered. When he arrived there, the body of the deceased was lying in the pit and that he himself got the body out of the pit. PW-5 stated that at that time there

was no water in the pit. PW-5 stated that the body was found about 32 paces away from the spot where the deceased was stated to have slept. He stated that at the spot he could not notice any blood even though he inspected the spot at the instance of the informant. PW-5 denied the suggestion that the inquest report was not prepared at the spot; that the informant had not informed him the place as to where the deceased had slept; and that he recorded the statement of the informant at his house after the autopsy of the body was done. PW-5 also denied the suggestion that the site plan was not prepared by him on the instructions of the informant. PW-5 stated that the delay in recording the statement of PW-2 was due to PW-5's busy schedule. He stated that the torch with which the witnesses saw the incident was not taken into custody. He stated that the informant party did not provide any document in respect of an application for loan. PW-5 admitted that the informant had not stated in the first information report with regard to witnessing the incident in the light of torches but that had come in the statement recorded on 21.5.2011. PW-5 stated that he could not get information of registration of any case between the accused and the deceased but on his visit to the village he did come to know that there was some dispute between the accused and the deceased in respect of *'Med'* of the field. PW-5 also stated that, according to his information, the deceased had given his land to the accused on '*Batayee*'. He admitted that in the site plan prepared by him he had not shown the distance between Point-A and the wooden bridge and between Points-A and C. He denied the suggestion that he did not properly investigate the matter and submitted the charge sheet by completing paper work at his table. He also denied the suggestion that the incident occurred in the darkness of night, committed by unknown persons and that the accused did not commit the offence.

12. **PW-6-Dr. Sudhakar Kumar Yadav**. He proved the autopsy and stated that the body was smeared with mud and had rigor mortis all over it. He stated that it is possible that the deceased could have died in the intervening night of 4/5.5.2011 at about 4.00 AM. He did not rule out the possibility that other injuries noticed on the body of the deceased could be a result of struggle at the time of strangulation.

In the cross-examination he stated that at the time of autopsy, he did not notice water inside the body and there were no signs to suggest a case of death due to drowning. He admitted that he had not mentioned in the autopsy report the estimated time of death but, in respect of time of death, whatever he had stated above, there could be a variation of about three hours either way. He stated that the marks of strangulation noticed on the body were caused by use of hand and not a rope or some hard substance. He denied the suggestion that the autopsy report was prepared at the instruction of the informant. He also denied the suggestion that he was telling a lie.

13. Incriminating circumstances appearing in the prosecution evidence were put to the appellants. The appellants denied their guilt and claimed that when information with regard to the death of the deceased was received, they were there along with the villagers. In respect of the reasons for their implication, they stated that the informant is in possession of the

house of the deceased and, therefore, to grab the house of the deceased, the accused were falsely implicated.

THE TRIAL COURT FINDINGS.

14. The trial court by relying upon the ocular account rendered by PW-2 and upon finding that the defence could not establish a cogent reason for false implication, whereas the medical evidence disclosed that death was a consequence of strangulation, convicted and sentenced the appellants as above.

SUBMISSIONS ON BEHALF OF THE APPELLANTS.

15. Aggrieved by the order of the trial court, the learned counsel for the appellants submitted as follows:-

(i) The stomach content of the deceased would suggest that he had his last meal not more than four hours before his death. By a conservative estimate in a Village, where people wake up early morning, dinner must have been had latest by 7 or 8 PM, therefore, death must have occurred on or about mid night and not later, which was not witnessed by any one and, therefore, the prosecution story that the deceased was killed in the wee hours of the morning, say at 4.00 AM, appears doubtful; (ii)The presence of PW-2 at the spot, at the time of the incident appears doubtful for two reasons: (a) according to PW-1, the deceased had given his field on 'Batayee' to the accused and that adjoining the field of the deceased, there were vacant fields and no field of PW-2, therefore, if PW-2 had to go to his own field to collect watermelon why would he be there near the field of the deceased;in the alternative, if it is assumed that the field, where the deceased died, was not given on 'Batayee', then, if the deceased was doing farming on his own, why PW-2 would come there for help. More so, when from the statement of PW-3, it appears that PW-2 and PW-3 had their own fields and they had gone to collect watermelons from their own field and had not visited the field of the deceased; and (b) that visiting the field of the deceased at 4.00 AM appears a bit improbable, if not impossible. (iii) Further, the statement of PW-2 that he witnessed the incident from a distance of around 50 paces in torch light is not supported by recovery of the torch during the course of investigation and the existence of torch light is not there in the FIR and its existence is disclosed for the first time in statement of PW-2 recorded under Section 161 Cr.P.C. after 16 days, therefore, the existence of torch light is nothing but an after thought. (iv) Other than that, the ocular account rendered by PW-2 would suggest that he witnessed the accused assaulting the deceased and when the accused were challenged they dumped the deceased in a pit, after dragging him. If that was the case, had PW-2 been present, he could have rushed to the rescue of the deceased more so, when is not the case of the prosecution that the accused were armed and, if the deceased was dumped in a pit, which had water, while he was about to die there would have been signs of drowning. This, therefore, creates a doubt with regard to PW-2's presence at the spot. (v) That the motive for the crime has not been proved because the prosecution set out twin motive for the crime. The first was that the deceased's 'Med' was dismantled by the accused and the second was that the deceased was trying to dispose off his land in favour of the informant party. In respect of dismantling the 'Med' of the field of the

deceased there is no good reason as, according to the prosecution case, the deceased's fields were on 'Batayee' with the accused. Moreover, there was no report in respect of any incident between the deceased and the accused. In so far as the second motive is concerned, no document was placed with respect to seeking of loan or in respect of proving an agreement to transfer the land and when PW-2 was questioned on that, PW-2 faltered by not being able to disclose details in respect thereof.

16. In a nutshell, on behalf of the appellants, it was submitted that this is a case where the incident occurred in the darkness of night, some unknown persons committed the murder, there was no eye witness of the incident and on strong suspicion or guess-work or ill-will the appellants were implicated, therefore, in absence of evidence of a sterling quality, there should be no conviction on the basis of solitary witness testimony, hence, the benefit of doubt should be extended to the accused party. The trial court, however, did not properly appreciate the evidence while recording conviction.

SUBMISSIONS ON BEHALF OF THE STATE

17. Per contra, learned AGA submitted that this is a case where there is an ocular account of the incident, the body of the deceased was smeared with blood which suggests that the body was in a pit that had water; that the ocular account gives a depiction of the accused pressing the neck and of throwing the deceased in a pit, which finds corroboration in the medical evidence which discloses strangulation as well as drag marks. Thus, it is a case where the ocular account finds support in the medical evidence and, therefore, prosecution has succeeded in proving the guilt of the accused. It has been alleged that even assuming that the motive might not have been proved with cogent evidence but where there is an ocular account that finds support in the medical evidence, absence of motive by itself is not fatal to the prosecution case. It is, thus, prayed by the learned AGA that the appeal be dismissed and the conviction and sentence be maintained.

ANALYSIS

18. Having noticed the entire prosecution evidence and the submissions of the learned counsel for the parties, we now proceed to analyse the evidence.

19. It is the prosecution case that the incident occurred at 4:00 AM in the morning. The FIR was lodged at 10:30 AM. The distance between the spot and the police station is 13 km. Therefore, the first question that arises for our consideration is whether, in the facts of the case, the FIR was prompt or not, if not, then whether it is a case where none witnessed a night incident and the delay was to contrive a story on suspicion and guess-work. From the testimony of the prosecution witnesses, it appears, the informant, his wife, and his son have all travelled on a motorcycle to the Police Station to lodge the first information report. It has come in the evidence that the entire village had gathered at the spot and the body, according to PW-2, was taken out from the pit by 7.00 AM and they left for the Police Station at about 8.00 AM. Interestingly, in the statement of the Investigating Officer (PW-5) it has come that when he arrived at the spot, the body of the deceased was lying in a pit and that he himself took out

the body from the pit and that pit had no water. Once this is the position, there appears no logical reason to delay lodging of the first information report, particularly, when the informant party had the means to travel to the Police Station. This creates suspicion in our mind whether the incident was witnessed in the manner alleged by the prosecution or when the body was discovered in the morning, the informant party was left guessing, or contriving a story, which caused the delay in reporting the incident; this delay in lodging the report though may not be fatal to the prosecution case, but it creates a doubt that puts us on guard to test the prosecution story on all material aspects more so, when one of the two prosecution witnesses of fact during cross-examination did not support the prosecution story.

20. There are three material aspects on which we propose to test the prosecution story. These are: (i) the possibility of the presence of PW-2 at the point from where he witnessed the incident and the likelihood of him recognizing the assailants from that distance in the night; (ii) the trustworthiness of the ocular account; and (iii) motive for the crime. A close scrutiny of the site plan prepared at the instance of the informant (PW-1) would reveal that the place where the deceased was assaulted by the accused is indicated by Point-A and Point-B is the pit from where the body of the deceased was recovered. The distance between Point-A and Point-B is 32 paces, according to the I.O. but it is much less according to the eye witness. But there is no discrepancy in respect of the spot from where they allegedly watched. As per the site plan, the witnesses allegedly witnessed the incident from near the wooden bridge that crosses the river Doha which, according to the statement of PW-2, is 50-60 paces away from Point-A. The possibility of someone noticing the entire incident in the light of torch from a distance of 50-60 paces appears a bit doubtful. More over, here, the torch has not been produced or seized during investigation to examine the strength of its light range and, otherwise also, the spotting of accused in torch light is not alleged in the FIR whereas the statement of PW-2, under Section 161 Cr.P.C. was recorded 16 days later on 21.5.2011. Assuming that PW-2 witnessed the accused from that distance in the company of PW-3 and they challenged the accused from that distance why would the accused, if they had already killed the deceased, drag the deceased about 32 paces, as per I.O., or 10-15 paces, as per PW-2, to throw his body in the pit, when the first reaction would be to escape from the spot. Importantly, the testimony of PW-6 (Autopsy Surgeon) is to the effect that no water was noticed in the lungs of the deceased and, therefore, the deceased could not have drowned, but, interestingly, according to PW-2, there was water upto the depth of two feet in that pit, which means that if the deceased had been alive at the time when he was thrown in the pit, there would have been signs of drowning reflected by the presence of water in his lungs, which is not the case here. Thus, it appears to be a case where the deceased was killed at some other place, may be at the place where he slept or may be at any other place and the body was dumped in the pit.

21. At this stage, we may notice another important feature in the prosecution evidence which is that at the time of autopsy it was noticed that blood had trickled from the nostrils and had smeared beard and moustaches of the deceased; presence of blood was also noticed in nostrils and ear, yet, no

blood was noticed by the Investigating Officer at the spot. Notably, in the testimony of the Investigating Officer there is no mention that during spot inspection drag marks were noticed starting from Point-A, where the deceased is said to have been assaulted, upto Point-B where his body, after dragging, was dumped. Thus, the ocular account rendered by PW-2 that the deceased was assaulted at Point-A and was dragged to, and dumped at, Point-B is not supported by material collected during the course of investigation; and the doctor has also not ruled out presence of other injuries as a result of struggle during strangulation. In addition to above, PW-2 is just a chance witness. Admittedly, he had slept in his own house and was not sleeping in the field with the deceased or in the adjoining field. He arrived at the spot not on hearing shrieks or cries but on a daily routine to pluck watermelons. PW-2's own filed is not there, as per PW-3, and the deceased's field was on 'Batayee' with the accused but, to justify his presence, PW-2 stated that the field where deceased was sleeping was not on 'Batayee'. This is inexplicable, particularly, when it has not been demonstrated that there were separate fields with different numbers. Thus, it appears, this aspect of the story has been weaved to justify PW-2's presence at that odd hour.

22. When we test the motive set out by the prosecution for commission of the crime, we find that the prosecution set up twin-motive. One that could not be proved,i.e., proposed transfer of land; and the other, i.e., in respect of dismantling of the 'Med' of the field of the deceased by the accused, there appears no logical reason, particularly, when it is the own case of the prosecution that the deceased had given his field on 'Batayee' to the accused. Further, there is no report in respect of any incident occurring in between the deceased and the accused in respect of dismantling of the 'Med'. Thus, there appears no cogent motive for commission of the crime whereas the accused did suggest a motive for false implication, which is to save their own skin. Notably, a suggestion was given that the deceased had developed relations with the wife of the informant and, therefore, informant's own sons had motive to finish off the deceased. In this context, it be noted that according to prosecution evidence, the deceased used to reside with the informant for last several decades. He also used to be fed by the informant party. In the night of the incident also, dinner was provided by the informant side to the deceased in the evening. Interestingly, when questioned about the time of serving dinner, PW-2 did not give a specific reply. Notably, in the autopsy report the estimated time of death is not disclosed. Though, PW-6 (autopsy doctor) does not rule out death having occurred at 4.00 AM but, importantly, rigor mortis had developed all over body. Normally, rigor mortis is fully developed by 12 hours and can remain as such for few hours more and passes away between 24 to 36 hours, depending on various factors. Thus, if rigor mortis all over the body was noticed at 4.45 PM on 05.05.2011, the possibility of death having occurred about midnight cannot be ruled out, which is also in sync with PW-6's statement that there can be a variation of three hours in his estimate of 4.00 AM. But, when we notice the stomach content ,i.e., 100 gm of pasty food material at the time of autopsy, keeping in mind that in villages people have early dinner, it throws a possibility of the incident having occurred much earlier than what has been suggested by the prosecution.

23. Having analysed the evidence above, we find that the prosecution set out twin motive for the crime but failed to

proved either of them. Two eye-witnesses were set up. Both were chance witnesses, one, out of the two, did not support the prosecution case during cross-examination and denied the presence of the other at the spot and claimed it to be elsewhere. The other eyewitness, apart from being chance witness, discloses that he witnessed the incident in the light of a torch from a distance of about 45-50 paces. The presence of torch is not disclosed in the FIR and during investigation no torch was shown to the I.O. and there is no custody memo of that torch. Further, that eye witness statement is recorded during investigation after 16 days. The ocular account rendered by PW-2, if accepted, would indicate that the deceased was being assaulted when PW-2 arrived at the spot to give a challenge to the accused from a distance of about 50 paces, where after, the accused dragged the deceased and dumped him in a pit, which had water. But no water was found in the lungs of the deceased which is indicative of a dead person having been dumped there. This suggests that the deceased was either killed at the spot where he was noticed being assaulted or elsewhere. Notably, at the time of autopsy the beard and moustaches of the deceased were noticed smeared in blood that had trickled from the nostrils and had also collected in the ear but no blood was noticed by the I.O. at the spot. The explanation offered to explain the delay in lodging the FIR, that is, first the body was taken out of the pit, is belied by the testimony of the I.O. who says that it was he, who got it out of the pit. Further, when we notice pasty food in the stomach, as per the autopsy report, in absence of any evidence as to when the deceased was served food, by rural standards and habits, consumption of food might have been early, say by 8:00 PM, the possibility of death taking place on or about midnight, much earlier to the specified time, also cannot be ruled out. The upshot of the entire discussion is that it appears to be a case of a blind murder in the darkness of night and the prosecution story has been weaved on suspicion, or is contrived, may be with ill-motives, by keeping an eye on the property of the deceased; and the prosecution evidence does not inspire our confidence to enable us to hold that the prosecution has been able to prove the charges beyond reasonable doubt. Thus, the benefit of doubt would have to be extended to the accused-appellants. Consequently, the appeal is **allowed.** The judgement and order of the trial court is set aside. The accused-appellants are acquitted of the charge (s) for which they have been tried. The appellants are reported to be in jail. They shall be set at liberty forthwith unless wanted in any other case, subject to compliance of Section 437-A Cr.P.C. to the satisfaction of the trial court below.

24. Let a certified copy of this order along with record of lower court be sent to the trial court for compliance. The office is further directed to enter the judgement in compliance register maintained for the purpose of the Court.

(2022)03ILR A397
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.02.2022

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE J.J. MUNIR, J.

Criminal Appeal No.6987 of 2009
AND
Criminal Appeal No. 6988 of 2009

Pradeep ...Appellant
Versus
State Of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Vijay Singh Sengar, Sri Azad Khan, Sri Ramesh Pandey, Sri Sanjeev Mishra, Sri Shyam Singh Sengar

Counsel for the Opposite Party:
A.G.A., Sri Nitinjay Pandey

Criminal Law- Code of Criminal Procedure, 1973- Section 154- Indian Evidence Act- Section 32- The FIR whether admissible as substantive evidence under Section 32 of the Evidence Act-Unless the case be one where the first informant is dead and what he reports through the FIR are facts related to the cause of his death, the FIR is not admissible as substantive evidence under Section 32 of the Indian Evidence Act, 1872- If the informant, after lodging the FIR, were to die a natural death, the FIR cannot be read as substantive evidence with the aid of Section 32 of the Evidence Act.

Only where the first informant is proved to be dead and the contents of the FIR are directly related to the facts of his death, can the FIR be read under Section 32 of the Evidence Act as a dying declaration otherwise the contents of the FIR would be inadmissible in evidence.

Criminal Law - Code of Criminal Procedure, 1973- Section 154- Indian Evidence Act- Section 145-The FIR to contradict or corroborate eye-witness account, where informant not available at the trial -The FIR is the earliest account of the occurrence and it is only the author of the FIR, that is to say, the first informant, who can prove its contents. It is he alone who can be cross-examined to contradict or corroborate him. Once he proves the FIR, the account can be looked into to judge the probity of other witnesses and their testimony also. But, in the absence of the informant entering the witness-box to prove the FIR, its contents cannot be held to be proved by examining the scribe, who has written it, or the police personnel, who have registered it.

Only the first informant can prove the contents of the FIR and nobody else. Even the investigating officer can merely identify the signature of the first informant and that of his own on the First Information Report and he can depose about the factum of the F.I.R. being registered by him on a particular date on a particular police station.

Criminal Law - Code of Criminal Procedure, 1973- Section 154- The fact that the FIR is not proved for the informant's absence does not impair the prosecution in establishing its case at the trial on the basis of material collected during investigation and proved by leading cogent evidence.

Merely because the FIR could not be proved due to the absence of the informant would not dent the case of the prosecution when the same is proved by codent and credible evidence of the witnesses.

Evidence Law - Indian Evidence Act- 1872- Section 145- The evidence of a witness, whose previous statement has not been taken down, is not inadmissible. It has merely to be approached with some caution and relied upon after seeking some corroboration.The evidence of such a witness has to be carefully scrutinized, given the disadvantage that the accused suffers from in the absence of a previous statement to contradict and shake his veracity.

Where the previous statement of a witness under Section 161 or Section 164 of the Cr.Pc has not been taken down then the fact that the said previous statement is not available during the trial to contradict the said witness will not be a ground to discard his testimony but the same has to be considered with due caution and circumspection by the court.

Evidence Law - Indian Evidence Act, 1872- Section 3- Contradiction between ocular and medical evidence - In a witness's account of the occurrence about something as violent as murder, where events happen in the split of a second, observational discrepancies may arise. Different persons may have varying perceptions of an event like the one about the part of the body, where the bullet

struck. It is very logical in the nature of things for two witnesses to perceive the precise situs of the shot, particularly, in case of a crime as dangerous and gory as murder, with observational differences.This discrepancy between the medico-legal evidence and the testimony of one of the witnesses of fact is not at all so material so as to place the prosecution under a shadow of 'reasonable doubt'.

As reactions of different people to a gory offence like murder is different, it is not logical to render with exactitude the author of the injury as well as the seat of the injury and therefore any such contradiction with the medical evidence will not render the case of the prosecution doubtful.

Evidence Law - Indian Evidence Act, 1872- Section 7- Subsequent conduct- The conduct of an accused, absconding from the place of occurrence, is very relevant as res gestae. Both the accused were apprehended by the Police on way to Etah. It is possible that being named in an FIR and talked about in the community, a person may abscond out of fear. But, where the evidence against an accused is an eye-witness account, the conduct in fleeing the locale of the occurrence lends support to the prosecution.

The fact that the accused fled after the commission of the offence is a relevant fact indicating their involvement in the offence.

Evidence Law - Indian Evidence Act, 1872- Section 3 , 45 & 114- Adverse Inference- It has not been laid down as an infallible rule, in cases of direct testimony of eye-witnesses, that failure to send the recovered weapon of crime to the Forensic Science Laboratory or the blood-stained clothes and earth would subject the prosecution to any kind of doubt. The well acknowledged principle is that, where the testimony of eye-witnesses is clear, consistent and confidence inspiring, forensic co-relation is not essential to sustain a conviction. Mere failure of the Investigation Agency in producing reports of the F.S.L. relating to the weapon of offence and the blood-stained earth and clothes would not derogate from the veracity of the prosecution, established by a dependable and tested eye-witness account.PW-9 was not cross-examined at all about the issue of the country-made pistol being in working order or the cartridges being live. Since that question was not put at all to PW-9, who testified to the recovery of the weapon and two live cartridges, it has to be held that the question, if put and the report, if summoned, would have established the fact and gone against the appellant, Akhilesh.

Settled law that where the ocular evidence is legal, cogent and trustworthy then failure of the investigating agency to bring on record either the report of the F.S.L or the weapon of offence would be of no consequence and if the defence fails to cross-examine the investigating officer on the said point then the court can take an adverse inference that the answer to the question would have been unfavourable to the defence. (Para 31, 32, 35, 47, 50, 52, 64, 67, 69, 75, 79, 80, 86)

Criminal Appeal rejected. (E-3)

Judgements/ Case law relied upon:-

1. Munnu Raja & anr. Vs The St. of M.P, (1976) 3 SCC 104

2. Bhavanbhai Premjibhai Vaghela & ors Vs St. of Guj., 2017SCC Online Guj 1406.

3. Shanker Vs St. of U.P. (1975) 3 SCC 851

4. In Re : Bheemavarapu Subba Reddi & anr, (1947) 1 MLJ 193

5. Gabbu Vs St. of M.P. (2006) 5 SCC 740

6. Babar Ali Vs St. of Assam, Crl. Appl. No. 281 of 2003 (Gau)

7. Harkirat Singh Vs St. of Punj. (1997) 11 SCC 215

8. Jayaseelan Vs St. of T.N (2009) 12 SCC 275

9. Rizan Vs St. of Chhatt. (2003) 2 SCC 661

10. Namdeo Vs St. of Maha. 2007 Cr.Lj 1819 (1824)

11. Mritunjoy Biswas Vs Pranab @ Kuti Biswas & anr. 2014 (4) SCC (Cri) 564

12. State of UK Vs Jairnail Singh AIR 2017 SC 5353

13. Rakesh & anr Vs St. of U.P & anr, Crl. Appl. No. 556 of 2021 dec. on 06/ 07/ 2021 (SC).

14. Saddak Hussain Vs St. (NCT of Delhi), Crl. A. No. 717 of 2018, LAWS (DLH) – 2019-5-155

(Delivered by Hon'ble J.J.Munir, J.)

1. This judgment will dispose of Criminal Appeal No.6987 of 2009 and the connected Criminal Appeal No.6988 of 2009, both arising from the judgment and order of Mr. Umesh Chandra, the then Additional Sessions Judge/ Fast Track Court No.1, Etah dated 27.10.2009, convicting the appellants, Pradeep and Akhilesh in Sessions Trial No.149 of 2007 of the offences punishable under Section 302 read with Section 34 IPC and the appellant, Akhilesh alone in Sessions Trial No.148 of 2007 of the offence under Section 25 of the Arms Act, 19591. The appellants have been sentenced in the manner as hereinafter detailed. While the appellants, Pradeep and Akhilesh have been sentenced to life imprisonment for the offences punishable under Section 302 read with Section 34, Indian Penal Code, 18602, the appellant, Akhilesh has been sentenced separately for the offence under Section 25 of the Arms Act to suffer three years' rigorous imprisonment. The appellants have further been sentenced to a fine of Rs.5000/- each for the offence under Section 302 read with Section 34 IPC and upon default, ordered to suffer six months' simple imprisonment additionally. A fine of Rs.1000/- has been imposed upon the appellant, Akhilesh for the offence punishable under Section 25 of the Arms Act and upon default, he has been ordered to suffer a month's simple imprisonment additionally. So far as the appellant Akhilesh is concerned, there is a direction that both sentences shall run concurrently.

2. The facts giving rise to the Appeals are these:

A First Information Report3 dated 18.11.2006 was lodged by Satya Prakash son of Buddhpal Singh, a resident of Village Diuna Kalan, falling within the local limits of Police Station Jaithra in the Sessions Division of Etah. The FIR was registered at 10 minutes past noon (12.10 p.m.) on 18.11.2006, regarding an incident that took place earlier in the day, at half past ten (10.30 a.m.), in the morning hours. The FIR was registered at Police Station Jaithra as Case Crime No.238 of 2006, under Sections 302 and 504 IPC, Police Station Jaithra, District Etah.

3. According to the FIR, the informant was a native of Village Diuna Kalan, Police Station Jaithra. To the south of the village, the informant and Pradeep son of Jagdish, also a native of the same village, had a common tubewell (described in the FIR as a boring). It was said that on 18.11.2006, that is the day when the FIR was lodged, the informant, along with his son Harveer, had proceeded to the tubewell to irrigate his fields. They had reached the tubewell to start the engine when Pradeep and Akhilesh alighted there, and abusing the two, asked the informant and his son not to run the tubewell. This led to a dispute between them with two on each side, whereupon Pradeep and Akhilesh

went back to the village and fetched a country-made pistol and a country-made rifle. The informant and his son, upon seeing the two approach carrying fire-arms, fled towards the village. Both the brothers gave the informant and his son a chase and at 10:30 in the morning, shot the informant's son in front of one Ram Prakash's house. The informant's son died on the spot. The first information further records that Rajendra Singh son of Khem Karan, Ajaypal son of Ramdeen and Ram Prakash son of Pokhpal Singh, besides other natives of the village, were present, who witnessed the occurrence. It was also reported that the dead body was lying at the site of occurrence. This written information was signed by the first informant and scribed by Ram Autar son of Gokul Singh, also a resident of Village Diuna Kalan.

4. On the basis of the said information, Case Crime No.238 of 2006, under Sections 302, 504 IPC was registered at Police Station Jaithra vide G.D. No.30. The Station Officer left the station at 12:10 hours. The Police reached the spot at 12:45 p.m. and held inquest. The inquest report was drawn up under the directions of the Station Officer by Head Constable Nepal Singh. The Station Officer, Udai Vir Singh Malik took up the investigation. He collected samples of blood-stained and plain earth from the spot, drawing up a common memorandum for the purpose. The place of occurrence was inspected and on identification by the first informant, a site plan was drawn up.

5. After proceedings of the inquest were over, the Investigating Officer addressed a memo to the Chief Medical Officer, requiring him to do an autopsy. He also did a sketch of the corpse (photo lash) and sent the dead body for autopsy. Dr. Pradeep Kumar Gupta, PW-5, who conducted the autopsy on 18.11.2006 at 4:55 p.m., found the following ante-mortem injuries on the person of the deceased :

"(1) A Firearm wound of entry: 2cm X 1cm X through & through on the right side lower part of chest and only 10cm below right nipple at 7 o'clock position margins inverted.

(2) A Firearm wound of exit 2.5 cm X 1.5cm X communicating e injury no.(1) on the lower back left side 4cm from middle and 15cm from left ant. sup. Iliac spine, margins everted.

Direction: anterior to posterior."

6. In the opinion of the Doctor, death had occurred one-third of a day before autopsy and it was due to shock and haemorrhage as a result of ante-mortem injuries.

7. On 20th November, 2006, that is to say, the third day following the occurrence, PW-9, Udai Vir Singh left the station at 7:30 a.m. in his official Jeep in connection with investigation into Case Crime No.238 of 2006, under Sections 302, 504 IPC. He had with him Constable No.718 Mahesh Chandra, Constable No.1158 Nand Lal, Constable No.529 Vinod Kumar and the driver of the official Jeep, Constable-Driver No.824 Brijesh Kumar. He was on the lookout for the wanted accused in the case. The Investigating Officer was proceeding on the Jaithra - Dariyabganj Road and had reached the Baniadhara Trivium, when he received information from a secret informer that near Village Baniadhara at the trivium of the kachcha road, that connects Village Diuna Kalan, the appellants were waiting to

board a vehicle to escape to Etah. They could be apprehended if prompt action were taken. The Investigating Officer proceeded to the spot, and on the pointing out of the informer, found the appellants sitting by the side of the Trivium of the roads leading to Baniadhara and Diuna Kalan.

8. Shorn of unnecessary detail, the appellants were arrested employing of necessary force. Nothing was recovered from possession of the appellant, Pradeep, but a search of the appellant, Akhilesh led to the recovery of a country-made pistol of .315 bore from his right pocket and two live cartridges of the same caliber from the left. A recovery-cum-arrest memo was drawn up, where it is mentioned that the appellant, Akhilesh confessed that this was the weapon that he had used in murdering Harveer on 18.11.2006. Arrest followed as both the appellants were wanted in Case Crime No.238 of 2006. It was also recorded in the recovery-cum-arrest memo that no member of the public volunteered to witness the recovery and the recovery-cum-arrest memo was signed by members of the police party and the two accused.

9. On the basis of the recovery-cum-arrest memo dated 20.11.2006, Case Crime No.239 of 2006, under Section 25 of the Arms Act, Police Station Jaithra, District Etah was registered against Akhilesh alone. The aforesaid crime was registered on 20.11.2006 at 1:15 p.m. The investigation of this case was entrusted to Sub-Inspector, Shiv Nandan Singh, while Case Crime No.238 of 2006 was investigated by the Station Officer, Udai Vir Singh Malik, PW-9, who after investigation, filed a charge sheet dated 24.11.2006 against the appellants in Case Crime No.238 of 2006, under Sections 302, 504 IPC. Sub-Inspector Shiv Nandan Singh filed a charge sheet against the appellant, Akhilesh Singh on 27.12.2006 in Case Crime No.239 of 2006, under Section 25 of the Arms Act.

10. Cognizance of the charge sheet in Case Crime No.238 of 2006 was taken by the Magistrate on 20.12.2006, whereas of the charge sheet in Case Crime No.239 of 2006 against the appellant, Akhilesh, cognizance was taken cognizance on 18.01.2007. The cases were committed to the Court of Sessions by the Magistrate. After committal, the case was received by the Sessions Judge on 14.02.2007, but cognizance of both cases was taken vide separate orders dated 24.09.2007 passed by the learned Sessions Judge. Sessions Trial No.149 of 2007 was assigned to the case arising out of Case Crime No.238 of 2006, under Sections 302 read with 34, 504 IPC whereas Sessions Trial No.148 of 2007 was assigned to the case arising out of Case Crime No.239 of 2006, under Section 25 of the Arms Act against the appellant Akhilesh alone. Both the trials were consolidated, with S.T. No.149 of 2007 being tried as the leading case. Charges were framed in both the Sessions Trials also on 24.09.2007. For more than obvious reasons, common evidence was recorded in both the trials.

11. In order to prove their case, the prosecution have examined the following witnesses:

(1) PW-1, Rajendra Singh (a native of the informant's village and a witness of fact who turned hostile);

(2) PW-2, Ram Autar (scribe of the written report);

(3) PW-3, Ajay Pal (witness of fact);

(4) PW-4, Smt. Girja Devi (another witness of fact and the deceased's mother);

(5) PW-5, Dr. Pradeep Kumar Gupta (the doctor who conducted postmortem examination on the deceased's corpse);

(6) PW-6, Constable-Clerk Makkhan Lal (who registered the case, drew up the Check FIR relating to Crime No.238 of 2006 and made the requisite G.D. Entry in the Station Diary. He is a formal witness);

(7) PW-7, Constable Mahesh Chandra (a witness of recovery-cum-arrest memo);

(8) PW-8, Constable Raj Narain (who registered the case, drew up the Check FIR relating to Crime No.239 of 2006 and made the requisite G.D. Entry in the Station Diary. He is a formal witness);

(9) PW-9, S.O. Udaivir Singh Malik (Investigating Officer of the leading case); and,

(10) PW-10, Constable Gopi Chandra (who proved the site-plan and charge-sheet relating to Crime No.239 of 2006).

12. The prosecution have relied on the following documentary evidence:

Sr. No.	Exhibit No.	Exhibited documents with brief particulars
1.	Ex. Ka-1	Written report lodged with the Police Station Jaithra by Satya Prakash and proved by PW-2, Ram Autar, scribe of the written report.
2.	Ex. Ka-2	Postmortem report of the deceased dated 18.11.2006, proved by PW-5, Dr. Pradeep Kumar Gupta.
3.	Ex. Ka-3	Check FIR dated 18.11.2006 relating to Crime No.238 of 2006, drawn up by PW-6, Constable Makkhan Lal.
4.	Ex. Ka-4	Carbon Copy of G.D. Entry No.30 time 12:10 p.m. relating to Crime No.238 of 2006, made by PW-6, Constable Makkhan Lal.
5.	Ex. Ka-5	Recovery-cum-arrest memo proved by PW-7, Constable Mahesh Chandra.
6.	Ex. Ka-6	Check FIR dated 20.11.2006 relating to Crime No.239 of 2006, drawn up by PW-8, Constable Raj Narain.
7.	Ex. Ka-7	Carbon Copy of G.D. Entry No.19 time 13:15 p.m. relating to Crime No.239 of 2006, made by PW-8, Constable Raj Narain.
8.	Ex. Ka-8	Site plan of the place of occurrence, where the deceased was done to death, dated 18.04.2006, proved by PW-9, S.O. Udai Vir Singh Malik.

9. Ex. Ka-9 Inquest report drawn up by HCP-Nepal Singh and proved by PW-9, S.O. Udai Vir Singh Malik.
10. Ex. Ka-10 Letter sent by the S.S.P., Etah to the C.M.O. dated 18.04.2006 requesting an autopsy, proved by PW-9, S.O. Udai Vir Singh Malik.
11. Ex. Ka-11 Sketch of the corpse (Photo Lash), dated 18.04.2006, proved by PW-9, S.O. Udai Vir Singh Malik.
12. Ex. Ka-12 Challan Lash (Police Form - 13), dated 18.04.2006, proved by PW-9, S.O. Udai Vir Singh Malik.
13. Ex. Ka 13 Letter to the C.M.O. dated 18.11.2006 drawn up by HCP Nepal Singh, proved by PW9 S.O. Udai Vir Singh Malik
14. Ex. Ka-14 Memo regarding collection of plain and blood-stained earth, proved by PW-9, S.O. Udai Vir Singh Malik.
15. Ex. Ka-15 Recovery memo of empties, proved by PW-9, S.O. Udai Vir Singh Malik.
16. Ex. Ka-16 Charge-sheet no.143/06 relating to Crime No.238 of 2006, dated 24.11.2006, drawn up and proved by PW-9, S.O. Udai Vir Singh Malik.
17. Ex. Ka-17 Site plan relating to Crime No.239 of 2006, dated 27.12.2006, drawn up by S.I. Shiv Nandan and proved by PW-10, Constable Gopi Chandra.
18. Ex. Ka-18 Charge-sheet relating to Crime No.239 of 2006, dated 27.12.2006, drawn up by S.I. Shiv Nandan and proved by PW-10, Constable Gopi Chandra.
19. Ex. Ka-19 Case Diary (S.C.D.-I dated 17.01.2007) relating to Crime No.239 of 2006, under Section 25 of the Arms Act, drawn up by S.I. Shiv Nandan Singh, proved by PW-10, Constable Gopi Chandra.
20. Ex. Ka-20 Sanction of prosecution relating to Crime No.239 of 2006, under Section 25 of the Arms Act granted by the District Magistrate, Etah.

13. In the statement under Section 313 Cr.P.C., the appellants have denied the incriminating circumstances appearing in the evidence against them, but have not entered defence. To the last question under Section 313 Cr.P.C., asking the accused if they had anything else to say in their defence that they wished, they answered in the negative. The Trial Judge, upon conclusion of the trial, has proceeded to convict the appellants by the judgment impugned.

14. While Pradeep has preferred Criminal Appeal No.6987 of 2009 from the impugned judgment and order, Akhilesh

has preferred Criminal Appeal No.6988 of 2009. Both the Appeals have been connected and heard together with Criminal Appeal No.6987 of 2007 being treated as the leading case.

15. Heard Mr. Shyam Singh Sengar, learned Counsel for the appellants and Mr. Mohd. Shoeb Khan, learned A.G.A. for the State.

16. The prosecution seek to establish the charge against the two appellants about the deceased being done to death by them in furtherance of a common intention on 18.11.2006 at 10:30 a.m. in front of the house of one Ram Prakash son of Pokhpal at the parties' Village Diuna Kalan within the local limits of Police Station Jaithra, District Etah. It would be convenient to evaluate the prosecution case under distinct heads of relevant facts, relating to which evidence has been led.

Time, place and manner of occurrence

17. There is not much issue about the date and time of incident. It is 18.11.2006 at 10:30 a.m. The place of occurrence, that the prosecution urge, is in front of the house of Ram Prakash in Village Diuna Kalan, Police Station Jaithra, District Etah. The earliest account about the manner of occurrence is to be found in the FIR, where it is said by the first informant, Satya Prakash that he had gone to the tubewell, located towards the south of the village, along with the deceased, his son on 18.11.2006 in order to irrigate his fields. There, the informant and his son were abused by the appellants, who prevented them from starting up the engine. This led to a dispute between parties, in consequence whereof, the appellants went back to the village and fetched illegal weapons. Seeing the two appellants approach armed, the father and the son made a dash for the village. They were given a chase. The appellants shot the deceased, employing their illicit firearms at 10:30 in the morning hours, in front of Ram Prakash's door. The deceased died on the spot. The prosecution seek to sustain the charges largely by the evidence of two out of the four witnesses of the fact, to wit, Ajaypal, PW-3 and Smt. Girja Devi, PW-4.

18. Ajaypal, PW-3, in his examination-in-chief, has said that the deceased, Harveer was murdered about a year or a year and a quarter ago. He was murdered at 10:30 in the day, 20-25 paces away from his house. Those, who killed him, are Akhilesh and Pradeep. Pradeep was wielding a rifle, while Akhilesh was armed with a country-made pistol. It is also said that Pradeep and the first informant, Satya Prakash had a common tubewell. The two had a quarrel over it, that led to the murder. In his cross-examination, this witness has testified as follows:

"घटना वाले दिन मैं अपने गांव में था। मैं अपने घर पर मौजूदा था। जब फायर की आवाज सुनी तब अपने घर से चल दिया। कुल 20 कदम का फासला है। इंजन रखने की बात कहाँ हुई मुझे नहीं मालुम। जब तक मैं पहुँचा एक फायर हो चुका था। दूसरा हुआ था। गोली हरवीर के पीठ में लगी थी। गोली मारते ही दोनों आदमी भाग गये थे। दोनों ने हरवीर पर फायर किये। जिस समय मैं पहुँचा वहाँ पूरा ही गाँव मौजूद था। किस किसका नाम बताँऊ।

घटना स्थल पर मैं वहीं बना रहा तथा लाश के साथ साथ ही रहा। जब तक दफना नही दिया तब तक साथ ही रहा कहीं नहीं गया। रिपोर्ट मेरे सामने नहीं लिखी गई थी।"

19. Again, about the manner of occurrence, the other witness, who has testified, is Smt. Girja Devi, PW-4. She has said in her examination-in-chief that the incident happened a year and five months ago. Her husband and son had left for the tubewell at 8 o'clock in the morning. The tubewell is a common facility with the appellant Pradeep. There was an exchange of sharp words, involving use of the tubewell, after which Akhilesh and Pradeep (the appellants) went home. They fetched a rifle and a country-made pistol. Her husband, Satya Prakash and her son, Harveer (the deceased) were standing at the house of Ram Prakash. Akhilesh shot her son. Pradeep had fired the first shot. When Pradeep had fired, the witness was at home. She has then corrected herself to say that she was just outside. It is then said that it was Akhilesh who shot the deceased. The deceased died on the spot. In her cross-examination recorded on the same day, PW-4 has stated thus:

"मेरे लड़के ने 10 बजे कलेऊ (नाश्ता) किया था। मेरे लड़के ने फूलगोभी की सब्जी व रोटी खाई थी। 2 रोटी खाई थी। पानी भी पिया था। रोटी खाने के बाद 1/2 घंटा घर पर ही रहे। उसके बाद प्रकाश के दरवाजे पर प्रकाश ये अजय पाल, राजेन्द्र, सत्य प्रकाश थे और कोई नहीं था। गोली लगने के बाद सभी गाँव के लोग आ गये। 10 बजे मैं अपने घर में खाना बना रही थी फिर कहा कि 10 बजे तक खाना बना चुकी थी। उसके बाद घर के बाहर मैं अपना काम कर रही थी। प्रकाश के दरवाजे पर अखलेश व प्रदीप ने कहा कि आप इंजन मत लगाइये इंजन मेरा लगा था बोरिंग साझे-2 का था इंजन सुबह लगाया था। इस बोरिंग से 3-4 साल से हम खेत भरते चले आ रहें हैं। इस घटना से पहले हमारे और प्रदीप के बीच कोई वाद विवाद बोरिंग के बारे में नही हुआ। प्रदीप व अखलेश मेरी सगी बहन के लड़के हैं। पहले फायर के बाद तुरन्त ही दूसरा फायर कर दिया था। फायर करीब 20-25 कदम की दूरी से किया था। गोली तमंचे की लगी थी जो करीब एक हाथ लम्बा होगा। जो पीतल की लम्बी वाली पतली गोली होती है वहीं चलाई थी। गोली कोख में लगी थी। जहाँ गोली लगी थी वह जगह देखी थी मेरा लड़का पेंट शर्ट पहने था। टी शर्ट चोखना था नेक नेक काली नेक नेक हरी थी। पेंट आसमानी रंग की थी। चप्पल पहने था। बनियान पहने था। इसके अलावा और कोई कपड़ा नहीं था बोरिंग घर से करीब 100 कदम दूर होगा। बोरिंग के पास झगड़ा नही हुआ था। वहाँ मुँह चावर हुई थी। मुँह चावर सुबह 9 बजे के करीब हुई थी मैं उस समय बोरिंग पर मौजूद थी। जब मुँह चावर हुई थी। मैं उन्हें वहीं छोड़ आई थी और घर चली आई थी। उसके बाद वही 10 बजे लौट कर आये। मुँह चावर के समय हमारे व अखलेश और प्रदीप के अलावा और कोई नहीं था। मैं इसकी शिकायत करने अपनी बहन के यहाँ नहीं गई थी। अपने घर चली आई थी।"

20. There is a distinctive feature about this case, where the first informant, Satya Prakash has been abducted some time in the year 2007, a fact that can be reckoned about the time of its occurrence from the testimony of PW-2, Ram Autar. Ram Autar, in his examination-in-chief on 02.04.2008, has stated that Satya Prakash was abducted 6-7 months ago. He does not know, whether he is dead or alive. It has figured in the judgment of the learned Trial Judge that a photostat copy of the FIR is on record, where, relating to the abduction of Satya Prakash, a crime was registered against Pradeep and some other persons under Section 364 IPC. Thus, Satya Prakash was no longer available to testify in the dock. It is for this reason that the FIR lodged by Satya Prakash has been proved

by PW-2, Ram Autar, who is the scribe of the written first information.

21. It is argued by the learned Counsel for the appellants that the manner of occurrence described in the FIR is quite different from what the two witnesses of fact, PW-3 and PW-4 have said. While the FIR clearly makes it out to be a case where the deceased along with the first informant, Satya Prakash, was chased by the appellants and the deceased shot in front of Ram Prakash's house, the testimony of PW-3, Ajaypal shows that the deceased was standing outside Ram Prakash's house, when the appellants came over and shot him. The testimony of PW-4, Smt. Girja Devi also suggests that the deceased, after eating his breakfast, had gone out of his home, when he was shot by the appellants in front of Ram Prakash's house. It is urged that in the account of the two witnesses, there is nothing about an immediate quarrel at the tubewell, followed by the appellants fetching firearms and then chasing the victim party to shoot the deceased. It is urged, therefore, by the learned Counsel for the appellants that the manner of occurrence, or to speak more precisely, the manner of assault is so differently described by the two witnesses of fact from the way it is put in the FIR that the prosecution falls under a cloud of doubt.

22. We have perused the evidence on record and considered the totality of circumstances. We are afraid that the learned Counsel for the appellants is not right about his submission on this score. For one, the testimony of the first informant is not available and for that reason, the contents of the FIR cannot be looked into, except the fact that it was dictated by the informant, written by the scribe, signed by the two and lodged at the police station on the date and time recorded. Therefore, the testimony of the two eye-witnesses has to be evaluated, putting aside the account of the occurrence carried in the FIR. We would shortly dwell upon the law that impels us to discount the FIR for the contents of it. We are of opinion that the evidence of both witnesses, about the occurrence, is truthful from their individual vantage. The two witnesses, who, according to their account, were in their homes located a few paces away from the place of occurrence, came out on hearing the first shot ring. The first shot is attributed to Pradeep, using his rifle, which did not hit target. The second shot by Akhilesh, employing his country-made pistol, was the fatal one, that the witnesses saw.

23. It is fallacious for the learned Counsel for the appellants to say that the version of the two witnesses, PW-3 and PW-4 be tested with reference to the account of the occurrence in the FIR. That would be a possibility if the first informant were available and produced in the dock to prove the FIR. He could then be contradicted or corroborated with reference to it. The other witnesses' account would also then be tested on the anvil of the first information version. Here, the contents of the FIR, for reasons that we would presently indicate, cannot be looked into at all. There is absolutely no warrant to test the veracity of the dock evidence of PW-3 and PW-4 with reference to the first information version, that has not been proved because of the informant's disappearance attributed to an abduction. The testimony of PW-3 and PW-4 has to be assessed for its worth on other parameters. What is consistent about the account of the two witnesses relating to the manner of occurrence is that the deceased was shot at by the two appellants. PW-4 says that

Pradeep missed target and Akhilesh fired the fatal shot from his country-made pistol. PW-3 does not go into this detail, but says that both the appellants opened fire. It is also the consistent version of the two witnesses of fact that the deceased was shot in front of Ram Prakash's house.

24. The fact that it was the appellants who shot the deceased employing their respective weapons and they shot him in front of Ram Prakash's house at 10:30 in the morning is a consistent account in the evidence of both the eye-witnesses. PW-4 has specified and attributed the fatal shot to Akhilesh. PW-3, in his account, is generally consistent about the assault by the appellants, employing firearms, though he does not specify as to which of the appellants hit target.

25. It also figures in the testimony of both PW-3 and PW-4 that the genesis of the dispute was a quarrel over a shared tubewell facility. PW-4 Smt. Girja Devi, being the mother of the deceased and the informant's wife, has naturally described the details of events about the verbal altercation between the two sides a little earlier over the use of the shared tubewell. Her account is logically more detailed about the genesis of the occurrence, which was a dispute over use of the tubewell, compared to the other witness. But, there is nothing in the evidence of these witnesses, that may cast a shadow of doubt over the projected manner of occurrence, which originated in a dispute between parties regarding use of the common tubewell and ended in this crime.

26. We are, therefore, not in agreement with the submission of the learned Counsel for the appellants that there is any doubt about the manner of occurrence, which the prosecution allege. We, therefore, hold that the time, place and manner of occurrence is established by the prosecution beyond reasonable doubt.

The FIR whether admissible as substantive evidence under Section 32 of the Evidence Act or available to contradict or corroborate eye-witness account, where informant not available at the trial

27. There is a peculiar feature of this case, where the first informant has disappeared some 6-7 months back prior to the case going to trial. The prosecution say that the informant had been abducted and an FIR was lodged against Pradeep for an offence punishable under Section 364 IPC. In the examination-in-chief of PW-2, Ram Autar, it has been testified:

"सत्य प्रकाश का आज 6-7 माह पहले अपहरण हो गया था। मुझे नहीं पता कि वह मर गये हैं या जिन्दा है।"

28. The learned Sessions Judge has remarked that PW-2 proved that Satya Prakash had been abducted. This conclusion appears to have been drawn because the testimony of PW-2 in the examination-in-chief extracted above was never challenged or contradicted. The learned Sessions Judge has taken additional note of the fact that a photostat copy of the FIR relating to the case reporting Satya Prakash's abduction is on record, where the appellant, Pradeep and some other men are the accused. We must take judicial notice of the fact, on the basis of records of this Court, that Pradeep was tried on the charge of abducting Satya Prakash by the Additional Sessions Judge, Court No.4, Etah in S.T. No.48 of 2010 (arising out Case Crime No.543 of 2007), under

Section 364 IPC, Police Station Jaithra, District Etah and sentenced to seven years' rigorous imprisonment together with a fine of Rs.5000/-. Pradeep carried an appeal to this Court, being Criminal Appeal No.2978 of 2019, that has come to be disposed of vide judgment and order dated 22.05.2019, upholding the conviction, but reducing the sentence to a term of six years.

29. PW-2 has also said that he does not know whether Satya Prakash is dead or alive. For the purpose of determining whether the FIR is admissible as substantive evidence, the first informant having gone traceless or killed, or is it still available to the appellants to contradict or corroborate the prosecution witnesses, it has to be seen whether the informant was available at the time of trial. There is no doubt that the informant was not available. From what we understand, he has never returned because at the hearing before us, none of the parties said that Satya Prakash is now around.

30. Learned Counsel for the appellants has urged that until time when the trial was held, hardly two years had passed by and apart from the FIR accusing Pradeep of causing Satya Prakash to be abducted, there was no proof that he was dead. He further argues that Satya Prakash's death cannot be presumed until the lapse of seven years without him being heard of by any one of those, who would naturally have known of his whereabouts. In short, Satya Prakash cannot be presumed to have suffered a civil death by time the trial was held.

31. We are of opinion that unless the case be one where the first informant is dead and what he reports through the FIR are facts related to the cause of his death, the FIR is not admissible as substantive evidence under Section 32 of the Indian Evidence Act, 18724. Their Lordships of the Supreme Court in **Munnu Raja and another v. The State of Madhya Pradesh5** and other decisions, do not doubt the principle that an FIR can qualify as a dying declaration, if the informant dies in consequence of injuries that he reports through the FIR, or to put it more in the form of principle, if the FIR has some nexus with the informant's death. If the informant, after lodging the FIR, were to die a natural death, the FIR cannot be read as substantive evidence with the aid of Section 32 of the Evidence Act. Here, the informant has not reported anything that bears any nexus with his death. Moreover, it is not established whether the informant is dead or alive. What is true is that he is untraceable and there is an allegation that he has been abducted by the appellant, Pradeep, which now stands vindicated with Pradeep's conviction for that offence. The fact remains, however, that the first informant, who is the author of the FIR, could not be produced at the trial.

32. The moot question is whether the FIR, in the absence of the informant being produced in the dock, would be admissible for the purpose of corroborating or contradicting the eye-witnesses who have testified at the trial. In our opinion, that cannot be done. In fact, the FIR is the earliest account of the occurrence and it is only the author of the FIR, that is to say, the first informant, who can prove its contents. It is he alone who can be cross-examined to contradict or corroborate him. Once he proves the FIR, the account can be looked into to judge the probity of other witnesses and their testimony also. But, in the absence of the informant entering the witness-box to prove the FIR, its contents

cannot be held to be proved by examining the scribe, who has written it, or the police personnel, who have registered it. The scribe i.e. PW-2 has testified that the informant dictated the FIR to him by word of mouth, which he reduced to writing. He read over the contents to the first informant, who signed the FIR after understanding the same. The evidence of PW-2, Ram Autar, is competent to establish that the written information is one that was narrated to the scribe by the informant and is faithfully transcribed. It proves that it was written by the scribe, PW-2 and signed by the informant, but does not prove the contents of the FIR.

33. An FIR is nevertheless the basis to set the process of criminal law in motion and it is proved that the FIR here was lodged by the first informant and registered at the police station. On its basis, investigation could and did commence, where material had to be collected and was collected. It is on the basis of that material that the appellants have been charge-sheeted and tried. It is on the basis of evidence led at the trial that the appellants have been found guilty beyond reasonable doubt, a conclusion that they assail before us. Admissibility and evidenciary value of an FIR, in the context of a dead first informant, whose death was not connected to the occurrence reported through the FIR, was considered by the Gujarat High Court in **Bhavanbhai Premjibhai Vaghela & 4 others v. State of Gujarat6** in an interlocutory challenge raised to the order of the Trial Court. The order challenged before the High Court had permitted the contents of the FIR to be proved by the Investigating Officer entering the witness-box, because pending trial, the first informant had suffered a natural death. The accused had objected to it and said that the Investigating Officer could not prove the contents of the FIR. The Trial Court rejected the objection and permitted the Investigating Officer to prove the FIR. This order was challenged under Article 227 of the Constitution, where, after survey of authority bearing on the issue, it was held in **Bhavanbhai Premjibhai Vaghela** *(supra):*

"11. The basic purpose of filing a First Information Report is to set the criminal law into motion. A First Information Report is the initial step in a criminal case recorded by the police and contains the basic knowledge of the crime committed, place of commission, time of commission, who was the victim, etc. The term "First Information Report' has been explained in the Code of Criminal Procedure, 1973 by virtue of Section 154, which lays down that:

"Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

12. F.I.Rs. can be registered by a victim, a witness or someone else with the knowledge of the crime. The police can record three different kinds of statements. The first kind of statement is one which can be recorded as an F.I.R., the second kind of statement is one which can be recorded by the police during the investigation, and the

third kind of statement is any kind of statement which would not fall under any of the two categories mentioned above. Evidence is the matter of testimony manifesting the fact on a particular precision or circumstances. The First Information Report is not by itself a substantial piece of evidence and the statement made therein cannot be considered as evidence unless it falls within the purview of Section 32 of the Evidence Act. It is an admitted fact that the original first informant because of the injuries caused by the applicants. The relative importance of a First Information Report is far greater than any other statement recorded by the police during the course of the investigation. It is the foremost information the police gets about the commission of an offence and which can be used to corroborate the story put-forward by the first informant under Section 157 of the Evidence Act or to contradict his version by facts under Section 145 of the Act in case he is summoned as a witness in the case by the Court. It may happen that the informant is the accused himself. In such cases, the First Information Report lodged byjhim cannot be used as an evidence against him because it is embodied in the basic structure of our Constitution that a person cannot be compelled to be a witness against himself.

13. x x x

14. If the informant dies, the First Information Report can be, unquestionably, used as a substantive evidence. A prerequisite condition must be fulfilled before the F.I.R. is taken as a substantive piece of evidence i.e. the death of the informant must have nexus with the F.I.R. filed or somehow having some link with any evidence regarding the F.I.R. This is what has been explained by the Supreme Court in the case of Damodar Prasad v. State of U.P. [(1975) 3 SCC 851 : AIR 1975 SC 757].

15. There are plethora of decisions taking the view that an F.I.R. can be a dying declaration if the informant dies of his injuries after lodging the same. [See Munna Raja v. State of M.P. ((1976) 3 SCC 104 : AIR 1976 SC 2199)].

16. Another important thing is that for an F.I.R. lodged by a deceased person to be treated as substantial, its contents must be proved. It has to be corroborated and proved for there to be any value of the same in the case. The F.I.R. can be used by the defence to impeach the credit of the person who lodged the F.I.R. under Section 154(3) of the evidence Act. In case the death of the informant has no nexus with the complaint lodged i.e. he died a natural death and did not succumb to the injuries inflicted on him in relation to a matter, the contents of the F.I.R. would not be admissible in evidence. In such circumstances, the contents cannot be proved through the Investigating Officer. The Investigating Officer, in the course of his deposition, should not be permitted to depose the exact contents of the F.I.R. so as to make them admissible in evidence. All that is permissible in law is that the Investigating Officer can, in his deposition, identify the sgnature of the first informant and that of his own on the First Information Report and he can depose about the factum of the F.I.R. being registered by him on a particular date on a particular police station.

17. It is absolutely incorrect on the part of the Trial Court to say that in the absence of the first informant, the police

officer can prove the contents of the F.I.R. as per Section 67 of the Evidence Act.

18. In the case of Harkirat Singh v. State of Punjab [(1997) 11 SCC 215 : AIR 1997 SC 3231], the Supreme Court observed as under:

"In our considered view, the High Court was not justified in treating the statement allegedly made by Kharaiti Ram during inquest proceedings as substantive evidence in view of the embargo of Section 162, Cr. P.C. Equally unjustified was the High Courts reliance upon the contents of the FIR lodged by Walaiti Ram who, as stated earlier, could not be examined during the trial as he had died in the meantime. The contents of the FIR could have been used for the purpose of corroborating or contradicting Walaiti Ram if he had been examined but under no circumstances as a substantive piece of evidence."

19. In the case of Hazarilal v. State (Delhi Administration) [(1980) 2 SCC 390 : AIR 1980 SC 873], the Supreme Court, in para 7, observed as under:

"The learned counsel was right in his submission about the free use made by the Courts below of statements of witnesses recorded during the course of investigation. Section 162 of the Code of Criminal Procedure imposes a bar on the use of any statement made by any person to a Police Officer in the course of investigation at any enquiry or trial in respect of any offence under investigation at the time when such statement was made, except for the purpose of contradicting the witness in the manner provided by S. 145 of the Indian Evidence Act. Where any part of such statement is so used any part thereof may also be used in the re-examination of the witness for the limited purpose of explaining any matter referred to in his cross-examination. The only other exception to this embargo on the use of statements made in the course of an investigation relates to the statements falling within the provisions of S. 32 (1) of the Indian Evidence Act or permitted to be proved under Section 27 of the Indian Evidence Act. Section 145 of the Evidence Act provides that a witness may be cross-examined as to previous statements made by him in writing and reduced into writing and relevant to matters in question, without such writing being shown to him or being proved but, that if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. The Courts below were clearly wrong in using as substantive evidence statements made by witnesses in the course of investigation. Shri. H.S. Marwah, learned counsel for the Delhi Administration amazed us by advancing the argument that the earlier statements with which witnesses were confronted for the purpose of contradiction could be taken into consideration by the Court in view of the definition of "proved" in Section 3 of the Evidence Act which is, "a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man, ought, in the circumstances of the particular case to act upon the supposition that it exists". We need say no more on the submission of Shri. Marwah except that the definition of proved does not enable a Court to take into consideration matters, including statements, whose use is statutorily barred."

20. I have to my benefit a very lucid and erudite judgment rendered by a learned Single Judge of the Madhya

Pradesh High Court in the case of Umrao Singh v. State of M.P. [1961 Criminal L.J. 270]. In this case, the petitioners Umrao Singh and Kunwarlal were convicted of the offence punishable under Section 323 of the Penal Code and sentenced to two months rigorous imprisonment. The case of the prosecution was that on 27th August 1959, the petitioners named above belaboured Barelal who had gone out to graze his cattle, and who was blamed by the accused to have caused damage to their crops. Barelal, however, died a natural death after six months of the occurrence, but before he could be examined as a witness. It was contended that the F.I.R. lodged by Barelal could not be considered by the Courts below and that the evidence of the solitary witness, Pannala was unreliable, as he was not mentioned in the list of witnesses filed by the prosecution. In this set of facts, the Court observed as under:

"4. It is true that the first information report is not by itself a substantive piece of evidence and the statement made therein cannot be considered as evidence unless it falls within the purview of S. 32 of the Evidence Act. It is an admitted fact that Barelal did not die because of the injuries caused by the petitioners. Section 32 was inapplicable.

5. It is true that in the list of witnesses Pannalal's name has been mis-spelt as "Dhannalal', but this doubt is removed when the first information report is looked into. There, Pannalal's name is mentioned. Shri. Dey contends that it is not permissible to look at the F.I. R. at all. In my opinion this argument cannot be accepted. It is proved by Ram Ratan P.W. 6 that he recorded the report which was lodged by Barelal There is a distinction between factum and truth of a statement. It has been aptly pointed out by Lord Parker C.J. in R. v. Willis (1960) 1 W.L.R. 55 that evidence of a statement made to a witness by a person who is not himself called as witness may or may not be hearsay.

It is hearsay and inadmissible when the object of the evidence is to establish what is contained in the statement; it is not hearsay and is admissible when it is proposed to establish by the evidence not the truth of the statement but the fact that it was made. According to Ram Ratan, Barelal mentioned Pannalal's name to him. Applying the above dictum, Ramratan's evidence is inadmissible to prove that Pannalal was in fact present at the time of the occurrence; but Ram Ratan's statement is admissible to prove that Barelal had mentioned the name of Pannalal to the witness."

34. There is a clear endorsement of the principle that the FIR cannot be used to corroborate or contradict any other witness except the informant in **Shanker v. State of U.P.7,** where it has been held:

"11. It is well settled that unless a first information report can be tendered in evidence under any provision contained in Chapter II of the Evidence Act, such as a dying declaration falling under Section 32(1) as to the cause of the informant's death, or as part of the informant's conduct under Section 8, it can ordinarily be used only for the purpose of corroborating, contradicting or discrediting (under Sections 157, 145 and 155, Evidence Act) its author, if examined, and not any other witness. As already noticed, in the present case, Smt Ishwari the informant was not examined as a witness. It is admittedly not

a statement falling under any provision in Chapter II of the Evidence Act. The High Court was thus in error in using Exhibit Kha 2, as they did. The High Court did not record a positive finding that Persoti and Uttam were falsely implicated. It merely held that the case against these two accused was "not free from reasonable doubt" because the possibility of "their being falsely implicated in the case on account of enmity cannot be excluded"."

35. The first informant, for whatever reason not being available or produced in the witness-box to prove the contents of the FIR, we are of opinion that the FIR cannot be looked into to corroborate or contradict the prosecution witnesses. The contents of the FIR are not proved. It is also held that the FIR is not one that has any nexus with the death of the informant and, therefore, not admissible as substantive evidence under Section 32 of the Evidence Act. However, the fact that the FIR was dictated by word of mouth by the informant to PW-2, who has transcribed it and that it bears the signatures of the first informant and the scribe, are well proved. The registration of the FIR at the police station on the date and the time specified is also proved. This Court must also say that the fact that the FIR is not proved for the informant's absence does not impair the prosecution in establishing its case at the trial on the basis of material collected during investigation and proved by leading cogent evidence.

The presence of eye-witnesses whether doubtful

36. The learned Counsel for the appellants has mounted a scathing attack on the prosecution by saying that the two witnesses, by whose testimony alone, the charges are sought to be established against the appellants, were not at all present at the place and time of occurrence. It is, amongst other things, submitted by Mr. Sengar, to this end, that the house of PW-3, Ajaypal is not shown in the site plan. He is an eye-witness named in the FIR and yet his house has not been shown. The ocular evidence of this witness is doubtful. He has been planted by the prosecution to support the prosecution by parroting the first information version.

37. A more serious objection, that the learned Counsel for the appellants takes to the testimony of both the eye-witnesses, is that their statements were never recorded by the Police under Section 161 of the Code of Criminal Procedure8 during investigation. It is urged that the fact that the statements of these two eye-witnesses were never recorded under Section 161 of the Code shows that they are got up by the prosecution later on to falsely depose against the appellants. It is particularly submitted that in the absence of the statements of PW-3 and PW-4 recorded under Section 161 of the Code, the appellants have lost the advantage of effectively cross-examining these witnesses and a fortiori, their right to meaningfully defend themselves. The absence of an earlier statement of the two eye-witnesses ipso facto prejudices the appellants. Making elaborate submissions on this count, the learned Counsel for the appellants submits that the evidence of PW-3 and PW-4 is entirely unreliable in the absence of a previous statement from these witnesses to test their veracity. It is urged that the evidence of witnesses, whose previous statements could be recorded but were not, ought to be approached with caution. The evidence of PW-3 and PW-4, therefore, cannot be relied upon, unless corroborated in material particulars by

some other evidence that lends assurance to it. It is urged that the presence of these witnesses in the sequence of events is highly doubtful and cannot form the basis of conviction, that must rest on surer ground.

38. The learned A.G.A., on the other hand, has submitted that the absence of record of statements under Section 161 of the Code does not necessarily erode the credibility of evidence that is otherwise convincing. He submits that the course of investigation in this case has gone awry, because the most important witness, Satya Prakash, who is the first informant, was abducted, soon after the appellant, Pradeep was enlarged on bail. Pradeep was an accused in the case relating to his abduction and later on convicted in that case. Satya Prakash was never found thereafter. The Investigating Officer has explained in his testimony the reason and circumstances under which the statement of PW-4 under Section 161 of the Code was not recorded. The learned A.G.A. points out that the Investigating Officer has clearly said in his examination-in-chief that he recorded the statement of Ajaypal son of Ramdeen, that is to say, PW-3. He also points out that statement of PW-3 noted under Section 161 of the Code is available on record.

39. We have considered the submissions advanced by the learned Counsel appearing for both sides on this score very carefully. We have looked into the record and find that so far as the statement of Ajaypal, PW-3 is concerned, it finds place in CD-III of the Case Diary dated 21.11.2006. The witness, in his cross-examination, has said in categorical words that the Investigating Officer had never taken down his statement. He has further said that he was speaking about the occurrence for the first time in Court. The Investigating Officer, PW-9, on the other hand, in his examination-in-chief, that was recorded much after the evidence of PW-3, has clearly said that on 21.11.2006, he recorded the statement of Ajaypal son of Ramdeen, that is to say, PW-3. PW-9 took stand in the dock on 18.05.2009 to testify for the prosecution and was available to the appellants for cross-examination. He was cross-examined too. But, no question was put to him about the stand of PW-3 that his statement was never recorded by PW-9. PW-9, the Investigating Officer, is a public servant and has testified to the fact that he recorded the statement of PW-3 on 21.11.2006, that has gone unchallenged on behalf of the appellants. In the circumstances, it cannot be inferred that the statement of PW-3 was not recorded by the Police under Section 161 of the Code. Thus, so far as PW-3 is concerned, his evidence in the dock is not one that is without the advantage of a previous statement available to the appellants to contradict him in accordance with the proviso to Section 162(1) of the Code in the manner provided under Section 145 of the Evidence Act. The statement recorded under Section 161 shows that it was taken down by the Investigating Officer in the course of investigation without unreasonable delay. The contention of the learned Counsel for the appellants and the remarks of the learned Sessions Judge that the statement of PW-3 was not recorded by the Investigating Officer, are not borne out by the record. There is no case on behalf of the appellants that the statement of this witness was recorded, but not supplied. It is that it was never recorded. That for a fact is incorrect, as CD-III dated 21.11.2006 would show. For the said reason, the testimony of PW-3 is not required to be approached with the kind of caution

necessary in the case of a witness, who testifies before the Court without a previous statement of his recorded during investigation.

40. So far as the presence of PW-3, Ajaypal is concerned, it is urged by the learned Counsel for the appellants that this witness's house is not shown in the site plan, which he says, was located 20 paces away from the scene of crime. The omission does not cast any doubt about the presence of the witness. The location of house of a witness in the site plan, relating to a crime, drawn up by the Investigating Officer is not the centre of his attraction, so much so that its absence in the thumbnail sketch, that the site plan is, may lead to an adverse inference about the witness not living close by. What is important is that, in his cross-examination, the witness has said that his house is located at a distance of 20 paces, but no question appears to have been put to him about this assertion. In fact, there is nothing in the testimony of this witness, that may derogate from his presence at the scene of crime. He has described the occurrence naturally as he has seen it with reference to distance, time and place of the crime. In his cross-examination, he has given graphic details about the location, distance and direction of his house and that of the deceased. He has said that between Satya Prakash's house and the witness's, there is the house of one Shiv Ram. He has detailed the orientation of the road, where the crime happened and the relative direction of his house to the said road.

41. Likewise, about his presence in the village, PW-3 has said that he has joined a security agency as a Guard, nine months ante-dating the time that his testimony was recorded, though the offence had taken place about a year and a half earlier. Therefore also, there is no reason to doubt his presence in the village. He has also dispelled the suggestion on behalf of the accused that he had been working with the Security Agency in Delhi for the past 2-3 years. In the above circumstances, the presence of this witness at the scene of crime cannot be doubted.

42. The learned Sessions Judge has, more or less for the same reason, believed him to be an eye-witness, and not doubted his presence. We are in agreement with the learned Sessions Judge, for the added reasons that we have indicated.

43. So far as PW-4, Girja Devi is concerned, the Investigating Officer has admittedly not recorded her statement during investigation. In his cross-examination, about the part relating to his failure to record the statement of Smt. Girja Devi, PW-4, PW-9 has said:

"घटना के दूसरे दिन चार दिन बाद गवाहों के ब्यान देउना कलां में लिये। जिन जिन गवाहों ने घटना देखी उन उन गवाहों के ब्यान लिये थे। गिरजादेवी के ब्यान मैने अंकित नहीं किये। गिरजादेवी का पति इस केस का वादी था इसलिये उसके ब्यान नहीं लिये थे। और न ही गिरजादेवी ने अपनी इच्छा से ब्यान देने की कोशिश की। और न ही उसने घटना के बारे में मुझे बताया चूंकि औरते कोर्ट कचहरी से बचती है। उसके पति का ब्यान लिया था उसके ब्यान कि आवश्यकता नही समझी। वादी के ब्यान में यह कही भी अंकित नही है कि मेरी पत्नी की घटना स्थल पर मेरे साथ थी। चूंकि वादी तथा अन्य गवाहान ने यह बात नही बतायी थी कि घटना स्थल पर गिरजादेवी मौजूद थी इसलिए गिरजादेवी का ब्यान व नाम घटना स्थल पर मौजूदगी पर नही लिखाया।"

44. The Investigating Officer says that he did not take down the statement of PW-4, Smt. Girja Devi for the reason that her husband was the first informant and his statement had been recorded. The Investigating Officer has further said that neither did Girja Devi volunteer to get her statement recorded. She did not tell the Investigating Officer anything about the occurrence, because womenfolk avoid going to Court. The Investigating Officer also clarified that since her husband's statement had been recorded, he did not consider her statement necessary. It is on the aforesaid stand that the Investigating Officer has explained why he did not record Girja Devi's statement.

45. It must be remarked that Girja Devi is not a witness mentioned in the FIR or one cited in the charge-sheet. She has, according to the Investigating Officer, never spoken about the case. Thus, according to the Investigating Officer, this witness is not one whom he has questioned, but not recorded; according to him, she is a witness, who said nothing to him during investigation. Girja Devi, PW-4 too has said that the Police did not question her and she did not tell them anything, but has said in her cross-examination, to which more wholesome reference would shortly be made, that she had told the Darogaji the same day that the deceased was shot in her presence. Taking a holistic view of the evidence with reference to the scene of occurrence, one cannot miss the part that figures in the evidence of PW-3, where he says that when he reached the place of occurrence, the whole village was present there. He says that they were in such multitude that he would find it hard to name them. In a scenario such as this, given the fact that the place of occurrence was a few paces away from the deceased's home, where Smt. Girja Devi, PW-4 would be around, her presence at the scene of crime is logical and natural.

46. It is no matter of suspicion why this witness, though not named in the FIR, or cited in the charge-sheet, was put up by the prosecution to prove their case. They were least expecting that the first informant, who was an eye-witness and had been recorded during investigation, would become the victim of abduction without trace. It is this unusual event that very logically would make the prosecution look to some other person, who had witnessed the occurrence. In contemporary times experience dictates, of which Courts have taken the judicial notice that strangers seldom risk testifying to a heinous crime. It is a sombre reality that the office of a witness to a heinous crime, when faithfully discharged, is one of the most perilous of enterprises. It is no matter of surprise that it is the blood relatives of a victim, who take upon themselves the risk of discharging the society's trust to bring the offender to justice. We think that it is precisely this situation that has impelled the prosecution to put up a witness, whom they have not questioned during investigation, that is to say, Smt. Girja Devi, PW-4.

47. This would require this Court to look into the law about the probative value of the evidence of a witness, whose statement during investigation was never recorded and who was not cited in the charge-sheet. One of the early decisions after the provisions of Section 161(3) were introduced in the present form to the Code of Criminal Procedure, 1898 is In re **Bheemavarapu Subba Reddi and another9,** where the issue was about the legality of the practice amongst Investigating Officers of taking down notes

of whatever was ascertained from witnesses and then setting them out formally in the case diary. This practice was assailed on behalf of the accused not only as one that ran counter to the mandate of the then newly amended provision of sub-Section (3) of Section 161 of the Code of Criminal Procedure, 1898, but a practice that prejudiced the accused in the matter of his defence. It was argued that the statement had to be recorded separately for each person, if the Investigating Officer chose to reduce it to writing. The statements, if recorded as short notes or rough notes, would be different from the ones elaborated in the case diary and that would handicap the accused from contradicting a witness with reference to his earlier statement. In a context very detailed and may be different, the remarks of Horwill, J. in his separate but concurring opinion have enlightening bearing on the point:

".....It is often of great assistance to the Court to know what the earlier statements of witnesses were; and an accused who cannot point to contrary statements made by witnesses when first examined, because those statements were not recorded, labours under a disadvantage that should be avoided unless the exigencies of the investigation make the recording of statements undesirable."

(Emphasis by Court)

48. In a much later decision, a Division Bench of the **Madhya Pradesh** High Court in **Gabbu vs. State of M.P.10**, taking note of the decision of the Madras High Court in In re **Bheemavarapu Subba Reddi** *(supra)* did not accord any value to the evidence of a witness for the prosecution, whose statement was not recorded during investigation. In **Gabbu** *(supra)*, it was held:

"11. Another witness Dinesh Kumar (PW 6) also could not be relied on because admittedly, his statement was not recorded under section 161, Criminal Procedure Code during the course of investigation. Therefore, appellants were not aware that on what point and purpose this witness was cited in the charge sheet and in Court they were taken into surprise when he was examined as eye witness. Mr. J.S. Ahluwalia (PW 13), Investigating Officer was also not in a position to state before the Court whether he was cited as eye witness in the charge-sheet or not. He has specifically stated that along with charge-sheet, statement of this witness recorded under section 161, Criminal Procedure Code was not filed. Though it is not mandatory to record statement of witness during the course of investigation but when the witness was available and cited in the charge-sheet, the prosecution has to explain as to why his statement was not recorded and on what point he was going to be examined especially when he was one of the important eye witnesses of the incident.

....."

49. It must be remarked about the decision in Gabbu, that their Lordships did not accord weight to the evidence of the witness whose statement was not recorded by the Police, for the reason that he was a witness cited in the charge-sheet and the Investigating Officer, apparently, did not explain why his statement was not recorded. Here, the position is much different. There is evidence to indicate that almost the whole village had witnessed the incident and the Investigating Officer had taken down the statements of those who were logically the best and dependable witnesses. Of these, the first informant,

most unexpectedly, disappeared a few months after the occurrence, leaving the prosecution without its star witness who had seen the occurrence from its origin. It was logical in these circumstances for the prosecution to look for those witnesses who had seen the occurrence, but for exigencies more than obvious were not considered necessary to be examined by the Investigating Officer. Smt. Girja Devi, PW-4 falls precisely into that category.

50. The evidence of a witness, whose previous statement has not been taken down, is not inadmissible. It has merely to be approached with some caution and relied upon after seeking some corroboration. There could be situations where an eye-witness has a dependable account of the occurrence to tell, but the Police, for some reason, discount him/ her at the time when they investigate. Here, PW-4 was kept out of the Investigating Officer's diary for reasons he has convincingly explained. The remarks of **Horwill, J. in Subba Reddi,** where His Lordship has emphasized the disadvantage to the accused if the statement of a witness during investigating is not available and the consequent importance of recording them, make clear allowance for exigencies of investigation that render recording of such statements "undesirable". To the exception, on account of recording of the statement being "undesirable', one can safely add another based on "sheer unnecessity' at the time when the Investigating Officer went about his task. Of course, a witness though unnecessary at the time of investigation to record, can be considered for his testimony in Court, if later exigencies make it imperative. But, the evidence of such a witness has to be carefully scrutinized, given the disadvantage that the accused suffers from in the absence of a previous statement to contradict and shake his veracity.

51. In **Babar Ali vs. State of Assam11,** a Division Bench of the Gauhati High Court was seized of a case, where the sole eye-witness and the first informant, for some reason had not been examined by the Investigating Officer under Section 161 of the Code. In considering the weight of his evidence to reach a just decision, it was observed:

"12. Thus, we find that P.W.-5 was the only eye witness, who was present at the place of occurrence and who has come forward to depose. He was not a stranger to the prosecution or to the defence as it was he who lodged the FIR. He was also present at the time of inquest. The Investigating Police Officer for the reasons best known to him did not record his statement under Section 161 Code of Criminal Procedure in such a serious case of homicide. It may be a case of genuine mistake omission or it may be intentional but the question is if the Investigating Police Officer with some ulterior motive omits to record the statement of the solitary eye witness, does it mean that the entire prosecution should fail on that count? If such unbridled power is given to the investigating police officer some unsecuruplous Investigating Police Officer may play havoc. Offence of murder are categorized as serious offences and as per the police Mannual, investigation in such a case is required to be supervised by senior Police Officer. In the present case the eye witness statement was not recorded and even the supervising Police Officer, if any, could not detect the above defect. ....."

14. In view of the above, we hold that for mere non-recording of the

statement under Section 161 Code of Criminal Procedure by the Investigating Police officer, the evidence adduced by P.W. 5 before the Court cannot be thrown out. However, considering the above omission, we have analyzed the evidence of P.W.-5 and find that his testimony is true, reliable and trustworthy. His statement inspire confidence and as a matter of fact, there was earlier version in the form of FIR. We have no hesitation to hold that the testimony of P.W.-5 is wholly reliable."

52. The testimony of a witness may have to be approached with caution, whose previous statement recorded under Section 161 or 164 of the Code is not available to test his veracity, but it cannot be discarded as inadmissible or of no probative value. It has to be tested for its worth in the foreshadow of other evidence and circumstances.

53. Although Smt. Girja Devi, PW-4, is not cited in the charge-sheet as an eye-witness, but has said that she was present. PW-4 would either have been working inside or outside her house, when the crime happened. It is but logical that she would have witnessed it, given the location of the deceased's house and the place of crime being just 20-25 paces apart. PW-4 is a very natural witness of the occurrence. To doubt her presence at the scene of crime would be an inference based on strained logic. The testimony of PW-4 is graphic in its detail about the occurrence. It recounts the genesis of the dispute between parties, much earlier in the day, to which she was privy. This witness, during her cross-examination, about her statement to the Police, has said thus:

"गोली लगने के करीब 1 घंटे बाद पुलिस आई थी। पुलिस के आने के बाद रिपोर्ट लिखाने सब लोग गये। मुझसे पुलिस ने कोई पूँछ ताँछ नहीं की थी। मैंने भी पुलिस वालों को कुछ नहीं बताया था। मैंने यह बात कि मेरे सामने गोली मारी थी दरोगा जी को उसी दिन बताई थी दरोगा जी को बताने के बाद आज अदालत में बता रही हूँ। मैंने वकील साहब से कोई पूँछताँछ मुकदमें के बारे में नहीं की। दरोगा जी दुवारी आये थे पर मैं नहीं मिली थी।"

She was also questioned by the Court about the fact of her statement being taken down by the Police. The relevant part of her answer to the Court's question is as follows:

"To Court. मैंने अपने पति से नहीं पूँछा था कि मेरा नाम गवाही में लिखाया है या नहीं क्योंकि मुझे मालुम था कि मेरा नाम गवाही में है।"

54. The learned Counsel for the appellants has said that the presence of this witness is demonstrably doubtful at the scene of crime going by her cross-examination as above extracted. It is pointed out that in one breath, she has said that she did not say anything to the Police and in the next, says that she told the *Darogaji* the same day of having witnessed her son being shot, a fact that she has testified to in Court.

55 The testimony of a witness about his/ her presence has, like any other evidence, to be read as a whole and co-related with other evidence and circumstances. Also, the intellectual accomplishment of a witness or mental capabilities have to be borne in mind. PW-4 is a house-wife, staying home all time with no formal training or education. The first part of her statement, where she says that she has said nothing to the Police, is

obviously a response in answer to the question if the Police had questioned her and the next part, where she says that she had told the Darogaji the same day of witnessing her son being shot, is something said in answer to a different question about the fact of telling the Police if she had seen the crime. It is but obvious that an uneducated woman, living in a rural milieu, would have her own notions about the Police questioning her and about telling them some facts of her own. It is all the more logical because the Investigating Officer, PW-9, in his cross-examination, has clearly stated that he never questioned Girja Devi nor did she volunteer a statement before him. He has said that the informant never told him that his wife was with him at the place of occurrence.

56. Upon a holistic view of the said testimony of Girja Devi and the Investigating Officer, it is pellucid that she was located in her home, too close to the spot, to be doubted about her presence on the scene of crime. The minor vacillations in her testimony about the Police not asking her anything and the witness not making a statement to the Police in one breath, and in the second, saying that she told the Police the same day about witnessing the shooting, are to be understood in the context of the locale of the crime and the rural way of life, where the Police had the first informant for a witness and a number of menfolk volunteering to testify. No matter, the Police would have paid little attention to whatever PW-4 said to them. PW-4 would be right in saying that she must have told the Investigating Officer or some other Sub-Inspector about the occurrence, but never being formally questioned, she has said elsewhere that the Police did not question her and she did not tell them anything.

57. In answer to the Court's question, the witness has said that her name was there amongst witnesses and has further said that she did not know, till the date she was testifying in the dock that her name was not there. She has further said that because she believed that her name was there as a witness, she did not ask her statement to be recorded. It is apparent from this part of the evidence of PW-4 that she believed all along that her name had been cited as a witness and she would testify in Court. The learned Sessions Judge has remarked about the testimony of this witness that she is an illiterate woman, who has thumb marked her application made to the Court to volunteer as a witness, which shows that she is a rustic woman. She would not understand the niceties of the law, but her stand clearly shows that she has, all along, considered herself to be a witness and has, therefore, applied to the Court to testify.

58. In the circumstances, the learned Sessions Judge has believed the presence of this witness on the scene of crime and we see no reason to differ from that conclusion of his. We, therefore, find that both PW-3 and PW-4 are not got up witnesses, though the statement of PW-4 was not taken down by the Police under Section 161 of the Code. They are, indeed, natural witnesses. Of course, since a prior statement of PW-4 is not available, her testimony has to be carefully considered about its probative value, because the accused have been disadvantaged in the matter of contradicting her with reference to her previously recorded statement.

Material contradiction between the eye-witnesses

59. It is argued by Mr. Sengar, learned Counsel for the appellants that it is a case where there is material contradiction in the

evidence of the two witnesses. It is submitted by the learned Counsel that in case of material contradiction between the evidence of the two witnesses of fact here, that is to say, PW-3 and PW-4, conviction is unsustainable. In support of his submission, the learned Counsel has taken this Court through the testimony of PW-3 and PW-4, pointing out contradictions that he castigates as material. We have carefully perused the testimony of both the witnesses. Our attention has been drawn to the part of cross-examination of PW-3 Ajaypal, where the witness has been questioned about the occurrence. He has said there that when he reached the spot, one round had been fired. The second was in his presence. The bullet struck Harveer on his back. This part of his testimony has been extracted in this judgment. It is pointed out that, by contrast, PW-4, Smt. Girja Devi, in describing the fatal event, has said that the second round was fired soon after the first. The deceased was shot from a distance of 20-25 paces. It was the shot from the pistol, that struck the deceased just below the chest, described in Hindi vernacular as 'kokh'. Broadly speaking, according to this witness, the bullet struck the deceased from the front and it is the submission of the learned Counsel for the appellants that according to PW-3, the deceased was shot in his back.

60. Seen in isolation, this does appear to be a contradiction in the account of the fatal occurrence by the two witnesses. Mr. Sengar says that this is a material contradiction, which cannot be overlooked. He buttresses his submission with the holding of their Lordships of the Supreme Court in **Harkirat Singh v. State of Punjab12**, where it was observed:

"3. To sustain the charges levelled against the appellant the prosecution relied principally upon the ocular version of Gurmit Singh (PW 3), Kharaiti Lal (PW 4) and Ajit Singh (PW 5). Walaiti Ram who had seen the incident and lodged the FIR could not be examined as he died in the meantime. Of the three eyewitnesses Gurmit Singh however turned hostile. In their testimonies Kharaiti Lal (PW 4) and Ajit Singh (PW 5) supported the entire prosecution case as stated above but their cross-examination revealed that in their statements recorded under Section 161 CrPC both of them had stated that the appellant was armed with dang (stick) -- and not pistol -- and that it was accused Raghbir Singh (since acquitted) who was armed with a pistol and had fired as a result of which Kharaiti Ram died and Gurmit Singh sustained injuries. Undoubtedly, these material contradictions made the evidence of these two witnesses suspect but still then, we find, the trial court and the High Court relied upon their testimonies ignoring the above material contradictions with a finding that the investigation was perfunctory and that with the ulterior object of shielding the real accused the statements of the above two eyewitnesses were recorded under Section 161 CrPC. In drawing the above conclusion, the High Court made the following comments:

"PW 4 Kharaiti Lal has made his statement in the inquest proceedings and a perusal of the same shows that he had mentioned in that statement that it was Harkirat Singh who had fired the shots from the pistol. Even in the first information report, it is clearly mentioned that Harkirat Singh had fired the shots. The statement in the inquest report and the statement under Section 161 CrPC were recorded on the same day, i.e., 29-11-1986. The contradiction in these two documents shows that the investigation was not fairly

conducted in this case. It appears that an effort was made to give benefit to Harkirat Singh. We do not attach any importance to the fact that the statement under Section 161 CrPC shows that it was Raghbir Singh who had fired the shots."

4. In our considered view, the High Court was not justified in treating the statement allegedly made by Kharaiti Lal during inquest proceedings as substantive evidence in view of the embargo of Section 162 CrPC. Equally unjustified was the High Court's reliance upon the contents of the FIR lodged by Walaiti Ram who, as stated earlier, could not be examined during the trial as he had died in the meantime. The contents of the FIR could have been used for the purpose of corroborating or contradicting Walaiti Ram if he had been examined but under no circumstances as a substantive piece of evidence. Having regard to the facts that except the evidence of the two eyewitnesses there is no other legal evidence to connect the appellant with the offences for which he has been found guilty and that in view of the material contradictions the evidence of the two eyewitnesses cannot be safely relied upon the appellant is entitled to the benefit of doubt. ....."

61. Mr. Sengar submits that the holding in **Harkirat Singh** *(supra)* has a decisive bearing not only on principle, but as the principle works on facts. He emphasizes that the facts in Harkirat Singh have a striking similarity to those here in that, that the first informant there was also dead before the case went to trial and of the three eye-witnesses, one had turned hostile, whereas the other two had supported the prosecution. The similarity does not end there. Of the two witnesses, who supported the prosecution, their Lordships held their testimony in the dock to be contradictory to the statements recorded under Section 161 of the Code.

62. This Court is of opinion that the principle in **Harkirat Singh** would not be attracted to the facts here at all. The reason is that in **Harkirat Singh,** the discrepancy between the statements to the Police and the dock evidence was that, in Court, the witnesses said that the appellant was armed with a pistol and had shot the deceased, whereas in their statements to the Police, they said that the appellant was armed with a stick. Another accused, Raghbir Singh, who had since been acquitted, was spoken of in their statements by the witnesses to the Police as the one armed with a pistol, who had shot the deceased and caused injuries to another victim. Thus, it was on this kind of a contradiction about the weapons wielded and the author of the fatal injury that their Lordships opined the investigation to be one that was perfunctory and done with the ulterior object of shielding the real accused. In those circumstances, taking note of the prosecution's handicap caused by the absence of the first informant, who too was an eye-witness, benefit of doubt was extended to the accused.

63. Here, by contrast, what this Court finds is that there is not the slightest contradiction in the testimony of both witnesses of fact, that the deceased was shot at by both the appellants. PW-4 has specified the the fact that the deceased was hit by the bullet that spewed from the country-made pistol wielded by Akhilesh. This is an added observation coming from PW-4, that PW-3 does not contradict. PW-3 and PW-4 are also unanimous about the place of occurrence, that is to say, almost at the door or in front of Ram Prakash's

house. The contradiction, that is built upon by the learned Counsel for the appellants, is the difference in the version of the two witnesses, about the site where the bullet hit the deceased. PW-3 says that the deceased was hit on his back, whereas PW-4 says he was struck in the chest/ stomach (described as 'kokh').

64. In a witness's account of the occurrence about something as violent as murder, where events happen in the split of a second, observational discrepancies may arise. Different persons may have varying perceptions of an event like the one about the part of the body, where the bullet struck. It is very logical in the nature of things for two witnesses to perceive the precise situs of the shot, particularly, in case of a crime as dangerous and gory as murder, with observational differences.

65. Contrary to what is urged on behalf of the appellants, rather than discrediting the two witnesses for the discrepancy where the bullet hit the deceased, we are inclined to think that both witnesses are utterly truthful and have given an unvarnished account of the occurrence, as they have perceived it. We would think that the witnesses are so truthful that they have stated without improvement what they have perceived. It was not difficult for them to say, after the lapse of a year and a half between the occurrence and the trial, that the deceased was hit in the chest just below the rib cage, going by the medico-legal evidence, that was available in plenty by that time. If the two witnesses were mouthpieces for the prosecution or the Police, they would have spoken with perfection about the site of the injury. The fact that they have spoken about the occurrence in the manner that they have perceived it, shows them to be dependable witnesses. The facts that both PW-3 and PW-4 are ad idem about the place of occurrence and that both the appellants opened fire, targeting the deceased, with PW-4 specifying that Akhilesh fired the fatal shot from his pistol, wholesomely make the account of the two witnesses free from the blemish of contradiction; particularly, embellishment or tutoring.

66. In appreciating discrepancies in the evidence of witnesses, that do not render the evidence utterly suspect or false, it was observed by the Supreme Court, after reference to earlier authority, in **Jayaseelan v. State of Tamil Nadu13:**

"13. Stress was laid by the appellant-accused on the non-acceptance of evidence tendered by PW 1 to a large extent to contend about the desirability to throw out the entire prosecution case.

"10. ... In essence the 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 major portion of evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, his conviction can be maintained. It is the duty of the court to separate grain from chaff. Where chaff can be separated from grain, it would be open to the court to convict an accused notwithstanding the fact that evidence has been found to be deficient, or to be not wholly credible. Falsity of 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 witness or witnesses cannot be branded as liar(s). The maxim "falsus in uno falsus in omnibus' has not received general acceptance nor has this maxim come to occupy the status of the rule of law. It is

merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be called a mandatory rule of evidence. (See Nisar Ali v. State of U.P. [AIR 1957 SC 366]) In a given case, it is always open to a court to differentiate the accused who had been acquitted from those who were convicted where there are a number of accused persons. (See Gurcharan Singh v. State of Punjab [AIR 1956 SC 460] .) The doctrine is a dangerous one specially in India for if a whole body of the testimony were to be rejected, because the 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 respect 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] .) An attempt has to be made to, as noted above, in terms of felicitous metaphor, separate grain from the chaff, truth from falsehood. Where it is not feasible to separate 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] and Balaka Singh v. State of Punjab [(1975) 4 SCC 511 : 1975 SCC (Cri) 601] .) As observed by this Court in State of Rajasthan v. Kalki [(1981) 2 SCC 752 : 1981 SCC (Cri) 593] 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. The courts have to label the category to which a discrepancy may be categorised. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. These aspects were highlighted in Krishna Mochi v. State of Bihar [(2002) 6 SCC 81 : 2002 SCC (Cri) 1220] and in Sucha Singh v. State of Punjab [(2003) 7 SCC 643 : 2003 SCC (Cri) 1697] . It was further illuminated in Zahira Habibulla H. Sheikh v. State of Gujarat [(2004) 4 SCC 158 : 2004 SCC (Cri) 999] , Ram Udgar Singh v. State of Bihar [(2004) 10 SCC 443 : 2004 SCC (Cri) Supp 550] , Gorle S. Naidu v. State of A.P. [(2003) 12 SCC 449 : 2004 SCC (Cri) Supp 462] and in Gubbala Venugopalaswamy v. State of A.P. [(2004) 10 SCC 120 : 2004 SCC (Cri) 1764] "

See Syed Ibrahim v. State of A.P. [(2006) 10 SCC 601 : (2007) 1 SCC (Cri) 34] at SCC pp. 605-06, para 10."

67. The learned Sessions Judge has explained the discrepancy in the

incongruent observation of PW-3, about the deceased being shot in the back, on the basis of the FIR version which shows that the deceased and his father were chased by the appellants and the deceased shot in the chase. The learned Sessions Judge has thought that to an observer, who was watching the victim flee and shot at, it would appear that the bullet hit him on the back. Here, the learned Sessions Judge has conjectured a bit to say that while fleeing, the deceased must be looking back, which caused him to receive the bullet injury on the front of his body. We do not think that so much of conjecture is required to recapitulate the scene of crime. The essential facts about the manner, place and perpetration of the crime are spoken about unanimously by both the witnesses of fact. The discrepancy about the situs of the entry wound is more on account of fallacies of perception of one of the witnesses, depending upon many factors that aberrate human observations, in a situation like the present one. We have spoken about it earlier and need not dilate further. Moreover, the FIR, for reasons already shown, is not to be looked into for its contents about the account of the occurrence. In our considered opinion, there is no material discrepancy between the testimony of the two witnesses of fact.

Variation between medical and ocular evidence

68. It is argued by the learned Counsel for the appellants that the prosecution case is under a grave cloud of doubt, because there is a serious and material discrepancy between the ocular and medical evidence. Dilating on this submission, Mr. Sengar says that whereas according to Ajaypal, PW-3, the deceased was shot in the back by Akhilesh, a perusal of the autopsy report, Ex. Ka-2, shows that the deceased received a single firearm wound of entry in the right side of the lower part of his chest. This, at least, discredits Ajaypal as a witness of fact, if not the other witness Smt. Girja Devi, PW-4, whose testimony is consistent with the medico-legal evidence.

69. We have considered the aforesaid submission of the learned Counsel for the appellants very thoughtfully. It need not detain us for long, because we have already dealt with the same submission from another vantage while considering the criticism of the prosecution case by the appellants on the premise of a material variation between the two witnesses of fact. We have opined there that there are many factors causing errors of perception in the nature of an event as gory as murder. The error may be attributed to the directional orientation of the deceased vis-à-vis the witness, the suddenness of the event, the very nature of a firearm injury, which may escape human attention about its site and many other similar factors. This discrepancy between the medico-legal evidence and the testimony of one of the witnesses of fact is not at all so material so as to place the prosecution under a shadow of 'reasonable doubt'.

Evaluation of the testimony of PW-3 and PW-4

70. We have held elsewhere in this judgment that evidence of PW-3 does not suffer from any kind of infirmity on ground that his previous statement recorded during investigation is not available. That criticism of his testimony by the learned Counsel for the appellants and the remarks of the learned Sessions Judge, that seem to support it, are both utterly contrary to the

record. The statement of this witness was recorded by the Police and finds place in CD-III dated 21.11.2006. This witness in his cross-examination has not been confronted with his previous statement when he took a stand that his statement was never taken down by the Police. The Investigating Officer has clearly said in his testimony that he has recorded the statement of this witness, about which he has not been challenged. The witness figures in the charge-sheet and his presence at the scene of crime is established. His testimony is consistent about the date, time, place and the manner of occurrence. He is a dependable witness, who has come out with an account of the crime that is corroborated by the testimony of PW-4 and the other circumstances noticed by us.

71. The Investigating Officer, PW-9 in his cross-examination has reasonably explained his inaction in not taking down the statement, particularly, of PW-4, Smt. Girja Devi. We have noticed elsewhere that there is no reason to doubt the presence of this witness at the scene of crime. She is a natural witness given the location of her house, a few paces away from the place of occurrence. The other circumstances, that we have noticed earlier in this judgment, clearly show that she witnessed the crime. There are very plausible reasons why the Investigating Officer did not record her statement. It was largely on account of the fact that the first informant was available and the most authentic eye-witness to testify. She has volunteered to testify for the prosecution after the first informant was abducted, clearly establishing her presence. Nevertheless, since her previous statement is not available, we have carefully scrutinized her testimony seeking corroboration with other evidence, direct and circumstantial. Her account of the occurrence is corroborated about essential facts and circumstances attending the crime by the evidence of PW-3, besides the medico-legal evidence.

72. The next fact of relevance in judging the probative value of the evidence of the two witnesses is their relationship to the deceased; and also to the appellants. PW-3 has said in his cross-examination that Satya Prakash was his nephew and so is Pradeep. PW-4 Smt. Girja Devi has said that both the appellants, Pradeep and Akhilesh are the sons of her sister. Thus, both witnesses are close relatives, both of the deceased and the two appellants. This is a fact, which in our opinion, lends inherent weight to the testimony of these witnesses, particularly, PW-4. There is no reason, going by the common and established experience of human nature and the world, for an aunt (maasi) to falsely implicate her sister's sons in a crime, carrying the highest penalties of the law, including death. We are alive to the fact that a false implication by an aunt is not an absolute impossibility, but to draw that kind of inference, the accused would have to explain the motive for the different, discordant or peculiar behaviour. In their statements, under Section 313 of the Code, both the appellants, who are nephews of PW-4 Smt. Girja Devi, have not assigned any particular reason why she would choose to falsely implicate them. In the absence of an explanation about false implication by a blood-relative of this proximity, it is difficult to look at Girja Devi's evidence with suspicion. Likewise is the case with the testimony of PW-3 Ajaypal, about whom no reason to falsely implicate has been given by the accused in their statement under Section 313 of the Code, except omnibus words that they have been falsely and wrongly implicated.

73. Quite apart, there is another aspect of the matter also. It is an acknowledged principle in assessing the testimony of close relatives of the deceased or the victim of a crime, which has come to be settled over time that such relatives, far from being regarded as what are known as interested witnesses, are to be trusted as inherently reliable, unless there be some cause to show animosity or motivation. Their probity comes from the fact that the relative of a victim of the crime would be the last person to get an accused convicted in error by their false evidence, thereby paving way for the real offender to go free. In this connection, reference may be made to the guidance of the Supreme Court in **Rizan v. State of Chhattisgarh14,** where it has been held:

"6. We shall first deal with the contention regarding interestedness of the witnesses for furthering the prosecution version. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal the actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible.

7. In Dalip Singh v. State of Punjab [AIR 1953 SC 364 : 1953 Cri LJ 1465] it has been laid down as under : (AIR p. 366, para 26)

"26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

8. The above decision has since been followed in Guli Chand v. State of Rajasthan [(1974) 3 SCC 698 : 1974 SCC (Cri) 222] in which Vadivelu Thevar v. State of Madras [AIR 1957 SC 614 : 1957 Cri LJ 1000] was also relied upon.

9. We may also observe that the ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dalip Singh case [AIR 1953 SC 364 : 1953 Cri LJ 1465] in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J. it was observed : (AIR p. 366, para 25)

"25. We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. If the foundation for

such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in -- "Rameshwar v. State of Rajasthan [AIR 1952 SC 54 : 1952 Cri LJ 547] ' (AIR at p. 59). We find, however, that it unfortunately still persists, if not in the judgments of the courts, at any rate in the arguments of counsel."

74. In **Namdeo v. State of Maharashtra15** while judging the solitary evidence of the deceased's son, who was castigated by the defence as an interested witness, it was held by their Lordships of the Supreme Court thus:

"29. It was then contended that the only eyewitness, PW 6 Sopan was none other than the son of the deceased. He was, therefore, "highly interested" witness and his deposition should, therefore, be discarded as it has not been corroborated in material particulars by other witnesses. We are unable to uphold the contention. In our judgment, a witness who is a relative of the deceased or victim of a crime cannot be characterised as "interested". The term "interested" postulates that the witness has some direct or indirect "interest" in having the accused somehow or the other convicted due to animus or for some other oblique motive.

37. Recently, in Harbans Kaur v. State of Haryana [(2005) 9 SCC 195 : 2005 SCC (Cri) 1213] the conviction of the accused was challenged in this Court, inter alia, on the ground that the prosecution version was based on testimony of relatives and hence it did not inspire confidence. Negativing the contention this Court said: (SCC p. 198, para 7)

"7. There is no proposition in law that relatives are to be treated as untruthful witnesses. On the contrary, reason has to be shown when a plea of partiality is raised to show that the witnesses had reason to shield the actual culprit and falsely implicate the accused."

38. From the above case law, it is clear that a close relative cannot be characterised as an "interested" witness. He is a "natural" witness. His evidence, however, must be scrutinised carefully. If on such scrutiny, his evidence is found to be intrinsically reliable, inherently probable and wholly trustworthy, conviction can be based on the "sole" testimony of such witness. Close relationship of witness with the deceased or victim is no ground to reject his evidence. On the contrary, close relative of the deceased would normally be most reluctant to spare the real culprit and falsely implicate an innocent one."

75. We have carefully scrutinized the evidence of both the witnesses and our analysis of it finds it to be a very dependable account of the occurrence. There is no reason shown by the appellants, even remotely, as already remarked, for their aunt (mother's sister) to falsely implicate. The same holds true for PW-3 as well, who is also a relative of the deceased as well as the appellants. No element of taint, originating from any reason to falsely implicate, has remotely been suggested or shown to us. There is no reason why the evidence of the two witnesses of fact, whose presence on the spot is not in doubt and who are very natural witnesses, should

not be accepted. While the advantage of contradicting one of these witnesses, PW-4, with reference to her previous statement might not be there, a searching cross-examination, both of PW-3 and PW-4, otherwise done, has not shaken them in the least measure about the basic fabric of the prosecution case. Both of them were consistent and unwaivering about the date, time, place and the weapons of assault. PW-4 has consistently spoken about the author of the fatal injury. The origin of the dispute, emanating from the use of common facility of a tubewell, has also figured consistently. The slight differences that appear are essentially the result of the point in time and the vantage that the witnesses had to view the occurrence.

76. There is yet another corroborating fact of consequence that lends credence to PW-3 and PW-4, the witnesses of fact. The conduct of an accused, absconding from the place of occurrence, is very relevant as res gestae. Both the accused were apprehended by the Police on way to Etah. It is possible that being named in an FIR and talked about in the community, a person may abscond out of fear. But, where the evidence against an accused is an eye-witness account, the conduct in fleeing the locale of the occurrence lends support to the prosecution. It is certainly relevant evidence that would support the prosecution hypothesis. In this connection, reference may be made to the holding of the Supreme Court in **Mritunjoy Biswas v. Pranab alias Kuti Biswas and another16**, where it has been observed:

30. Be it noted, the other two witnesses have deposed about the accused running away from the place of occurrence immediately. That apart, the accused had absconded from the village. We are absolutely conscious that mere abscondence cannot from the fulcrum of a guilty mind but it is a relevant piece of evidence to be considered along with other evidence and its value would always depend the circumstances of each case as has been laid down in Matru v. State of Uttar Pradesh, (1971) 2 SCC 75, State of M.P. through C.B.I. and others v. Paltan Mallah and others, (2005) 3 SCC 169 and Bipin Kumar Mondal v. State of West Bengal, (2010) 12 SCC 91. In the instance case, if the evidence of the witnesses are read in a cumulative manner, the abscondence of the accused gains significance."

77. Here also, placed against the consistent eye-witness account of the two witnesses of fact, the conduct of the appellants in moving away from the village, only to be apprehended by the Police, while waiting to board a vehicle to Etah, lends much support and assurance to the testimony of PW-3 and PW-4. Wholesomely, the evidence of both the witnesses of fact is free from blemish and is, therefore, dependable.

Non-examination of weapon, blood-stained clothes and earth by forensics

78. It is argued by the learned Counsel for the appellants that though blood-stained clothes, blood-stained soil and the weapon of assault were all recovered by the prosecution, these were not sent for forensic examination to ascertain use of the weapon in the assault and to connect the blood-stains on the clothes and the soil with the deceased. It is submitted that unless it is done, the appellants are entitled to acquittal. Reliance has been placed by the learned Counsel for

the appellants on the decision of the Supreme Court in **State of Uttarakhand v Jairnail Singh17**. Learned Counsel has particularly drawn our attention to the following remarks of their Lordships in **State of Uttarakhand v Jairnail Singh:**

"18. First, the parties involved in the case namely, the victim, his brother, who was one of the eye-witnesses with other two eye-witnesses and the accused were known to each other then why the Complainant-brother of victim in his application (Ex-P-A) made immediately after the incident to the Chief Medical Superintendent, Pilibhit did not mention the name of the accused and instead mentioned therein "some sardars".

19. Second, according to the prosecution, the weapon used in commission of offence was recovered from the pocket of the accused the next day, it looked improbable as to why would the accused keep the pistol all along in his pocket after the incident for such a long time and roam all over.

20. Third, the weapon (pistol) alleged to have been used in the commission of the offence was not sent for forensic examination with a view to find out as to whether it was capable of being used to open fire and, if so, whether the bullet/palate used could be fired from such gun. Similarly, other seized articles such as blood-stained shirt and soil were also not sent for forensic examination.

21. Fourth, weapon (Pistol) was not produced before the concerned Magistrate, as was admitted by the Investigating Officer.

22. Lastly, if, according to the prosecution case, the shot was hit from a very short distance as the accused and the victim were standing very near to each other, then as per the medical evidence of the Doctor (PW-6) a particular type of mark where the bullet was hit should have been there but no such mark was noticed on the body. No explanation was given for this. This also raised some doubt in the prosecution case.

23. In our considered opinion, the aforesaid infirmities were, therefore, rightly noticed and relied on by the High Court for reversing the judgment of the Sessions Court after appreciating the evidence, which the High Court was entitled to do in its appellate jurisdiction. We find no good ground to differ with the reasoning and the conclusion arrived at by the High Court."

79. It is the third of the listed infirmities about the prosecution case that the learned Counsel for the appellants has pressed in aid of his submission here. We must say at once that it was in the totality of five other relevant facts indicated by their Lordships that the non-examination of the weapon of offence and the blood-stained shirt and soil by the Forensic Science Laboratory, was held to vitiate the prosecution. To our understanding, it has not been laid down as an infallible rule, in cases of direct testimony of eye-witnesses, that failure to send the recovered weapon of crime to the Forensic Science Laboratory or the blood-stained clothes and earth would subject the prosecution to any kind of doubt. The well acknowledged principle is that, where the testimony of eye-witnesses is clear, consistent and confidence inspiring, forensic co-relation is not essential to sustain a conviction. In this connection, we may refer to with profit what was said about lack of support by forensic evidence to a clear ocular version in **Rakesh and another v. State of Uttar**

Pradesh and another18, where it was held:

"12. Now so far as the submission on behalf of the accused that as per the ballistic report the bullet found does not match with the firearm/gun recovered and therefore the use of gun as alleged is doubtful and therefore benefit of doubt must be given to the accused is concerned, the aforesaid cannot be accepted. At the most, it can be said that the gun recovered by the police from the accused may not have been used for killing and therefore the recovery of the actual weapon used for killing can be ignored and it is to be treated as if there is no recovery at all. For convicting an accused recovery of the weapon used in commission of offence is not a sine qua non. PW 1 and PW 2, as observed hereinabove, are reliable and trustworthy eyewitnesses to the incident and they have specifically stated that A-1 Rakesh fired from the gun and the deceased sustained injury. The injury by the gun has been established and proved from the medical evidence and the deposition of Dr Santosh Kumar, PW 5. Injury 1 is by gunshot. Therefore, it is not possible to reject the credible ocular evidence of PW 1 and PW 2 -- eyewitnesses who witnessed the shooting. It has no bearing on credibility of deposition of PW 1 and PW 2 that A-1 shot deceased with a gun, particularly as it is corroborated by bullet in the body and also stands corroborated by the testimony of PW 2 and PW 5. Therefore, merely because the ballistic report shows that the bullet recovered does not match with the gun recovered, it is not possible to reject the credible and reliable deposition of PW 1 and PW 2."

80. It appears from the evidence that the weapon of offence, the blood-stained earth and the clothes were sent to the Forensic Science Laboratory, but not produced at the trial due to some lapse of the Investigating Officer. In our opinion, mere failure of the Investigation Agency in producing reports of the F.S.L. relating to the weapon of offence and the blood-stained earth and clothes would not derogate from the veracity of the prosecution, established by a dependable and tested eye-witness account.

Mere recovery of murder weapon does not establish a charge under Section 302 IPC

81. It is urged by the learned Counsel for the appellants that evidence led by the prosecution to prove the case under Section 25 of the Arms Act could not be the basis to hold the charge under Section 302 IPC established against the appellants. This submission of the learned Counsel for the appellants draws inspiration from a decision of the Delhi High Court in **Saddak Hussain v. State (NCT of Delhi)19**, where it was held by a Division Bench of the Delhi High Court:

"26.Considering the fact that at no stage did the prosecution project a case that it was the appellant, who had fired at the deceased, rather it was their consistent stand that it was A-5, who had taken out a pistol from his possession and fired at the victim on his chest and he had succumbed to the said injuries, we are left wondering as to where was the occasion for the trial court to have convicted the appellant for the offence under Section 302 IPC on the ground of recovery of the weapon of offence? The only role allegedly attributed to the appellant in the entire incident was that he had grabbed the victim by his face and thrashed him by saying that "Tu

hamare khilaf gawahi dega". Thereafter, the appellant alongwith the other accused persons had started beating Jeet, who tried to save himself by running towards a nearby country liquor shop. On reaching near the said country liquor shop, the appellant and the other accused persons had again caught hold of Jeet and thrashed him. The prosecution version has consistently been that it was A-5, who had taken out a pistol and fired at Jeet. That being the admitted case of the prosecution throughout and the trial court having acquitted A-5 for the offence punishable under Section 302 IPC, the conviction of the appellant for the said offence is not sustainable only on the basis of alleged recovery of the weapon of offence on his disclosure statement."

82. A reading of the decision in **Saddak Hussain** *(supra)* shows that on facts the allegation of shooting the deceased was credited to another accused, since acquitted and referred to as 'A5'. There was a solitary eye-witness account of PW-7, which the Trial Court had discarded on the ground of inconsistencies noticed. His presence was considered doubtful on the scene of crime. Their Lordships of the Division Bench remarked that after the testimony of PW-7 was discarded, all that was left was circumstantial evidence. The sole circumstance against the appellant was recovery of the weapon of offence based on his disclosure statement. It was in those circumstances that mere recovery of the weapon of offence was held not evidence enough to convict him of the offence punishable under Section 302 IPC. Much by contrast here, there is a dependable ocular version of two witnesses, whom we have believed to have seen the occurrence. It is not a case which, like the one before the Division Bench of the Delhi High Court, stands with the eye-witnesses account lost as undependable. On this state of evidence, the decision of the Delhi High Court and the principle enunciated there would not at all come to the appellants' rescue. The appellants cannot, therefore, take advantage of non-production of the FSL Report relating to the firearm and other material evidence.

The charge under Section 25 of the Arms Act, if established against Akhilesh

83. So far as the offence under Section 25 of the Arms Act is concerned, it is argued that sanction by the District Magistrate was granted on 15.01.2007, whereas the charge-sheet was filed in the case on 27.12.2006, vitiating conviction for the said offence. It appears from the record that cognizance of the offence under Section 25 of the Arms Act was taken by the Magistrate on 18.01.2007. What is relevant is the date of the cognizance and not submission of the charge-sheet. On the date the cognizance was taken, the case was validly instituted with due sanction by the District Magistrate.

84. The other submission, that has been advanced against conviction for the offence under Section 25 of the Arms Act, is that the weapon and the cartridges were not sent to the Forensic Science Laboratory and in the absence of a report from the F.S.L., the offence cannot be established. It appears that the weapon and cartridges were sent, but the report was not available. However, the District Magistrate, while granting sanction, has recorded his satisfaction that he has found the country-made pistol of .315 bore to be in working order as also the two cartridges to be live. Before the Trial Court, the Investigating Officer of the

case under Section 302/34 IPC, that is to say, PW-9 was recalled on 13.08.2009, in whose presence the country-made pistol was unsealed, together with the two cartridges. PW-9 identified the weapon and the cartridges, whereupon they were marked as Material Exhibits 1, 2 and 3. The enclosing cloth, that was employed to seal the country-made pistol, was marked as Material Exhibit 4 and that used for the purpose of the two live cartridges as Material Exhibit 5. Three empties, one of which was recovered from the scene of occurrence and the two others that were test fired, were also produced and marked as Material Exhibits 6, 7 and 8.

85. It was said by PW-9 in his cross-examination that the seized country-made pistol and the live cartridges were sealed on the spot and necessary endorsement made on the sealed packet. It is also said in the cross-examination that the package was duly signed by the appellant, Akhilesh. It was not signed by witnesses. It is also said that the memo of seizure bears the appellant Akhilesh's signature, but no date. It is also said that the country-made pistol seized was sent for examination, duly sealed. To a suggestion on behalf of the accused, PW-9 has said that it is incorrect to say that no country-made pistol or cartridges were recovered from the appellant Akhilesh or that these were planted to bolster the prosecution.

86. It is noticeable that PW-9 was not cross-examined at all about the issue of the country-made pistol being in working order or the cartridges being live. It is true that there are authorities that say that a weapon produced before the Court should carry with it a certification about it being in working order. Generally, this certification must come from the Forensic Science Laboratory or an expert. Here, the Police Officer, who was called to prove the recovery of the country-made pistol and the two live cartridges, has testified to it without being cross-examined in the least about the weapon being in working order. If that question had been put to PW-9, a report from the Forensic Science Laboratory could be immediately summoned. Since that question was not put at all to PW-9, who testified to the recovery of the weapon and two live cartridges, it has to be held that the question, if put and the report, if summoned, would have established the fact and gone against the appellant, Akhilesh. The fact is, therefore, held to be amply established that the weapon recovered was in working order and the two cartridges recovered were live. In the circumstances, the conviction recorded by the Trial Court for the offence under Section 25 of the Arms Act cannot be faulted.

87. So far as the principal offence under Section 302 read with Section 34 IPC is concerned, the following facts are amply proved:

(1) Time, place and manner of occurrence;

(2) The transcription of the FIR by PW-2 at the dictation of the disappeared first informant, Satya Prakash and its registration at the police station on the date and time mentioned;

(3) The presence of the two eye-witnesses, to wit, PW-3, Ajaypal and PW-4, Smt. Girja Devi on the scene of crime is well established and not doubtful;

(4) There is no material contradiction between the eye-witness accounts of PW-3 and PW-4 that support each other;

(5) There is no material discrepancy between the ocular testimony and the medico-legal evidence;

(6) The slight difference between the ocular version of one witness and the medico-legal report is not so material, as to place the prosecution under a shadow of reasonable doubt; wholesomely the evidence of PW-3 and PW-4, the two eye-witnesses, is free from blemish and dependable;

(7) The mere failure of the prosecution in producing reports from the Forensic Science Laboratory relating to the weapon of offence and the blood-stained earth and clothes would not derogate from the veracity of the prosecution, established by a dependable eye-witness account.

88. The facts found established, including the presence of witnesses, their broad and robust support to the basic fabric of the prosecution case about the date, time and place of occurrence, the genesis of the dispute and the identity of the assailants, including the specific role played by the two, that is to say, the two appellants, the absence of a plausible motive for the two eye-witnesses to falsely implicate the appellants, who are relatives of the appellants as well as the deceased and very natural witnesses, in our opinion, establish the prosecution case beyond reasonable doubt. We think that the prosecution have proved it.

89. In the result, these appeals fail and are **dismissed**. Appellant, Akhilesh, who is on bail, shall surrender to his bail bonds to serve out the sentence awarded to him. The other appellant, Pradeep is in jail. Let a copy of this order be communicated to him through the Superintendent of the Jail, where he is serving.

90. Let a copy of this order be certified to the Trial Court and the lower court records sent down at once.

(2022)03ILR A435
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.03.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE SUBHASH VIDYARTHI, J.

Government Appeal Defective No. 1 of 2020

State of U.P. ...Appellant
Versus
Sri Sunil & Ors. ...Respondents

Counsel for the Appellant:
A.G.A.

Counsel for the Respondents:

A. Practice & Procedure - The Court observed that the delay has been caused in filing the appeal which is apparently caused due to red tapism in the office of the District Magistrate and instant case is a case of no evidence as only a skeleton was found and it was not known whether it was a male or female and even D.N.A. was not conducted. Therefore, rejected the application as well as the appeal. (Para 12)

Appeal Rejected. (E-10)

List of Cases cited:

1. Basawaraj Vs Land Acquisition Officer (2013) 14 SCC 81

2. Postmaster General Vs Living Media India Ltd. (2012) 3 SCC 563

3. State of M.P. Vs Chaitram Maywade (2020) 10 SCC 654

4. State of U.P. Vs Chief Controlling Revenue Authorities at Allahabad & anr. 2021 (8) ADJ 486

(Delivered by Hon'ble Vivek Kumar Birla, J.
&
Hon'ble Subhash Vidyarthi, J.)

1. Heard learned A.G.A. on the delay condonation application.

2. The limitation for filing the appeal was up to 25-04-2018 and on 08-01-2020 the Stamp Reporter has reported a delay of 623 days with one defect. The defect was removed and appeal was presented on 09-01-2020. Therefore, there was delay of 623+1 = 624 days in presenting the appeal.

3. By drawing attention to the contents of the affidavit filed in suport of this application it is submitted by learned A.G.A. that the delay is purely procedural in nature and is liable to be condoned.

4. In the affidavit filed in support of the application for condonation of delay it has been stated that an application for obtaining a certified copy of the judgment dated 25-11-2017 was filed on 18-12-2017 and a certified copy of the judgment was received on 16-02-2018. Thereafter, on 12-03-2018 a proposal was sent by the District Government Counsel to the District Magistrate for filing the Government Appeal against the impugned judgment and after considering the material available before the District Magistrate, he sent the proposal for filing the Government Appeal on 17-03-2018. On 16-12-2018, the Government passed the G.O. for filing the appeal. It is further stated in the affidavit that since the limitation for filing of the appeal had also expired, a communication was sent to the District Magistrate on 03-01-2019 and reminders were sent on 21-06-2019 and 22.10.2019 for sending an officer not below the rank of a Gazetted Officer, so that an affidavit in support of the delay condonation application may be prepared and filed along with the appeal without any further delay and thereafter vide letter dated 18.11.2019 the District Magistrate has deputed an officer to contact the office of the Government Advocate for filing of the affidavit along with application for condonation of delay.

5. Before proceeding further it would be appropritae to take note of the law laid down by the Supreme Court on this aspect.

6. In **Basawaraj v. Land Acquisition Officer,** (2013) 14 SCC 81, the Hon'ble Supreme Court summerised the law regarding condonation of delay in the following words: -

"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 bona fide 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."

7. Again, in **Postmaster General v. Living Media India Ltd.**, (2012) 3 SCC 563, the Hon'ble Supreme Court held that: -

"29. In our view, it is the right time to inform all the government bodies, their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bona fide effort, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red tape in the process. The government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for the government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few."

8 . Same view was reiterated by Hon'ble Supreme Court in recent case of State of **M.P. Vs. Chaitram Maywade (2020) 10 SCC 654** while condoning delay of 588 days and the Delay Condonation Application was rejected. In para 4 and 5 it was observed as under:-

"4. We have also epxressed our concern that these kinds of the cases are only "certificate cases" to obtain a certificate of dismissal from the Supreme Court to put a quietus to the issue. The object is to save the skin of officers who may be in default. We have also recorded that irony of the situation where no action is taken against the officers who sit on these files and do nothing.

5. Looking to the period of delay and the casual manner in which the application has been worded, the wastage of judicial time involved, we impose costs on the petitioner State of Rs.35,000/- to be deposited with the Mediation and Conciliation Project Committee. The amount be deposited within four weeks. The amount be recovered from the officer(s) responsible for the delay in filing and sitting on the files and certificate of recovery of the said amount be also filed in this court within the said period of time. We have put to Deputy Advocate General to caution that for any successive matters of this kind the costs will keep going on."

9. In **State of U.P. Vs. Chief Controlling Revenue Authorities at Allahabad and another 2021(8) ADJ 486,** one of us has considered the entire law where plea of proecdural delay has been taken to condone the laches/delay.

10. In the light of the aforesaid law we proceed to consider this application.

11. We find that admittedly the certified copy was received on 16-02-2018 and it took about two years to process and ultimately the appeal was filed on 08-01-2020. There is absolutely no explanation for the period between 03-01-2019, on which date a communication was sent to the District Magistrate to appoint an Officer for preparing the affidavit in support of the application for condonation of delay and 18-11-2019, the date on which the District Magistrate deputed an Officer for the said purpose. The delay has apparently been caused due to red tapism in the office of the District Magistrate and keeping in view the law declared by the Supreme Court in the above noted cases, it cannot be accepted as a sufficient cause for the delay.

12. In view of the fact that proseuction was lodged under Sections 498-A, 304-B, 201 I.P.C. and 3/4 of Dowry Prohibition Act, we thought it

proper to have a glance over the impugned judgment as allegations, if proved, would be considered to be against society. In cross it was admitted by PW-1 and 2 that death had taken place after seven years of marriage. It is a case where only a skelteon was found and it was not known whether it was of a male or of a female and even D.N.A. was not conducted to ascertain whether it was of the deceased Kaushlaya. It is virutally a case of no evidence.

13. Keeping in view the aforesaid facts and the legal position, we do not find any good ground to condone such huge delay. In these circumstances, the application for condonation of delay in filing the appeal is liable to be rejected.

14 . The delay condonation application is accordingly rejected.

Order on Application Seeking Leave to File Appeal

Since the application seeking condonation of delay to file leave to appeal is dismissed, the application seeking leave to file appeal is accordingly rejected.

Order on the Appeal

Since the application seeking leave to file an appeal is rejected, the appeal also stands dismissed.

(2022)03ILR A438
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.02.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.

THE HON'BLE SUBHASH VIDYARTHI, J.

Government Appeal No. 1 of 2021

State of U.P. ...Appellant
Versus
Shivchand Yadav & Anr. ...Respondents

Counsel for the Appellant:
A.G.A.

Counsel for the Respondents:

A. Criminal Law - The prosecution has failed to prove the guilt of the accused person by leading sufficient evidence to form a chain to complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused person. (para 24)

Appeal Rejected. (E-10)

List of Cases cited:

1. Babu Vs St.of Kerala (2010) 9 SCC 189

2. Surrendra Kumar Vs St.of Punj. (1999) SCC (Crl.) 33

3. Sampath kumar Vs. Inspector of Police (2012) 4 SCC 124

4. Anwar Ali Vs St. of H.P. (2020) 10 SCC 166

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

1. Heard Ms. Nand Prabha Shukla, learned AGA for the appellant on the application under Section 378(3) Cr.P.C. seeking leave to file appeal against the judgment and order dated 02.09.2020 passed by the learned Sessions Judge, Bhadohi at Gyanpur in Session Trial No. 120 of 2014 (State vs. Shivchand Yadav and another) and Session Trial No.121 of 2014 (State vs. Shivchand Yadav).

2. Facts of the case, briefly stated, are that on 03.05.2014 a first information

report was lodged at 00:30 hours against unknown persons on the information given by Ajay Kumar Maurya son of Late Ramji Maurya stating that the informant's father was employed as Muneeb in the oil depot of Madan Lal Agrahari. On 02.05.2014 at 21:30 hours, he received an information that his father was murdered at Toll Plaza of Lala Nagar, near petrol pump of Natwa Village by some unknown miscreants.

3. The accused persons Shivchand Yadav (respondent no.1) and Kamlesh Dubey (respondent no.2) were arrested on 08.05.2014 and one pistol along with three cartridges were recovered from respondent no.1. On the basis of the said recovery, Case Crime No. 145 of 2014 under Sections 3/25/27 of the Arms Act was registered against him on that very day. After investigation a charge sheet under Section 302 IPC was submitted in Case Crime No. 143 of 2014 against both the respondents and a charge sheet under Section 3/25/27 of the Arms Act was submitted in Case Crime No. 145 of 2014 against the respondent no.1.

4. As many as 11 witnesses were examined by the prosecution before the learned Trial Court. After examination of the statements of witnesses, the Trial Court came to a conclusion that there was no delay in lodging the FIR and the prosecution has proved the time and place of occurrence.

5. P.W.-2 and P.W.-4 were said to be eye-witnesses of the incident and the learned Trial Court has discussed and analyzed their statements in great detail for ascertaining their presence at the time and place of the incident. It was emphasized by the defence counsel before the Trial Court that the presence of eye-witnesses at the time and place of occurrence was highly doubtful. They were neither accompanying the deceased nor are they residents of any locality near the place of occurrence. As they are chance witnesses and residents of places far away from the place of the incident, it was incumbent upon them to disclose the particular occasion for which they were present on the time and place of the incident.

6. The learned Trial Court has recorded that in his examination in chief, P.W.-1 Ajay has deposed that while returning from the police station, he was informed by some people that the incident was witnessed by Guddu Dubey and Pappu Maurya. Pappu Maurya is uncle (Mausa) of P.W.-1 Ajay. When P.W.-1 reached on the spot, Pappu was not present there. Even at the hospital, he had not met Pappu. He has stated that he met Pappu in the morning of the next day, i.e. on 03.05.2014. However, P.W.-2 Pappu stated that in the night of the occurrence, he went to the house of the deceased at 10:30 P.M. and he stayed there overnight. He further stated that he met with P.W.-1 Ajay when he left the spot to visit the deceased's house. He also talked with Ajay for a few minutes. He was present at the time of inquest and postmortem. At one place P.W.-2, Pappu has said that when he reached the spot of occurrence, it was crowded and about 50 to 100 persons were present there. The assailants were not present at the spot and they had fled away. The deceased's son Ajay (P.W.-1), deceased's brother Prakash and his brother-in-law Manoj Kumar were present at the spot. The learned Trial Court has further noted that there is no explanation as to why the names of the accused persons were not mentioned in the FIR when both P.W.-1 and P.W.-2 were in contact and there was no reason for

concealment of the names of the assailants from the informant, who is a close relative of P.W. 2.

7. Similarly, if the testimony of P.W.-1, Ajay is to be believed then naturally questions will arise about the conduct of P.W.-2 Pappu who, being an eye witness of the incident and a relative (co-brother) of the deceased, could not inform the family members immediately about the incident and waited till morning to visit the house of the deceased. Such conduct of P.W.-2, Pappu is unnatural and it cannot be believed by any stretch of imagination that a person who is witnessing the murder of his close relative or acquaintance will keep mum and not disclose the name of the assailants, whom he claims to identify, even to the family members of the deceased, with whom he had met just after the incident.

8. After extensively referring to the statements of P.W.-1-the informant and son of the deceased and P.W.-2 the eye witness of the incident and nephew of the deceased, the learned Trial Court came to a conclusion that a close scrutiny of their statements depicts that there are material inconsistencies in the statements of P.W.-1 and P.W.-2 and the contradictions between the testimonies of the two witnesses are such as cannot be reconciled. Upon a careful examination of the testimonies of P.W.-1 and P.W.-2, it is apparent that neither P.W.-2 was present on the spot at the time of occurrence nor any disclosure was ever made by him to P.W.1 regarding the names of the assailants.

9. Regarding the alleged second eye witness-P.W.-4 Arvind Maurya, the learned Trial Court has recorded that this witness came to light after the statement of P.W.-3, Janki Devi wife of the deceased was recorded by the Investigation Officer on 15.05.2015 i.e. after a fortnight. P.W.-3 has stated that she knew the names of the assailants from the very beginning, but she had not disclosed the same to her son-P.W.-1.

10. As per the prosecution version, there are four witnesses of the incident out of whom only two (P.W.-2 and P.W.-4) have been examined. Both of them claimed that they witnessed the incident when they were present at the petrol pump. They stayed at the spot for some time after the incident. P.W.-1 Ajay stated that he met P.W.-2, Pappu on the next day, which is a very awkward circumstance that none of the witnesses, who were close to the deceased, could remain at the spot at least till arrival of the family members of the deceased. The witnesses have not uttered anything about the steps taken by them after the occurrence. It is very strange that these witnesses did not send any information of the incident to the family members of the deceased and the information was sent by some unknown persons. The Trial Court has held that after a close scrutiny of all the witnesses, it is very much clear that all the witnesses of fact examined by the prosecution have less to disclose and more to hide about the occurrence and the presence of the eye witnesses at the spot. Stark contradictions and inconsistencies appearing in the testimonies of witnesses establish that neither P.W.-2 nor P.W.-4 had witnessed the incident.

11. The Trial Court has also recorded that the incident occurred in the night at the southern track of the G.T. Road and it was allegedly seen by the witnesses from the northern track of the road which is

partitioned by a divider and the divider is embedded with oleander (Kanail shrubs) and the vehicles were passing from both sides of the road and there was no source of light on the southern track of the road where the incident occurred. The site plan does not show any electric polls in it. P.W.-4 claims to have witnessed the occurrence from the distance about 25 meters. These circumstances can only lead to one conclusion that it is impossible for anybody to witness the incident from the distance of 25 meters while there is no source of light at the scene and the witnesses were present on one side of the road while see the incident occurred on the other side of the road and the road is divided, shrubs are planted on the divider and traffic was moving on both sides of the road.

12. P.W.-4, Arvind Maurya has stated that when he heard the gun shot, he was driving his motorcycle. The learned Trial Court has recorded that generally when a person is himself driving a motorcycle on highway in night hours, his focus will be concentrated on his front side and it is not possible that while driving the motorcycle they would have observed the incident from the other side of the road. In such circumstances, it was not possible for P.W.-2 and P.W.-4 have witnessed the occurrence on the other side of the road which was not illuminated.

13. The learned Trial Court has recorded that in their examination in chief, both the aforesaid witnesses stated that initially they saw that the accused persons and the deceased were talking and in the meantime the accused persons started abusing the deceased and afterwards they fired at him. However, in his cross examination, P.W.-4 stated that he saw the accused persons and the deceased only after he heard the gun shot.

14. After a very detail and thorough scrutiny of the statements of all the witnesses, the learned Trial Court came to the conclusion that if all the facts are combined together, the only conclusion is that the witnesses have not witnessed the incident. The learned Trial Court has come to a conclusion that the prosecution witnesses could not prove the guilt of the accused persons. Consequently, it concluded the accused persons by means of the judgment and order dated 02.09.2020. We do not find any infirmity in the aforesaid finding of the learned Trial Court.

15. In **Babu v. State of Kerala**, (2010) 9 SCC 189, the Hon'ble Supreme Court was pleased to reiterate the guidelines for the High Court to interfere with the judgment and order of acquittal passed by the trial Court, in the following words: -

"12. This Court time and again has laid down the guidelines for the High Court to interfere with the judgment and order of acquittal passed by the trial court. The appellate court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be the more probable one. While dealing with a judgment of acquittal, the appellate court has to consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial court were perverse or otherwise unsustainable. The appellate court is entitled to consider whether in arriving at a finding of fact, the trial court had failed to take into consideration admissible evidence and/or had taken into consideration the evidence brought on record contrary to law. Similarly, wrong placing of burden of proof may also be a subject-matter of scrutiny by

the appellate court. (Vide Balak Ram v. State of U.P., Shambhoo Missir v. State of Bihar, Shailendra Pratap v. State of U.P., Narendra Singh v. State of M.P., Budh Singh v. State of U.P., State of U.P. v. Ram Veer Singh, S. Rama Krishna v. S. Rami Reddy, Arulvelu v. State, Perla Somasekhara Reddy v. State of A.P. and Ram Singh v. State of H.P.)

13. In Sheo Swarup v. King Emperor, the Privy Council observed as under: (SCC Online PC: IA p. 404)

"... the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses.'

14. The aforesaid principle of law has consistently been followed by this Court. (See Tulsiram Kanu v. State, Balbir Singh v. State of Punjab, M.G. Agarwal v. State of Maharashtra, Khedu Mohton v. State of Bihar, Sambasivan v. State of Kerala, Bhagwan Singh v. State of M.P. and State of Goa v. Sanjay Thakran.)

15. In Chandrappa v. State of Karnataka, this Court reiterated the legal position as under: (SCC p. 432, para 42)

"(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.'

16. In Ghurey Lal v. State of U.P., this Court reiterated the said view, observing that the appellate court in

dealing with the cases in which the trial courts have acquitted the accused, should bear in mind that the trial court's acquittal bolsters the presumption that he is innocent. The appellate court must give due weight and consideration to the decision of the trial court as the trial court had the distinct advantage of watching the demeanour of the witnesses, and was in a better position to evaluate the credibility of the witnesses.

17. In State of Rajasthan v. Naresh, the Court again examined the earlier judgments of this Court and laid down that: (SCC p. 374, para 20)

"20. ... An order of acquittal should not be lightly interfered with even if the court believes that there is some evidence pointing out the finger towards the accused.'

18. In State of U.P. v. Banne, this Court gave certain illustrative circumstances in which the Court would be justified in interfering with a judgment of acquittal by the High Court. The circumstances include: (SCC p. 286, para 28)

"(i) The High Court's decision is based on totally erroneous view of law by ignoring the settled legal position;

(ii) The High Court's conclusions are contrary to evidence and documents on record;

(iii) The entire approach of the High Court in dealing with the evidence was patently illegal leading to grave miscarriage of justice;

(iv) The High Court's judgment is manifestly unjust and unreasonable based on erroneous law and facts on the record of the case;

(v) This Court must always give proper weight and consideration to the findings of the High Court;

(vi) This Court would be extremely reluctant in interfering with a case when both the Sessions Court and the High Court have recorded an order of acquittal.'

A similar view has been reiterated by this Court in Dhanapal v. State.

19. Thus, the law on the issue can be summarised to the effect that in exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial court's acquittal bolsters the presumption of his innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference."

(emphasis supplied)"

16. Ms. Nand Prabha Shukla, learned AGA has submitted that the appellant was seeking leave to file an appeal against the aforesaid judgment mainly on the ground that although it is a case of circumstantial evidence, the accused persons had a strong motive to kill the deceased.

17. Regarding motive, P.W.-1 Ajay Kumar Maurya has stated that while he was returning from the police station, some people informed him that the incident was witnessed by Guddu Dubey and Pappu Maurya and they also told him that a few days ago, Kamlesh Dubey alias Karia (respondent no.2) and Shivchand Yadav (respondent no.1) had forcibly tried to take kerosene oil from his father and when refused, they had abused his father.

18. P.W.-3 Janki Devi wife of deceased has stated in her examination in chief that her husband had informed her that Shiv Chand Yadav and Kamlesh Dubey were pressurising him to deliver kerosene oil and upon his refusal, they had threatened to kill him. She had advised her husband to report the matter to police. Apart from this statement of P.W.3, there is no material on record in this regard.

19. A mere vague allegation of demand of delivery of kerosene oil without a specific mention of the date of the alleged demand and the quantity demanded, is not sufficient to establish a motive for committing a heinous offence of murder. We are not convinced that the non-fulfilment of a demand to deliver an undisclosed quantity of kerosene can be a sufficient motive to commit murder of the deceased.

20. Although, motive is a relevant consideration while deciding the case, it cannot be the sole ground for convicting an accused when there is no other sufficient evidence available on record to establish his guilt beyond reasonable doubt. Therefore, assuming that the alleged demand of delivery of kerosene oil could form a motive for committing an offence, the learned court below has committed no error in acquitting the accused when their guilt could not be established beyond reasonable doubt by evidence adduced by the prosecution.

21. In **Surendra Kumar vs. State of Punjab, (1999) SCC (Crl.) 33**, the Hon'ble Supreme Court pleased to hold that in the absence of proof of any other circumstance pointing to the guilt of the appellant, the evidence adduced by the prosecution in support of the motive is not of any significance.

22. In **Sampath Kumar v. Inspector of Police, (2012) 4 SCC 124**, the Hon'ble Supreme Court referred to and relied upon its previous decisions and proceeded to hold that motive alone can hardly be a ground for conviction. The relevant passage of the aforesaid judgment is as follows: -

"29. In *N.J. Suraj v. State* the prosecution case was based entirely upon circumstantial evidence and a motive. Having discussed the circumstances relied upon by the prosecution, this Court rejected the motive which was the only remaining circumstance relied upon by the prosecution stating that the presence of a motive was not enough for supporting a conviction, for it is well settled that the chain of circumstances should be such as to lead to an irresistible conclusion, that is incompatible with the innocence of the accused.

30. To the same effect is the decision of this Court in *Santosh Kumar Singh v. State and Rukia Begum v. State of Karnataka* where this Court held that motive alone in the absence of any other circumstantial evidence would not be sufficient to convict the appellant. Reference may also be made to the decision

of this Court in *Sunil Rai v. UT, Chandigarh*. This Court explained the legal position as follows: (*Sunil Rai* case, SCC p. 266, paras 31-32)

"31. ... In any event, motive alone can hardly be a ground for conviction.

32. On the materials on record, there may be some suspicion against the accused, but as is often said, suspicion, howsoever strong, cannot take the place of proof."

23. In the present case, there is no direct evidence to prove the guilt of the accused persons and it is a case of circumstantial evidence. In Anwar Ali versus State of H. P. (2020) 10 SCC 166, the Hon'ble Supreme Court was pleased to reiterate that "in a case of circumstantial evidence, the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else and the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis that that of the guilt of the accused and such evidence would not only be consistent with the guilt of the accused but should also be inconsistent with his innocent.

24. Analyzing the facts of the present case in light of the aforesaid law laid down by the Hon'ble Supreme Court, we find that in the present case, the prosecution has failed to prove the guilt of the accused persons by leading sufficient evidence to form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused persons and therefore, even if we assume that the accused had a motive to commit murder of the deceased, it will not be sufficient to hold the accused persons guilty of the offence.

25. On examination of the aforesaid judgment and order passed by the learned Trial Court it is clear that the judgment has been passed after a very detailed and thorough examination of the entire material available on record. The learned AGA has not assailed the validity of the judgment terming it as perverse. Her submission is that the learned Trial Court has not weighed and assessed the prosecution case in its proper perspective and has erroneously acquitted the accused-respondents. However, in view of the foregoing discussion, we find that the learned Trial Court has acquitted the accused respondents on the basis of the finding recorded after a thorough analysis of the entire evidence that it is a case of doubtful evidence against the accused persons. The aforesaid finding appears to be well founded, which needs no interference by this Court in exercise of its appellate jurisdiction under Section 378 Cr.P.C.

26. In view of the aforesaid discussion, this Court is of the view that no case is made out for grant of leave to file an appeal under Section 378(3) of the Criminal Procedure Code against the judgment and order dated 02.09.2020 passed by the learned Sessions Judge, Bhadohi at Gyanpur in Session Trial No. 120 of 2014 (State vs. Shivchand Yadav and another) and Session Trial No.121 of 2014 (State vs. Shivchand Yadav).

27. The application seeking leave to file an appeal is **rejected.**

28. Since the application granting for leave to appeal is rejected, consequently the appeal also stands dismissed.

(2022)03ILR A446
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.02.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE SUBHASH VIDYARTHI, J.

Government Appeal No. 306 of 2021

State of U.P. ...Appellant
Versus
Brijesh & Anr. ...Respondents

Counsel for the Appellant:
A.G.A.

Counsel for the Respondents:

A. Criminal Law - The Court neither find any clear motive for the accused to administer poison to the deceased nor has it been proved that the accused has the poison in his possession and therefore, there is no sufficient evidence to prove that the accused persons committed murder of the deceased by administering poison to him. (Para 25)

Appeal Rejected. (E-10)

List of Cases cited:

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

2. Jaipal Vs St. of Har. (2003) 1 SCC 169

3. Jayamma Vs St. of Karn. (2021) 3 SCC 213

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

1. Heard Shri Ratan Singh, learned Additional Government Advocate for the Appellant - State of U.P., on the application under Section 378 (3) of the Criminal Procedure Code (herein after referred to as "Cr.P.C.") seeking leave to file appeal against the judgment and order dated 18.03.2021 passed by the learned Additional Sessions Judge, Court No. 8, Bulandshahar in Sessions Trial No. 352 of 2016, acquitting the accused-respondents of the charges of committing offences punishable under Sections 302/34, 328/34 of the Indian Penal Code (hereinafter referred to as "IPC") in Case Crime No. 265 of 2014, Police Station Chhataari, District Bulandshahr.

2. Briefly stated, the prosecution case is that on 16.08.2014 Ashok Kumar gave information (Exhibit A-1) to the police that his son (Sanna) had committed suicide at his home on the same day. No one is guilty for it, yet to ascertain the cause of his death, a post-mortem examination be conducted. On 25.08.2014, the informant filed an application under Section 156 (3) Cr.P.C. (Exhibit A-2) stating that his son Sanna used to work in Gujarat alongwith Brijesh (the respondent no. 1) of the same village and they used to do painting jobs in factories. About one month prior to the date of the incident i.e. 16.08.2014, Sanna had told the informant on phone that Brijesh has made illicit relations with a girl at Surat and upon being forbidden, Brijesh threatened him of dire consequences. The informant had told him that he will talk to Brijesh when he would come to the village.

3. The informant's son Sanna and Brijesh were visiting the village on the occasion of 'Rakshabandhan'. On 16.08.2014 at 10:00 a.m. Brijesh and his relative Praveen had come to the informant's home. At that time the informant, his wife and other son Tota Ram were present there. In their presence, Brijesh called and took away the informant's son Sanna saying that they will

go to the market to eat and drink something. Although, the informant objected to it, Brijesh and Praveen took away his son Sanna on a motorcycle to the tube-well of Praveen's uncle Laloo near the cremation ground in the village. They put some poisonous substance in liquor and made Sanna drink it and they took away Rs.6,000/- and a mobile from Sanna's pocket. At that very time, the informant's other son Tota Ram reached there to call his brother Sanna and he saw that Brijesh and Praveen were offering liquor to Sanna, but Brijesh and Praveen did not send him and asked Tota Ram to leave else they would kill him also. After killing Sanna by making him consume some poisonous substance in liquor and after causing injuries to his legs, they dropped him home on their motorcycle at about 4:00 p.m. Tota Ram sent an information of the incident to the police on 'Dial 100', upon which a constable visited his home and took Tota Ram to the police station for lodging an FIR. At a short distance from Pandawal Chowki, the said motorcycle met with an accident with another motorcycle, due to which Tota Ram and the constable suffered injuries and the report could not be lodged in Police Station Chhataari. Afterwards, police came to the informant's house and prepared an inquest report of the dead body of the deceased Sanna and got a post mortem examination done. Thus, the accused-respondent committed murder of the informant's son Sanna.

4. On the aforesaid application, on 16.09.2014, an FIR (Ex.K-4) was registered as Case Crime No. 265 of 2014 under Sections 302, 328 IPC in the concerned Police Station against the accused-respondents.

5. The cause of death of the deceased could not be ascertained by the post mortem examination and his viscera was preserved and sent to the Forensic Science Laboratory. As per the Laboratory's report, Aluminium Phosphide, which is commonly known as Salphas, was found in the parts of viscera.

6. After examining the evidence on record and taking into consideration the rival contentions, the learned Court below recorded a finding that the deceased died due to consumption of poison. Regarding the informant's allegation that the accused persons took away his son Sanna, the Court below held that when the accused Brijesh (respondent No. 1) was allegedly threatening the deceased Sanna of dire consequences, the fact that the informant let his son to go with the accused-respondents for eating and drinking is unnatural and against common human behaviour. The Court below further held that the prosecution could not establish the motive for commission of the offence. The FIR of the incident was lodged with a delay of 9 days whereas in the application given to the police on 16.08.2014 (Ex. K-1), the informant himself had stated that his son has committed suicide. The fact of earlier report (Ex.Ka-1) was concealed in the application under Section 156 (3) Cr.P.C. On the basis of the aforesaid findings, the learned Court below gave a judgment and order dated 18.03.2021 acquitting the accused-respondents of charges of commission of offences punishable under Sections 302/34 and 328/34 IPC.

7. The State has filed this appeal against the aforesaid order alongwith an application under Section 378 (3) Cr.P.C. seeking leave to file appeal mainly on the ground that the learned trial court has not properly appreciated the evidence of the prosecution and has committed a gross error in disbelieving the testimony of the

prosecution witnesses. The order of acquittal of the accused-respondent is perverse and the learned trial court did not weigh and assess the case in its proper perspective.

8. We have examined the lower court record to go through the evidence available on record of the case to examine the aforesaid grounds taken by the learned A.G.A.

9. PW-1 Ashok Kumar-the informant, has narrated the FIR version.

10. PW-2 Tota Ram said that he was at his home alongwith his parents and his deceased brother Sanna. The accused-respondents came to his house and called and took away Sanna with them at about 10:00 a.m. on the date of the incident. PW-2 was going to the fields. When he went to Laloo's tube-well near the cremation grounds. He asked Sanna to come home but the accused-respondents asked the PW-2 to leave saying that Sanna will come later on. At about 4:00 p.m., the accused-respondents dropped his brother Sanna at his home. When he reached home, he found his brother dead.

11. PW-3 Kumari Sheetal, aged about 12 years, is the sister of the deceased. She stated that she has not gone to any school. She does not know counting. She does not know the date of the incident. However, she stated that on the date of the incident at about 3:30 p.m., the accused-respondents had brought his brother Sanna home after killing him.

12. PW-4 Rajpal stated that on the date of the incident between 10:00 to 11:00 a.m., he had seen the accused persons and the deceased sitting in the cremation ground consuming liquor. Between 4:00-5:00 p.m., he saw Praveen driving a motorcycle. Sanna was sitting between Praveen and Brijesh and Brijesh was holding Sanna. Upon returning from the fields, he came to know that Sanna had died.

13. The accused-persons produced Veer Pal Singh as DW-1, who was the real mama (maternal uncle) of the deceased Sanna. He stated that on 16.08.2014 at about 3:00 p.m., his brother-in-law i.e. the Informant Ashok Kumar, had informed him on phone that Sanna had committed suicide by consuming poison at home. Upon receiving this information, came to Ashok's house alongwith his wife and children. He reached there at about 5:30 p.m. Ashok asked him to give the information of Sanna's suicide and dictated a report and DW-1 scribed the report as per Ashok's dictation, which was marked as Ex.7A and proved by DW-1. He also proved the inquest report (Ex.Ka-10) prepared by the Police.

14. The learned Court below has referred the statement of PW-1 that one month prior to the incident, the deceased had informed the informant that Brijesh had entered into a relation with a girl at Surat. When Sanna forbade Brijesh, he threatened the former with dire consequences. In spite of the aforesaid alleged threats, the informant let his son go with the accused persons, which conduct is against normal human behaviour. If a person's son is being threatened by someone with dire consequences, he will not let his son to go with that person for eating and drinking.

15. PW-2 Tota Ram, who is stated to have seen the deceased with the accused

persons at the Laloo's tube-well, has not made any statement about anything having been offered by the accused-respondents to the deceased for eating and drinking and he has not stated that they were eating and drinking together.

16. Another witness PW-4 said that the accused persons and the deceased were drinking together in the cremation ground. This statement is contradictory to the statement of PW-2 who stated the place of seeing the accused persons with the deceased at Laloo's tube-well.

17. Although PW-4 stated that he saw the accused persons taking the deceased on a motorcycle, no averment to this effect was made in the application under Section 156 (3) Cr.P.C. which was filed after 9 days after the occurrence of the incident, obviously after obtaining legal advice and after due consultation.

18. As per the statement of PW-3 (Kumari Sheetal), she had her lunch at 12:00 Noon and at that time her parents and Tota Ram were in the fields. Half an hour after she had her lunch, the deceased asked her to bring fodder. When she returned with the fodder after another half an hour, the deceased was not there at his home. This indicates that the deceased was at his home even after the informant (PW-1), his other son Tota Ram (PW-2) and the informant's wife went to the fields.

19. Thus, there were serious discrepancies in the statement of the prosecution witnesses regarding presence of the deceased at the home or at the place of the incident.

20. The Court below also took into consideration the fact that the informant had alleged that the accused-respondents dropped the deceased home after killing him, which too is against the normal human behaviour. If a person commits murder of any other person, he would not take the dead body on the motorcycle to deliver it at the deceased's home.

21. The informant - PW-1 had submitted an information of the incident on the date of the incident itself i.e. 16-08-2014, stating that his son had committed suicide in his home and nobody was guilty for it, yet a post mortem examination be conducted for ascertaining the reason of his death. A mention of this fact was recorded in the general diary on 16-08-2014 at 18:45 p.m. and on the basis of this report, the police went to the spot and prepared an inquest report (Ex.Ka-10), which mentions that the informant Ashok Kumar and the informant's brother-in-law Veer Pal were also present at the time of inquest. Veer Pal Singh has appeared as DW-1 and has stated that on 16-08-2014, the informant had informed him on phone that Sanna has committed suicide by consuming poison at home. When he reached the informant's house at about 5:30 p.m., the informant dictated a report to him, thereafter, the informant put his thumb impression on the report scribed by the DW-1 on his dictation. The DW-1 was also a witness of the inquest.

22. In the present case, there is no direct evidence of the incident and the case is based on the circumstantial evidence that the deceased had allegedly been last seen with the accused-persons drinking alcohol and thereafter he died and ALP (sulphas) was found in the examination of his viscera.

23. In **Sharad Birdhichand Sarda v. State of Maharashtra,** (1984) 4 SCC 116,

the Hon'ble Supreme Court laid down the following conditions which must be fulfilled before a case can be said to be established on the basis of circumstantial evidence: -

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

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

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]

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

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

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

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

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

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

24. In the same judgment, the Hon'ble Supreme Court explained the mode and manner of proof of cases of murder by administration of poison, in the following words: -

"164. We now come to the mode and manner of proof of cases of murder by administration of poison. In Ramgopal case18 this Court held thus: (SCC p. 629, para 15)

"Three questions arise in such cases, namely (firstly), did the deceased die of the poison in question? (secondly), had the accused the poison in question in his possession? and (thirdly), had the accused an opportunity to administer the poison in question to the deceased? It is only when the motive is there and these facts are all proved that the court may be able to draw the inference, that the poison was administered by the accused to the deceased resulting in his death."

165. So far as this matter is concerned, in such cases the court must carefully scan the evidence and determine

the four important circumstances which alone can justify a conviction:

(1) there is a clear motive for an accused to administer poison to the deceased,

(2) that the deceased died of poison said to have been administered,

(3) that the accused had the poison in his possession,

(4) that he had an opportunity to administer the poison to the deceased."

25. In the present case, there is neither any clear motive for the accused to administer poison to the deceased, nor has it been proved that the accused had the poison in their possession and, therefore, there is no sufficient evidence to prove that the accused persons committed murder of the deceased by administering poison to him.

26. In J**aipal v. State of Haryana, (2003) 1 SCC 169**, the Hon'ble Supreme Court held that ALP on account of its very pungent smell (which can drive out all inmates from the house if left open) cannot be taken accidentally. Therefore, the learned Court below held that Aluminum Phosphoid could not be administered deceitfully or accidentally. The only possibility remains that the accused administered it forcibly, but neither any witness has given any evidence to this effect nor the post mortem report mentions any injury on the person of the deceased which could indicate any resistance made by him against this forcible act.

27. Keeping in view the aforesaid facts which emerge from the statement of witnesses as well as other material available on record, particularly the application given to the police on 16.08.2014 (Ex. K-1) and the application filed by the informant under Section 156 (3) Cr.P.C. (Ex.K-2), we find that the prosecution has miserably failed to establish that the accused-respondents have committed murder of the deceased by administering poisonous substance.

28. In J**ayamma Vs. State of Karnataka (2021) 3 SCC 213**, the Hon'ble Supreme Court was pleased to reiterate the well settled law that the power of scrutiny exercisable by the High Court under Section 378 Cr.P.C. should not be routinely invoked where the view formed by the trial court was a "possible view". The Hon'ble Supreme Court held that unless the High Court finds that there is complete misreading of the material evidence which has led to miscarriage of justice, the view taken by the trial court which can also possibly be a correct view, need not be interfered with.

29. Examining the impugned judgment and order passed by the learned court below, we are of the view that the findings of the Court below forming basis of its judgment are based on a correct evaluation of the evidence available on the record of the case. The judgment dated 18.03.2021 passed by the learned Additional Sessions Judge, Court No. 8, Bulandshahr in Sessions Trial No. 352 of 2016 does not suffer from any illegality or infirmity so as to warrant a further scrutiny by this Court in exercise of its appellate jurisdiction. There is no good ground for grant of leave to appeal to the State-appellant. The application seeking leave to file an appeal is, accordingly rejected.

(Order on Appeal)

30. Since the application seeking leave to file an appeal is rejected, the appeal also stands **dismissed** summarily at the admission stage.

(2022)03ILR A452
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.12.2021

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE BRIJ RAJ SINGH, J.

Government Appeal No. 1653 of 2002

State of U.P. ...Appellant
Versus
Radhey Shyam & Ors. ...Respondents

Counsel for the Appellant:
A.G.A.

Counsel for the Respondents:

A. Criminal Law - The Court on finding serious contradictions in the statements of P.W. 1 and P.W. 2 rejected the appeal.

Appeal Rejected. (E-10)

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

1. This government appeal has been preferred against a common judgment dated 23 January 2002 passed by the Special Judge/Additional District & Sessions Judge, Bijnor in Sessions Trial No. 39 of 1994 (State Vs. Radheyshyam and others) for offences under Sections 302 read with Section 34 I.P.C., Sessions Trial No. 181 of 1994 (State Vs. Jogendra) only for offences under Section 25 of the Arms Act and in Sessions Trial No. 182 of 1994 (State Vs. Radheyshyam) only for offences under Section 25 of the Arms Act, Police Station Kotwali Dehat, District Bijnor, by which the accused respondents have been acquitted.

2. As per the prosecution case, it is stated that Rajesh along with Radheyshyam, Ram Kumar and Jeet Singh with an intention to kill, earlier made an attempt to murder the complainant Dinesh Singh on 01.10.1993. A report was lodged by the father of the complainant in the police station alleging that the accused attempted earlier to kill his father but they were unsuccessful. The father of the complainant (Phool Singh) had gone outside the house on the call of nature on 16.11.1993 at 5.A.M., and on way back in front of Dharmvir's house, he was apprehended by Radheyshyam, Jitendra, Yogendra and Rakesh. Radheyshyam had 315 Bore Rifle and others had country-made pistol and all the four accused fired at his father. Hearing the sound of fire shots, the complainant and his uncle Suresh and some villagers reached the spot. The accused threatened them to dire consequences, in case they come to save the deceased or anyone who dares to lodge F.I.R. or comes forward as witness. The father of the complainant died on the spot. The villagers did not accompany the complainant to lodge the report, thereafter, the complainant went to his brother Brijpal Singh residing in Village Kiratpur. He took him to the police station and thereafter the report was lodged.

3. The charge sheet was submitted before the C.J.M., under Section 302 I.P.C. The accused denied the charge. The charge sheet was also filed under Section 25 of the Arms Act.

4. Prosecution, in order to prove the charge, produced P.W. -1 (Dinesh) (the complainant), P.W. -2 (Suresh Chandra, the

eye witness), P.W. -3 (Head Constable Chandrashekhar Yadav), P.W. -4 (Subodh Kumar, a Police Official), P.W. -5 (S.I. Bable Singh), P.W. -6 (Vijay Pal Singh S.I. Police), P.W. -7 (S.I. Police Harishchandra Singh), P.W. -8 (Dr. A.K. Kots) and P.W. -9 (Ramji Mal Sharma, a Police Official).

5. The accused were confronted with the prosecution evidence and the circumstances under Section 313 Cr.P.C. They denied charge and pleaded that have been falsely implicated.

6. The trial court upon examining the prosecution evidence and the statements of witnesses, came to a conclusion that the prosecution failed to prove the charge against the accused respondents. Consequently, acquitted the accused respondents. Hence the present appeal.

7. We have heard Om Prakash Mishra, learned A.G.A. and perused the record with the assistance of the learned counsel.

8. P.W. -8 (Dr. A.K. Kots) conducted the post mortem on 17.11.1993 and noted three injuries on the body of the deceased, which is as under:

"(1) Lacerated wound 02 cm x 1.5 cm muscle deep which was inside of forearm, 03 cm above from wrist joint. There was mark of blackening on this wound.

(2) Lacerated exit wound 02 cm x 1.5 cm muscle deep above left elbow. Bullet tail was found on opening the wound and bone fractured.

(3) Lacerated wound 01 cm x 01 cm cavity deep on left illium .....20 cm above from mid axillary ... no blackening was found and it was entry wound.

Blood was clotted near all the wounds."

9. P.W. -8 recovered a bullet (18 gram) from the right side of the chest. The stomach of the deceased was empty. The cause of death opined by the medical expert was due to shock and haemorrhage as a result of excessive bleeding. The P.W. -8 further opined that the death was caused due to injury caused by rifle and country-made pistol. He further expressed an opinion that he was not sure as to how many bullets were fired on the deceased. He found only one bullet. The witness proved that the death was caused by fireshot injury.

10. P.W. -1 (Dinesh) (the complainant) and P.W. -2 (Suresh Chandra), are the witnesses of fact. P.W. -3 to P.W. -9, are formal witnesses, who have proved the documents. P.W. -5 (S.I. Bable Singh) stated before the court that after stopping the car in the village the police party went to the tubewell. P.W. -6 (Vijay Pal Singh S.I.), admitted in the cross examination that the police party reached by a vehicle and thereafter took the path going through the fields of the village to reach the tubewell. The accused were apprehended by them. It is thus, clear that the entire recovery proceeding is highly doubtful.

11. P.W. -1 and P.W. -2 reiterated the version of the F.I.R. in examination in chief, but, P.W. -1 admitted at page -16 of his cross examination that he along with his maternal uncle Suresh Chandra (P.W. -3), while were sitting in their verandah when gun shot fire was heard. P.W. -2 also stated in his cross examination at pages 7-8 that he heard sound of four round of gun shot fire at an interval of 1-2 seconds. He further admitted that to the

eastern side, the house of Phool Singh is situate. When he reached the place of occurrence, deceased had died. Pertinently, from the cross examinations of P.W. -1 and P.W. -2, it is evident that both these witnesses were not present at the place of incident at the time of occurrence. They went to the place of incident after the death of the deceased. Further between the place of incident and the place of presence of the witnesses, there lies a pond and wall, thus the witnesses P.W. -1 and P.W. -2, were not in a position to see the incident as per the site map.

12. P.W. -1 has stated that after the incident the villagers did not support him in lodging the report, therefore, he went to call his brother Brajpal, 14 Kms. away to village Kiratpur. His brother was not found in the village, he thereafter went to the factory, 5 Kms. away from Kiratpur at Nazibabad Road. His brother came back to his village Kiratpur and they both did not go to the police station directly which was situate at Kiratpur. P.W. -1 came to his village along with his brother Brajpal, thereafter, they went to police station and report was lodged. P.W. -1 has admitted that he reached Kiratpur at 11 A.M. and thereafter went to the factory which was 4-5 Kms. away. After 10-15 minutes, Brajpal came from factory and they came back to their village. In contradiction P.W. -2 stated that only he had gone to call Brajpal from Kiratpur. Thus, the statements of both the witnesses are totally contradictory to each other. It is improbable that report was lodged at 11:30 A.M., as the distance of Kiratpur is 14 Kms. from the place of incident and it is admitted that at 11 A.M., P.W.-1 reached Kiratpur. In such a situation, it is improbable to reach the police station at 11:30 within 30 minutes, further, P.W. -1 admitted that his brother Brajpal was not found in the village and he went to the factory, 4 Kms. away to take Brajpal. P.W. -2 (Suresh Chandra), brother in law *(Sala)* of the deceased, is an interested witness and witness of chance.

13. The recovery of 315 Bore rifle and four live cartridges of 315 Bore from the Radheyshyam is in contradiction to the bundle presented before the trial court. One country-made SBBL gun and four 315 Bore miss-fired cartridges was produced by the prosecution. The recovery alleged to have been made from the accused is not that was placed before the court.

14. It is evident that there is serious contradictions in the statements of P.W. -1 and P.W. -2. They claim to be occular witness and of having reached the site of the incident. The prosecution failed to prove their presence at the site. The site was not visible from the spot of their presence as per their statement and site map. The F.I.R. also appears to be ante time and at the same time the recovery of fire arm and cartridges employed in the commission of the offence is improbable and doubtful. We are unable to persuade ourselves in taking an opinion different from that of the trial court.

15. The application seeking leave to appeal is **rejected**.

16. The appeal, in consequence, stands **dismissed.**

(2022)03ILR A454
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.03.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE SUBHASH VIDYARTHI, J.

Government Appeal No. 2300 of 1984

State of U.P. ...Appellant
Versus
Phool Singh & Ors. ...Respondents

Counsel for the Appellant:

A.G.A.

Counsel for the Respondents:
Sri Satya Prakash, Sri Apoorv Tiwari, Sri Lalji Sahai Srivastava, Sri Raj Kumar Yadav, Sri Ram Lal Yadav

A. Criminal Law - Unlawful Assembly - Once it is established that the unlawful assembly has a common object, it is not necessary that all persons framing the unlawful assembly must be shown to have committed some overt act. (Para 68)

By the conduct of the accused persons in gathering in front of the house of the accused Phool Singh, carrying guns and country-made pistols and being a part of the unlawful assembly which resorted to firing, the Court concluded that each member of the assembly has a common object to help Phool Singh and Giriraj Singh in settling the score by resorting to rioting, being armed with deadly weapons, and attempting to murder by firing at Sukh Singh and his associates and committing murder of Sukh Singh. (Para 68)

The accused/respondents cannot be acquitted for the mere reason of a defect in investigation when the entire evidence of record proves beyond reasonable doubt that the accused/respondents have committed the offence. (Para 56)

Appeals Allowed. (E-10)

List of Cases cited:

1. Jalil Khan & ors. Vs St. of U.P. (2016) 93 ACC 882: 2016 SCC OnLine All 84

2. Sri Bhagwan Vs St. of U.P. 2013 (12) SCC 137

3. Paniben (Smt) Vs St. of Guj. (1992) 2 SCC 474

4. Ramji Singh Vs St. of U.P. (2020) 2 SCC 425

5. Ilangovan Vs St. of T.N. (2020) 10 SCC 533

6. Guru Dutt Pathak Vs St. of U.P. (2021) 6 SCC 116

7. St. of U.P. Vs M.K. Anthony (1985) 1 SCC 505

8. St. of U.P. Vs Krishna Master (2010) 12 SCC 324

9. Manu Sharma Vs St. (NCT of Delhi) (2010) 6 SCC 1

10. Acchar Singh Vs St. of H.P. (2021) 5 SCC 543

11. St. of Karn.Vs Suvarnamma (2015) 1 SCC 323

12. Gajoo Vs St. of Uttarakhand (2012) 9 SCC 532

13. Manjit Singh Vs St. of Punjab (2019) 8 SCC 529 *(Distinguished)*

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

1. Heard Ms. Nand Prabha Shukla, learned A.G.A. for the State and Sri Apoorv Tiwari and Sri Raj Kumar Yadav, Advocates, the learned Counsel for the accused-respondent Nos. 2, 3 and 5.

2. By means of the instant appeal filed under Section 378 of Cr.P.C., the State has challenged the judgment and order dated 30th April 1984 passed by the Special Judge (Additional Sessions Judge), Agra in Sessions Trial No. 51 of 1982 under Sections 148, 307/149, 302/149 IPC, Police Station Fatehpur Sikri, District Agra whereby the accused-respondent Nos. 1 to 6 have been acquitted from all the charges.

Prosecution Case

3. The prosecution case is that the accused persons are residents of Village Baseri Chahar and the house of the accused Phool Singh son of Patiram (the respondent No. 1) is situated opposite the house of Sukh Singh, the informant of the case. Giriraj Singh is the brother-in-law of

Fauran Singh - who is the elder brother of Phool Singh and Giriraj Singh lives with Phool Singh. The respondent Nos. 2 and 3 are nephews of the respondent No. 1, the respondent No. 4 is a relative of the respondent No. 1 and the respondent Nos. 5 and 6 are friends of the respondent No. 1. Giriraj Singh and Phool Singh used to indulge in indecent talks, looking at the ladies of the informant's house. On 20.06.1981 the informant had objected to it. Upon this Giriraj Singh and Phool Singh abused the informant. Member Singh s/o Devi Ram who is related to the informant like a brother, also objected to the activities of Giriraj Singh and Phool Singh. Upon this, the aforesaid persons left the place and Giriraj Singh said that at that time he was short of man power and he will settle the score with the informant. On the next day i.e. on 21.06.1981, when the informant was lying down in front of his house, Phuli, Giriraj and Fateh Singh armed with single barrel guns and Virendra, Sher Singh, Malkhan and Brijendra armed with country made pistols gathered in front of Phuli's house. They charged towards the informant's house. Upon hearing the commotion, Ramshri wife of Nirpat-cousin of the informant and Balbiri wife of Shivram, another cousin of the informant, came there. The accused-persons started firing. The informant took shelter of a wall and the pellets of gun-shots hit Balbiri and Ramshri and also the wall behind which the informant was taking shelter. Upon hearing the noise, some other persons came there and asked the accused-persons not to do so, as it will result in loss of lives of the people. The accused-persons started firing on those people also, due to which pellets hit Phool Singh s/o Jorawar Singh, Sobaran s/o Dilip Singh, Chhiddi s/o Devjeet, Panna s/o Manphool and Lakhan s/o Jogdar. After this, seven accused persons ran away towards south of Phuli's house. After sometime, the police guard posted in the village came there.

4. Sukh Singh arranged a Tractor with Trolley to take the injured to the hospital and Sukh Singh, Mohan, Subedar Kharag Singh and other persons accompanied them. Maharam met on the way, who told them that Brijendra Singh s/o Hari Ram (respondent No. 6) had been arrested and Brijendra Singh was also made to sit in the Tractor Trolley.

5. Thereafter at the tube-well of Subedar Kharag Singh, Sukh Singh dictated the script of the F.I.R. to Subedar Kharag Singh who wrote the same in his hand writing and the injured persons were taken by Sukh Singh to the Police Station. A report of the incident was lodged in Police Station Fatehpur Sikri on 21.06.1981 at 5:20 p.m. and the police recorded the statement of injured Phool Singh s/o Jorawar Singh who was lying down in a serious condition in the Tractor Trolley alongwith the other injured persons. While groaning with pain, Phool Singh stated that as soon as he reached in front of the house of Sukh Singh upon hearing the commotion, Fateh Singh (the respondent No. 2) fired at him and the bullet hit him below his left shoulder. Giriraj Singh shot the second fire and the bullet from it hit his left thigh and he fell down. Even after it, gun-shots kept on being fired, from which Sobaran, Chhiddi, Panna and Lakhan were injured. Ramshri and Balbiri were lying down and groaning in pain since before his arrival. He said that his condition was very bad and he could not speak anything more. He had been shot by Fateh Singh and Giriraj and he should be sent to a hospital soon. This statement was recorded by the Sub Inspector and immediately afterwards

he sent the injured Phool Singh in a Tractor Trolley to Primary Health Centre, Fatehpur Sikri for his medical examination and treatment, from where he was referred to a Hospital at Agra. Phool Singh s/o Jorawar Singh died before he could reach the hospital.

6. Giriraj Singh absconded and the accused respondent Nos. 1 to 6 were charged and tried for committing offences punishable under Sections 148, 307/149, 302/149 IPC.

Prosecution Evidence

7. The prosecution examined 5 witnesses, out of which PW-1 (Sukh Singh), PW-2 (Lakhan) and PW-3 (Sobaran Singh) were the eye-witnesses of the incident. The injury reports of Chhiddi, Panna, Lakhan Singh, Balbiri, Ramshri, Sobaran Singh and post-mortem report of the dead body of Phool Singh were placed on record. Injury reports of Chhiddi, Panna, Lakhan Singh and Balbiri mention gun-shot injuries whereas injury reports of Lakhan Singh and Ramshri mention lacerated wounds. The post mortem report of the dead body of Phool Singh mentions two gun-shot wounds.

8. PW-1 Sukh Singh has stated that his house is situated opposite the house of the accused-Phool Singh. Giriraj Singh and Phool Singh used to indulge in indecent talks and for this reason relations with those persons became strained. One day before the day of occurrence, his wife Lalmani alongwith other ladies, namely Ramshri wife of Nirpat and Basanti wife of Meet Singh were returning after easing themselves. Phool Singh and Giriraj started cracking indecent jokes with the ladies. Sukh Singh was coming behind the ladies and he forbade those persons from talking in such manner in presence of the ladies. Member Singh also reached there at the same time and he also forbade Giriraj Singh and Phool Singh from doing such talks. Giriraj said that at that time he was short of man power, else he would have taught a lesson. The following day at about 2:00-3:00 p.m. Sukh Singh was lying down in his house. He saw Sher Singh, Phool Singh, Fateh Singh, Giriraj, Virendra, Malkhan and Brijendra had gathered in front of the house of Phool Singh. Phool Singh and Giriraj Singh had single barrel guns and other four persons had country made pistols. These persons charged towards the house of PW-1 shouting to catch hold of him. PW-1 ran away and took shelter of a wall. Upon hearing the commotion, his sister-in-law Ramshri and younger brother's wife Balbiri came out of their house and some persons from the aforesaid seven fired two gun-shots. Some pellets hit Ramshri and Balbiri and some hit wall where PW-1 was hiding. Thereafter, Phool Singh, Sobaran, Lakhan, Panna and Chhiddi came there. The aforesaid seven accused persons shot on these persons also and Lakhan, Sobaran, Chhiddi, Phool Singh s/o Jorawar and Panna got injured. Upon hearing the noise of gun-shots, police guard came there and seeing the police, the accused-persons ran away towards south. PW-1 took Tractor of Chhiddi and arranged for transporting the injured persons to the hospital. PW-1, Mohan, Subedar Kharag Singh and some other persons went in the Tractor with the injured persons. Maharam met on the way and he told that the accused Brijendra Singh had been caught. Then Brijendra Singh was also made to sit in the Tractor Trolley. A report was got scribed by Subedar Kharag Singh which was proved by the PW-1 as Exhibit-1. Thereafter, PW-

1 went to the police station alongwith the injured persons and he gave the report there. Thereafter, the injured were sent to a hospital. At the hospital, they were told that the injured were in a serious condition and they were referred to Agra. Accordingly, the injured were taken to Agra, where the doctor examined Phool Singh and told that he was dead.

9. In his cross-examination, PW-1 stated that there is a distance of about 45-50 steps between his house and the house of the accused Phool Singh. The accused persons had fired 7-8 shots. Two fires were directed towards him. After the accused persons had left, he had seen the pellets in and around the wall and had shown it to the Sub-Inspector. Some pieces of plaster of the wall had fallen down. He did not know as to whether the Sub-Inspector collected the pellets and the pieces of plaster or not. The tube-well where the FIR was scribed, is about 2-3 Furlongs away from the village. The report had not been written till Maharam stopped them. 3-4 minutes after running away of the accused, they had gone to the Baithak of Bhima Numbardar. It took 15-20 minutes to arrange the tractor. From the Baithak of Bhima Numbardar, they reached his tube-well in 5-6 minutes. About ½ hour was spent at the tube-well in writing the FIR. He does not know how to write and, therefore, he dictated the FIR to Subedar Kharag Singh. No draft of the FIR was prepared. No one had a prior experience of writing such an FIR. It is wrong that the FIR-Exhibit-1 was signed on the next day or that it was got written by some other person. The police station is about 8 Miles away from the tube-well. As there were injured persons in the tractor, it was driven slowly and it took about 1 ¼ - 1 ½ hours to reach the police station from the tube-well. He denied the defence story that they had rioted at the temple and that Subedar Kharag Singh had fired indiscriminately in the Panchayat due to which the persons got injured.

10. PW-2 Lakhan s/o Jogdar is also one of the injured persons. He stated that he knows all the accused persons, who are residents of his village. On the date of occurrence at about 3:00 p.m., he was at his home. He heard gun-shots from the side of house of the accused Phool Singh. Upon hearing the gun-shots, he went there and Saurabh and Panna followed him. They reached the chowk in front of the House of the accused Phool Singh. The house of Sukh Singh is opposite the house of Phool Singh. Giriraj Singh and Phool Singh had single barrel guns and other accused persons had country made pistols. He saw Balbiri, Ramshri and Phool Singh s/o Jorawar had fallen down there. Giriraj fired at PW-2 Lakhan and the pellets hit his hand. Giriraj fired the second shot which hit Sobaran. Shera shot a fire which hit Panna. Upon seeing Subedar Kharag Singh and the Police Guard, the accused and Giriraj ran away. They took the injured to the Baithak (sitting area) of Bhima Numbardar. There the injured were put in a tractor and taken to Fatehpur Sikri. On the way, Maharam stopped the Tractor and told that Brijendra Singh had been caught with the help of police. The Police personnel made Brijendra Singh to sit in the Tractor. Subedar Kharag Singh scribed the report at the tube-well and PW-2 and other persons went to the Police Station. The medical examination of PW-2 and other persons was done in Agra hospital. Phool Singh s/o Jorawar Singh had died on the way.

11. In his cross-examination PW-2 stated that there are two houses and an open plot between his house and the house

of Phool Singh. He had heard two gun-shots at his home and 2-3 while on the way. There was a distance of 1-1 - 2-2 steps between the persons who were firing. They were at a distance of about 15-20 steps from the house of Sukh Singh. The accused Brijendra had been caught before they could reach the tube-well. He too denied the defence story that any Panchayat was held at the temple and a quarrel took place in the Panchayat and he also denied and that Subedar Kharag Singh had fired indiscriminately in the Panchayat due to which the persons got injured.

12. PW-3 Sobaran is also an injured witness and he stated that he was present at his house on the day of occurrence at about 3:00 p.m. He heard gun-shots. Upon hearing the gun-shots, he reached the *chowk* in front of the house of Phool Singh and Phool Singh s/o Jorawar, Ramshri and Balbiri were lying down injured there. Phool Singh, Fateh Singh and Giriraj were carrying guns and Sher Singh, Malkhan, Brijendra and Virendra were carrying country made pistols. Lakhan had reached there before PW-3 and Sobaran and Panna reached after him. Giriraj shot at Lakhan and thereafter he shot at PW-2 Sobaran Singh. Sher Singh fired at Panna with a country made pistol. All three were hit by pellets and upon being injured, they sat near larawani. Upon seeing Subedar Kharag Singh, the Police personnel and some other persons of the village, the accused-persons ran away. Thereafter Phool Singh was lifted and taken to the Baithak of Bhima Numbardar. The injured ladies were sent to the house of Sukh Singh. Thereafter, they went to the police station in a Tractor Trolley. Police Guard and Subedar Kharag Singh etc. had caught Brijendra. They stopped the tractor at the tube-well and Brijendra was made to sit on the Tractor Trolley. Thereafter Subedar Kharag Singh scribed the Report there. They went with the report to the Police Station. Subedar Kharag Singh and Police personnel returned to the village. His injuries were examined by the doctor at Agra. Phool Singh had died on the way.

13. In his cross-examination, PW-3 stated that he had told the Sub-Inspector that he saw Phooli, Fatte and Giriraj Singh carrying guns and Shera, Malkhan and Virendra carrying country made pistols. He categorically denied that he had told the Sub-Inspector that the fact that the accused Phool Singh, Giriraj, Fateh Singh Virendra, Shera, Malkhan and Brijendra had ran away, had been told to him by Sukh Singh. Brijendra had been caught before they reached the tube-well of Sukh Singh. He had not told the Sub-Inspector that Brijendra was caught beyond the tube-well of Sukh Singh. The ladies were also made to sit in the tractor at the Baithak of Bhima Numbardar. The report was scribed at the tube well of Sukh Singh. He categorically denied the story of a quarrel at the temple and he denied that the persons were injured due to the indiscriminate firing done by Subedar Kharag Singh.

14. PW-4 Subedar Kharag Singh said that he had heard 2-3 gun-shots and then he heard 4-5 gun-shots. Carrying his gun, he went to Sukh Singh's house. Balbiri, Ramshri, Chhiddi and Phool Singh were lying injured there. He saw the accused and other persons running away, who were being chased by the police and Maharam etc. He met Sukh Singh there, who told the entire incident to PW-4. Both the injured ladies were taken into the home and Phool Singh and Chhiddi were taken to Baithak of Bhima Numbardar. Lakhan, Panna and Sobaran also reached there. They had

suffered gun-shot injuries. Sukh Singh arranged a Tractor. He started towards the police station alongwith the injured persons and PW-4. When they reached near Sukh Singh's tube-well, Maharam bawled and informed that the accused Brijendra had been caught by him and the police. Then Brijendra was also made to sit in the tractor. Sukh Singh asked PW-4 to write his report and he wrote whatever the former told him. It was signed by Sukh Singh. PW-4 proved the report as Exhibit A-1.

15. In his cross-examination, PW-4 stated that he was in a hurry to take the injured persons and he did not see empty cartridge shells or pellet marks in the Wall of Sukh Singh's verandah. When the Sub-Inspector inspected the spot, he had called PW-4. There were pellet marks in the wall, but no pellets were there. Pieces of plaster were not lying there. Near the places of holes of pellet marks, sand from the plaster was lying there. He had denied having told the Investigating Officer that he had went with the tractor trolley up to Jaingara and he could not tell as to how the Investigating Officer mentioned it. He denied that any Panchayat was held at the temple on the date of incident and that Sukh Singh and others had created an uproar in it. He denied having fired at the crowd due to which the persons suffered injuries.

16. PW-5 Vidya Sagar Tiwari was posted as Constable Clerk on the date of the incident. He proved the Report lodged in the police station, which was written and signed by him. He stated that initially the case was registered under Sections 147/148/307 I.P.C. and after receiving the information of death of Phool Singh it was converted into Section 302. He had registered this fact in the General Diary on 22-06-1981 at Report No. 30. The original G.D. is in his handwriting and its copy is on record and is marked as Exhibit A-11. The investigation of the case was conducted by Sub Inspector Bharat Ram who died on 13.03.1984, i.e., about a year before recording of the statement of PW-5. The statement of the deceased Phool Singh is recorded in the Case Diary in the hand writing of S.I. Bharat Ram, which was proved by PW-5 and was marked as Exhibit A-15.

Defence Evidence

17. In their statements recorded under Section 313, Cr.P.C., all the accused persons denied the charges and stated that they had been falsely implicated due to party-bandi in the village.

18. The accused-Respondent No. 4 Sher Singh stated that there was no vision in his right eye and for the past 4-5 years, the vision of left eye was also poor.

19. The accused-Respondent No. 5 Malkhan Singh stated that prior to the indecent, on 15th June he and two persons had found a handkerchief on the road. One of them picked it up and handed it over to the wife of Badan Singh Nai. The lady demanded Rs.300/- which, she said, were kept in the handkerchief. Since none of them had any money, they went away. On 21st June, a Panchayat was held at Thakur Devalay to discuss the matter. He had also gone to the Panchayat. The Panchs asked him about the money. He and his companions denied. Sukh Singh etc. were also present and Subedar Kharag Singh had his licensed gun. A quarrel tool place there. Sukh Singh etc. pelted stones. He also ran. Subedar Kharag Singh resorted to indiscriminate firing. Respondent No. 5 ran away and he did not see as to who suffered injuries.

20. Accused-Respondent No. 6 Brijendra Singh (now dead) said that he is a medical practitioner having his clinic in village Jaingara, which is about 2 Km. away from his village. At the time of the quarrel he was at his clinic. When these persons were bringing the injured in tractor-trolley, they saw him, caught him and dragged him to the trolley.

21. It is significant to mention that upon being asked as to whether they will give an explanation, except for the accused-respondent no. 5 Malkhan Singh, all other accused persons answered in the negative. Although he had stated that he will not give any explanation, the Accused-Respondent No. 1 Phool Singh appeared as DW-1 and although accused-respondent no. 5 Malkhan Singh had stated that he would give an explanation, he did not appear as a witness.

22. The accused-respondent No. 1 Phool Singh (DW-1) stated that the Accused-Respondent No. 5 Malkhan Singh is also called as Bhagat Ji. A dispute had occurred between Bhagat Ji and the wife of Madan Nai regarding a handkerchief and some money. He asked me to settle the dispute. I asked these people to gather ten persons of the village and hold a Panchayat at the temple and settle the dispute. On this suggestion of DW-1, a Panchayat was held at the temple of Thakur Ji. DW-1, Sukh Singh, Padam Singh, Pooran Pradhan and Kedar were nominated as Panch. Panchayat started at about 02:00 p.m. Shera had come to attend the Panchayat alongwith Malkhan. 40-50 persons of the village had gathered in the Panchayat. A short while after start of the Panchayat, a quarrel occurred and brick batting started. Subedar Singh fired a shot from his gun and a stampede started. Villagers suffered pellet injuries due to the gun-shot fired by Subedar Kharag Singh.

23. In his cross-examination, DW-1 stated that the handkerchief was lost and found by Malkhan about 2-1 days before the Panchayat. No one got injured in brick batting.

Findings of the Trial Court

24. After discussion of the entire evidence, the learned trial court gave the judgment and order dated 30-04-1984 acquitting all the accused persons of all the charges on the following grounds: -

(I) The prosecution has produced PW-1, PW-2 and PW-3 as eye-witnesses but PW-3 was confronted with his statement recorded under Section 161 Cr.P.C., in which he had stated that Sukh Singh had told him about running of Phool Singh; this indicates that PW-3 did not see the incident.

(II) All the witnesses had enmity with the accused persons since prior to the incident and it was also established that only those witnesses of fact were produced who are closely related to each other.

(III) The Investigating Officer did not recover any pellets either from the wall where Sukh Singh had taken shelter or from any place near the wall and no empty shells of cartridges were recovered from the spot. No blood was found from any place in the chowk although several injured persons fell on the ground after receiving injuries in the chowk, which makes the place of incident doubtful. Therefore, the statements of the eye-witnesses have not been corroborated regarding the place of incident by material circumstances.

(IV) The fact that the arrest of the accused Brijendra has been mentioned in the FIR indicates that it was prepared subsequently.

(V) The statement of the deceased Phool Singh made to the Investigating Officer has been relied upon as his dying declaration but the Investigating Officer did not take the precaution of recording his statement in the presence of two respectable witnesses as required in the Police Regulations and, therefore, much evidentiary value cannot be placed upon this dying declaration.

(VI) The deceased Phool Singh mentioned that only Fateh Singh and Girraj fired at him. He also stated that Sobaran, Chhiddi, Panna, Lakhan, Ramshri and Balbiri also suffered injuries in the firing but he did not name any other person who resorted to firing and, therefore, if this dying declaration is accepted as true, then only two persons resorted to firing. Therefore, the prosecution story is belied by the dying declaration and makes the prosecution case of firing by the seven accused extremely doubtful.

(VII) Although the defence theory regarding Panchayat and firing is highly improbable and unnatural, it makes no difference and it is a cardinal principle of law that the prosecution must prove its case beyond doubt and cannot take advantage of the weakness of defence.

25. The State has filed the present appeal under Section 378 Cr.P.C., which has been admitted by means of an order dated 07-01-1987.

26. During the pendency of the appeal, the respondent Nos. 1, 4 and 6 have died and the appeal stands abated as against them. The respondent Nos. 2, 3 and 5 are represented by Sri Apoorv Tiwari and Sri Raj Kumar Yadav, Advocates, who have advanced their submissions in opposition of the appeal.

Submissions of the Appellant-State

27. Ms. Nand Prabha Shukla, learned A.G.A. has taken us through the statements of witnesses in order to establish that the findings of the learned Court below are perverse and the judgment under challenge is unsustainable. She has submitted that the Investigating Officer has recorded the statement of injured Phool Singh under Section 161 Cr.P.C., who died thereafter while being taken to the hospital. Therefore, his statement has to be treated as his dying declaration and the provisions of Police Regulations would not apply to it and non-compliance with the aforesaid provisions would not vitiate its evidentiary value.

28. In **Jalil Khan and others versus State of U.P**. (2016) 93 ACC 882 = 2016 SCC OnLine All 84, a coordinate Bench of this Court has dealt with the effect of non-compliance with the provisions of Regulation 115 of the Police Regulations in a Statement which was recorded under Section 161 Cr.P.C. and the relevant portions of the aforesaid judgment are being reproduced below: -,

"38. Next ground of challenge, that dying declaration has been wrongly believed by the learned trial Judge has two points that it has been recorded in contravention of para 115 of the U. P. Police Regulations and presence of independent persons was not procured by

the investigating officers before recording the dying declaration.

39. On behalf of the State-respondent, these arguments have been replied that when statement of the deceased Abdul Samad was recorded by the investigating officer, it was recorded under Section 161 Cr.P.C. in absence of contemplation of the death of the injured. The learned trial Judge has believed the dying declaration. The dying declaration was recorded by first investigating officer Sri. R.P. Chaudhary though he has not been examined by the prosecution and the second investigating officer Ramesh Chandra Dubey, P.W.-8 has proved the dying declaration Exhibit Ka-12. Non-examination of Sri. R.P. Chaudhary has been explained by this witness, according to him, R.P. Chaudhary has died. Death of R.P. Chaudhary has not been disputed by the defence before the learned trial Judge.

40. On behalf of the defence, this witness has been cross examined regarding the dying declaration on the point that why he did not record the statement of the doctor about the fitness of mental condition of Abdul Samad at the time of recording of his statement on 29.2.1986.

41. We are of the opinion though while making declaration, injured apprehended his death but there is nothing on record that the investigating h but there is nothing on record that the investigating officer was informed by the doctor or any other person about impending death of the injured. According to the prosecution witnesses the deceased was conscious and he became unconscious only half an hour before he reached the District Hospital, Sultanpur. During cross examination, Musa Qasim, P.W.-1 was asked whether he had informed the investigating officer that his father was in serious condition to which he replied that he was not asked by the investigating officer in this regard. He only informed the investigating officer, he had seen the occurrence and identified the miscreants.

42. In view of above, there appears substance in the argument advanced on behalf of the State-respondent that the investigating officer merely recorded statement of injured Abdul Samad under Section 161 Cr.P.C. and it was not made in contemplation of the death of the injured. Keeping in view this fact, we do not think the two points submitted before us in reference to admissibility of dying declaration Exhibit Ka-12, survive no more."

29. In the present case also, the statement of Phool Singh was recorded by the Investigating Officer under Section 161 Cr.P.C. and it was not signed by him. At the time of making the statement Phool Singh had suffered two gun-shot injuries, he was lying in a Tractor Trolley for being taken to the hospital for his treatment. His condition was serious and he was groaning in pain while making the statement and he even said that he could not speak anything more. Soon thereafter, he died before he could reach the hospital. However, there is nothing on record which establishes that while recording the statement of Phool Singh, the Investigating Officer was acting with an understanding that the former was about to die and that the later was recording his dying declaration. The provisions of Regulation 115 of the Police Regulations would not apply to a statement recorded under Section 161 Cr.P.C. However, as the person died soon after recording of his

statement under Section 161 Cr.P.C., the statement can be relied upon as his dying declaration even without compliance of the requirements of Regulation 115.

30. The learned A.G.A. has placed reliance on a decisions of the Hon'ble Supreme Court in the case of **Sri Bhagwan Vs. State of U.P., 2013 (12) SCC 137**. The relevant portion of the said judgment is extracted herein below:-

"21. As far as the implication of 162 (2) of Cr.P.C. is concerned, as a proposition of law, unlike the excepted circumstances under which 161 statement could be relied upon, as rightly contended by learned senior counsel for the respondent, once the said statement though recorded under Section 161 Cr.P.C. assumes the character of dying declaration falling within the four corners of Section 32(1) of Evidence Act, then whatever credence that would apply to a declaration governed by Section 32 (1) should automatically deemed to apply in all force to such a statement though was once recorded under Section 161 Cr.P.C. The above statement of law would result in a position that a purported recorded statement under Section 161 of a victim having regard to the subsequent event of the death of the person making the statement who was a victim would enable the prosecuting authority to rely upon the said statement having regard to the nature and content of the said statement as one of dying declaration as deeming it and falling under Section 32(1) of Evidence Act and thereby commend all the credence that would be applicable to a dying declaration recorded and claimed as such."

31. The requirements of a valid dying declaration have been formulated by the Hon'ble Supreme Court in **Paniben (Smt) v. State of Gujarat, (1992) 2 SCC 474** in the following words: -

"18. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of either tutoring, prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailants. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. This Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under:

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (Munnu Raja v. State of M.P.)

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (State of U.P. v. Ram Sagar Yadav; Ramawati Devi v. State of Bihar).

(iii) This Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration. (K. Ramachandra Reddy v. Public Prosecutor).

(iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence. (Rasheed Beg v. State of M.P.)

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (Kake Singh v. State of M.P.)

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (Ram Manorath v. State of U.P.)

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (State of Maharashtra v. Krishnamurti Laxmipati Naidu)

(viii) Equally, merely because it is a brief statement, it is not be discarded. On the contrary, the shortness of the statement itself guarantees truth. Surajdeo Oza v. State of Bihar)

(ix) Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye witness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail. (Nanahau Ram v. State of M.P.)

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (State of U.P. v. Madan Mohan)".

32. Examining the dying declaration of Phool Singh alongwith the other evidence available on record, we find that the declaration was recorded by the Investigating Officer S.I. Bharat Ram soon after the incident, when Phool Singh was lying in the Tractor-trolley alongwith the other injured persons for being taken to a hospital. Initially it was recorded in the form of a statement under Section 161 Cr.P.C. but due to death of Phool Singh soon thereafter, it assumed the character of his dying declaration. S.I. Bharat Ram, who had recorded the statement, expired before he could be examined as a witness in the trial and the aforesaid statement of Phool Singh was proved by PW-5 Head Constable Vidya Sagar Tiwari, who was posted as a Constable Clerk in Police Station Fatehpur Sikri on the date of incident, i.e. 21-06-1981. Phool Singh has unequivocally stated that upon hearing the commotion, as soon as he reached in front of the house of Sukh Singh, Fateh Singh (the respondent No. 2) fired at him and the bullet hit him below his left shoulder. Giriraj Singh shot the second fire and the bullet from it hit his left thigh and he fell down. Even after it, gun-shots kept on being fired, from which Sobaran, Chhiddi, Panna and Lakhan were injured. Ramshri and Balbiri were lying down and groaning in pain since before his arrival. The dying declaration of Phool Singh has been adequately corroborated by the statements of PW-1, PW-2 and PW-3, amongst whom PW-1 is the eye witness and PW-2 and PW-3 are the injured witnesses. There is no material contradictions between the dying

declaration of Phool Singh and the statements of injured witnesses PW-2 and PW-3 and the eye witness PW-1 and the same is fully corroborated by the post mortem report of the deceased Phool Singh and the injury reports of the other injured persons. Keeping in view the principle laid down in Jalil Khan, Sri Bhagwan and Paniben (Supra), it is clear that when we examine the statement of the deceased Sukh Singh, we have no hesitation in holding that his statement has to be relied upon as an acceptable dying declaration.

Submissions on behalf of Accused - Respondents

33. Shri Apoorv Tiwari, the learned counsel appearing for the accused-respondents No. 2, 3 and 5 has made several submissions while opposing the Appeal and we will deal with the same one by one. The first submissions of the learned Counsel for the accused respondents is that PW-1 stated that his relations with the accused-persons were strained and, therefore, he is not an independent witness and his evidence should be discarded. His second submission is that all the witnesses are closely related and evidence of such related witnesses needs to be examined cautiously and corroboration of statements of such witnesses is required.

34 . The reason for relations of the accused-persons being strained with the PW-1 and other persons was that Giriraj and Phool Singh used to indulge in indecent talks in presence of the ladies of the family of PW-1 who has stated that when he forbade Phool Singh and Giriraj from indulging in indecent talks in presence of the ladies, they said that they will continue to do it and Giriraj had said that at that time he was short of man power and he will settle the score. Therefore, the allegations of strained relations weighs heavily against the accused-persons as it gives rise to the motive for committing the crime and the testimony of the PW-1 and injured witnesses PW-2 and 3 as well as dying declaration of Phool Singh cannot be discarded on the ground of strained relations.

35. So far as the submission of the witnesses being closely related is concerned, there is no law that the testimony of a related witness cannot form the basis of conviction of the accused. The only caution is that the testimony of related witnesses should be examined more carefully.

36 . In **Ramji Singh v. State of U.P., (2020) 2 SCC 425**, the Hon'ble Supreme Court was dealing with a similar situation where the witnesses were closely related to the deceased and there was enmity between both the sides. The Hon'ble Supreme Court has dealt with the situation in the following manner: -

"19. It has been urged that the statements of the two witnesses PWs 1 and 2 should not be relied upon since they are closely related to the deceased and there was enmity between both the sides. It has been urged that PW 2 had a dispute with Krishna Autar (A-3) and his brother had litigation with Lakhan Singh (A-1). We assume these facts to be true. There is no manner of doubt as stated in the complaint itself that the relationship between the two sides was strained. They belonged to different groups and obviously there was enmity between them. As is often said enmity is a double-edged sword. It can be both the motive for a crime and it can also be a motive to falsely implicate some other

people. However, each case has to be decided on its own evidence. In this case we have come to the conclusion that the written complaint was recorded immediately after the occurrence. There was no time to concoct a false case implicating those who were not involved. The fact that Sarman Singh was murdered is not disputed. The only question is whether it was the accused persons who murdered him or somebody else. Once we believe that PWs 1 and 2 are eyewitnesses, then there is no reason to hold that the appellants were falsely implicated. They are all named in the written complaint as well as in the FIR which was recorded at the earliest. Their version is corroborated by the version of PW 4, who though not an eyewitness reached the spot at about 12.45 p.m. and then scribed the complaint. In our view this complaint depicts what actually happened.

20. True it is that there are some minor variations and contradictions in the statement of the two witnesses, especially PW 2. PW 2 may have improved his version slightly while appearing in court but the core of his evidence remains intact....

21. We must remember that the prosecution story is that six persons who were heavily armed, two of them with guns, killed the deceased in broad daylight. This itself shows that these accused persons were not scared of the villagers. While leaving the place of occurrence they threatened all gathered there by saying that anybody who tried to interfere would meet the same fate. In such a situation no other villager who may have been present would turn up to give evidence. This Court cannot lose sight of the harsh reality that witnesses are scared to depose in court. In this case two of the witnesses have spoken up and their evidence has been corroborated on all counts. It may be true that their relations with the accused may not have been cordial but the evidence does not show that the enmity or dispute between these two witnesses and the accused was of such a nature that these two witnesses would make false statements only to settle scores with the appellants thereby leaving the real culprits to go scot-free. In our opinion merely because these witnesses are interested witnesses their testimony cannot be discarded."

37. In I**langovan v. State of T.N., (2020) 10 SCC 533** the Hon'ble Supreme Court held that: -

"it is settled law that the testimony of a related or an interested witness can be taken into consideration, with the additional burden on the Court in such cases to carefully scrutinise such evidence (see Sudhakar v. State)."

38. Therefore, the submission of the counsel for the appellant, that the testimonies of the witnesses in the case should be disregarded because they were related, without bringing to the attention of the Court any reason to disbelieve the same, cannot be countenanced keeping in view the fact that PW-2 and PW-3 are the injured witnesses and their presence on the spot of occurrence cannot be doubted and there is no discrepancy in the statements of PW-2 and PW-3, as also in the dying declaration of Phool Singh regarding the narration of the incident.

39. The third submission of the learned Counsel for the Accused-respondents is that the statement of eye-witnesses have not been supported by any independent witnesses.

40. In **Guru Dutt Pathak v. State of U.P., (2021) 6 SCC 116, t**he Hon'ble Supreme Court has been pleased to summarize the law in this regard in the following words: -

"24. One another ground given by the learned trial court while acquitting the accused was that no independent witness has been examined. The High Court has rightly observed that where there is clinching evidence of eyewitnesses, mere non-examination of some of the witnesses / independent witnesses and / or in absence of examination of any independent witnesses would not be fatal to the case of the prosecution.

24.1. In Manjit Singh v. State of Punjab, it is observed and held by this Court that reliable evidence of injured eyewitnesses cannot be discarded merely for reason that no independent witness was examined.

24.2. In the recent decision in Surinder Kumar v. State of Punjab, it is observed and held by this Court that merely because prosecution did not examine any independent witness, would not necessarily lead to conclusion that the accused was falsely implicated.

24.3. In Rizwan Khan v. State of Chhattisgarh, after referring to the decision of this Court in State of H.P. v. Pardeep Kumar, it is observed and held by this Court that the examination of the independent witnesses is not an indispensable requirement and such non-examination is not necessarily fatal to the prosecution case."

41. There is no rule that in every criminal case, the testimony of the related witnesses needs corroboration and where there is clinching evidence, non-examination of independent witnesses will not be fatal to the prosecution case.

42. The aforesaid three submissions of the learned Counsel for the Accused-respondents are directed to attack the testimonies of prosecution witnesses. The substance of the testimonies of all the witnesses examined in the case has been reproduced in earlier part of this judgment. PW 1 Sukh Singh and injured witnesses PW 2 Lakhan and PW 3 Sobaran Singh are the most natural witnesses of the incident and their testimonies cannot be disbelieved merely on the ground that they are closely related. They would be the least disposed to falsely implicate the accused persons or substitute them in place of the real culprits. In the present case, seven accused persons carrying guns and country-made pistols had fired gun-shots and injured several persons and killed one person at the chowk in front of the deceased's house in broad day light. From their conduct it appears that they had no respect or fear for the law. It is a matter of common understanding that in such matters, the independent persons, generally, do not dare to give evidence against the accused on account of fear. The mis-carriage of justice is inevitable, if in such a case the testimonies of the witnesses, who are closely related with the deceased, are required to be corroborated by the independent evidence.

43. In **State of U.P. v. M.K. Anthony, (1985) 1 SCC 505,** the Hon'ble Supreme Court has held that: -

"10. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of

truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals. Cross-examination is an unequal duel between a rustic and refined lawyer....."

44. In **State of U.P. v. Krishna Master, (2010) 12 SCC 324** the Hon'ble Supreme Court explained the manner in which the Court should examine the statement of witnesses in the following words:-

"15. Before appreciating evidence of the witnesses examined in the case, it would be instructive to refer to the criteria for appreciation of oral evidence. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is found, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hypertechnical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.

16. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of the evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless the reasons are weighty and formidable, it would not be proper for the appellate court to reject the evidence on the ground of variations or infirmities in the matter of trivial details. Minor omissions in the police statements are never considered to be fatal. The statements given by the witnesses before the police are meant to be brief statements and could not take place of evidence in the court. Small/Trivial omissions would not justify a finding by

court that the witnesses concerned are liars. The prosecution evidence may suffer from inconsistencies here and discrepancies there, but that is a shortcoming from which no criminal case is free. The main thing to be seen is whether those inconsistencies go to the root of the matter or pertain to insignificant aspects thereof. In the former case, the defence may be justified in seeking advantage of incongruities obtaining in the evidence. In the latter, however, no such benefit may be available to it.

17. In the deposition of witnesses, there are always normal discrepancies, howsoever honest and truthful they may be. These discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition, shock and horror at the time of occurrence and threat to the life. It is not unoften that improvements in earlier version are made at the trial in order to give a boost to the prosecution case, albeit foolishly. Therefore, it is the duty of the court to separate falsehood from the truth. In sifting the evidence, the court has to attempt to separate the chaff from the grains in every case and this attempt cannot be abandoned on the ground that the case is baffling unless the evidence is really so confusing or conflicting that the process cannot reasonably be carried out. In the light of these principles, this Court will have to determine whether the evidence of eyewitnesses examined in this case proves the prosecution case."

45. In **Manu Sharma v. State (NCT of Delhi), (2010) 6 SCC 1** the Hon'ble Supreme Court formulated the principles to be kept in mind by the appellate Court while dealing with appeals against acquittal:-

"27. The following principles have to be kept in mind by the appellate court while dealing with appeals, particularly against an order of acquittal:

(i) There is no limitation on the part of the appellate court to review the evidence upon which the order of acquittal is founded.

(ii) The appellate court in an appeal against acquittal can review the entire evidence and come to its own conclusions.

(iii) The appellate court can also review the trial court's conclusion with respect to both facts and law.

(iv) While dealing with the appeal preferred by the State, it is the duty of the appellate court to marshal the entire evidence on record and by giving cogent and adequate reasons set aside the judgment of acquittal.

(v) An order of acquittal is to be interfered with only when there are "compelling and substantial reasons" for doing so. If the order is "clearly unreasonable", it is a compelling reason for interference.

(vi) While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above

infirmities, it can reappraise the evidence to arrive at its own conclusion.

(vii) When the trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of ballistic experts, etc. the appellate court is competent to reverse the decision of the trial court depending on the materials placed."

46. In **Achhar Singh v. State of H.P., (2021) 5 SCC 543**, the Hon'ble Supreme Court explained the scope of powers of the High Court in appeals against acquittal in the following manner: -

"16. It is thus a well-crystalized principle that if two views are possible, the High Court ought not to interfere with the trial court's judgment. However, such a precautionary principle cannot be overstretched to portray that the "contours of appeal" against acquittal under Section 378 Cr.P.C. are limited to seeing whether or not the trial court's view was impossible. It is equally well settled that there is no bar on the High Court's power to re-appreciate evidence in an appeal against acquittal. This Court has held in a catena of decisions (including Chandrappa v. State of Karnataka, State of A.P. v. M. Madhusudhan Rao and Raveen Kumar v. State of H.P.) that the Cr.P.C. does not differentiate in the power, scope, jurisdiction or limitation between appeals against judgments of conviction or acquittal and that the appellate court is free to consider on both fact and law, despite the self-restraint that has been ingrained into practice while dealing with orders of acquittal where there is a double presumption of innocence of the accused."

The Hon'ble Supreme Court further held that "homicidal deaths cannot be left to judicium dei. The court in its quest to reach the truth ought to make earnest efforts to extract gold out of the heap of black sand. The solemn duty is to dig out the authenticity. It is only when the court, despite its best efforts, fails to reach a firm conclusion that the benefit of doubt is extended."

47. The principles which emerge from the aforesaid decisions, are that the "contours of appeal" against acquittal under Section 378 CrPC are not limited to seeing whether or not the trial court's view was impossible. There is no bar on the High Court's power to reappreciate evidence in an appeal against acquittal. Cr.P.C. does not differentiate in the power, scope, jurisdiction or limitation between appeals against judgments of conviction or acquittal. The appellate court is free to consider on both fact and law, despite the self-restraint that has been ingrained into practice while dealing with orders of acquittal where there is a double presumption of innocence of the accused.

48. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. In the deposition of witnesses, there are always normal discrepancies, howsoever honest and truthful they may be, but that is a shortcoming from which no criminal case is free. These discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition, shock and horror at the time of occurrence and threat to the life. It is the duty of the court to separate falsehood from the truth. In sifting the evidence, the court has to attempt to

separate the chaff from the grains in every case. The main thing to be seen is whether those inconsistencies go to the root of the matter or pertain to insignificant aspects thereof. In the former case, the defence may be justified in seeking advantage of the incongruities occurring in the evidence. In the latter, however, no such benefit may be available to it. In the light of these principles, this Court will have to determine whether the evidence of the eyewitnesses examined in this case proves the prosecution case. When the trial court has ignored the evidence or misread the material evidence or has ignored material documents like the dying declaration, the appellate court is competent to reverse the decision of the trial court depending on the materials placed.

49. The dying declaration of Sukh Singh son of Joravar Singh (Exhibit A-15) states that a gun-shot fired by Fateh Singh hit below his left shoulder and the other gun-shot fired by Giriraj hit him in his left thigh and he fell down in the chowk; gun-shots kept on being fired and the injured Sobaran, Chhiddi, Panna, Lakhan and Ramshri and Balbiri were lying down and groaning since before he reached there. PW-1 Sukh Singh has stated that he saw that Sher Singh, Phool Singh, Fateh Singh, Giriraj, Virendra, Malkhan and Brijendra had gathered in front of the house of Phool Singh. Phool Singh and Giriraj Singh had single barrel guns and the other four persons had country made pistols. Some persons from the aforesaid seven fired two gun-shots. Some pellets hit Ramshri and Balbiri and some hit the wall where PW-1 was hiding. Thereafter, Phool Singh, Sobaran, Lakhan, Panna, Chhiddi came there. The aforesaid seven accused persons shot at these persons also and Lakhan, Sobaran, Chhiddi, Phool Singh s/o Jorawar and Panna got injured. PW-2 Lakhan, an injured witness, has stated that upon hearing the gun-shots being fired, he went to the chowk in front of the House of the accused Phool Singh and saw that Giriraj Singh and Phool Singh had single barrel guns and the other accused persons had country made pistols. He saw Balbiri, Ramshri and Phool Singh s/o Jorawar had fallen down there. Giriraj fired at PW-2 Lakhan and the pellets hit his hand. Giriraj fired the second shot which hit Sobaran. Shera shot a fire which hit Panna. The injured were put in a tractor and taken to Fatehpur Sikri. The medical examination of PW-2 and the other persons was done in Agra hospital. Phool Singh s/o Jorawar Singh had died on the way. In his cross-examination PW-2 denied the defence story that any Panchayat was held at the temple and that a quarrel had taken place in the Panchayat and he also denied and that Subedar Kharag Singh had fired indiscriminately in the Panchayat due to which the persons got injured. PW-3 Sobaran is also an injured witness and he stated that upon hearing the gun-shots, he reached the chowk in front of the house of the accused Phool Singh and Phool Singh s/o Jorawar, Ramshri and Balbiri were lying down injured there. Phool Singh, Fateh Singh and Giriraj were carrying guns and Sher Singh, Malkhan, Brijendra and Virendra were carrying country made pistols. Lakhan had reached there before PW-3 and Sobaran and Panna reached after him. Giriraj shot at Lakhan and thereafter he shot at PW-2 Sobaran Singh. Sher Singh fired at Panna with a country made pistol. All three of them were hit by pellets. His injuries were examined by the doctor at Agra. Phool Singh had died on the way. PW-4 Subedar Kharag Singh said that he heard 2-3 gun-shots and then he heard 4-5 gun-shots. Carrying his gun, he went to

Sukh Singh's house Balbiri, Ramshri, Chhiddi and Phool Singh were lying injured there.

50. Thus from the prosecution evidence consisting of the dying declaration of Phool Singh son of Jorawar Singh and the statements of the prosecution witnesses, it comes out that all the accused persons had gathered with fire-arms in front of the house of the accused-respondent No. 1 Phool Singh son of Patiram and they charged towards the house of the informant Sukh Singh. All of them fired due to which Sukh Singh died and Balbiri, Ramshri, Phool Singh s/o Jorawar Singh, Sobaran s/o Dilip Singh, Chhiddi s/o Devjeet and Panna s/o Manphool and Lakhan s/o Jogdar got injured and Phool Singh son of Jorawar Singh died while being taken to a Hospital at Agra. There is no dicrepancy in the statements of any of the witnesses regarding any material circumstance relating to the incident.

51. There is another circumstance which has been ignored by the learned trial Court. In their statements recorded under Section 313 Cr.P.C., in response to a question as to whether they would give any explanation, except for the accused-respondent no. 5 Malkhan Singh, all other accused persons answered in the negative. Although he had stated that he will not give any explanation, the Accused-Respondent No. 1 Phool Singh appeared as DW-1 and although the accused-respondent no. 5 Malkhan Singh had stated that he would give an explanation, he did not appear as a witness. The conduct of the accused persons in refraining from appearing as a witness so as to avoid offering themselves for being cross-examines raised a presumption against them that had they appeared as a witness and had they been cross-examined, the truth would have been elicited from them, which would obviously be against them.

52. In **Manu Sharma v. State (NCT of Delhi), (2010) 6 SCC 1,** the Hon'ble Supreme Court held that: -

"269.... While answer given by the accused to question put under Section 313 of the Code are not per se evidence because, firstly, it is not on oath and, secondly, the other party i.e. the prosecution does not get an opportunity to cross-examine the accused, it is nevertheless subject to consideration by the court to the limited extent of drawing an adverse inference against such accused for any false answers voluntarily offered by him and to provide an additional/missing link in the chain of circumstances.....

274. This Court has time and again held that where an accused furnishes false answers as regards proved facts, the Court ought to draw an adverse inference qua him and such an inference shall become an additional circumstance to prove the guilt of the accused. In this regard, the prosecution seeks to place reliance on the judgments of this Court in Pershadi v. State of U.P. [AIR 1957 SC 211 : 1957 Cri LJ 328] , State of M.P. v. Ratan Lal [AIR 1994 SC 458 : 1994 Cri LJ 131] and Anthony D'Souza v. State of Karnataka [(2003) 1 SCC 259 : 2003 SCC (Cri) 292] where this Court has drawn an adverse inference for wrong answers given by the appellant under Section 313 CrPC. In the present case, the appellant Manu Sharma has, inter alia, taken false pleas in reply to Questions 50, 54, 55, 56, 57, 64, 65, 67, 72, 75 and 210 put to him under Section 313 of the Code."

53. In **State of Karnataka v. Suvarnamma, (2015) 1 SCC 323,** the Hon'ble Supreme Court held that: -

"Once the prosecution probabilises the involvement of the accused but the accused takes a false plea, such false plea can be taken as an additional circumstance against the accused. Though Article 20(3) of the Constitution incorporates the rule against self-incrimination, the scope and the content of the said rule does not require the court to ignore the conduct of the accused in not correctly disclosing the facts within his knowledge. When the accused takes a false plea about the facts exclusively known to him, such circumstance is a vital additional circumstance against the accused."

54. Thus it is settled law that although an accused person cannot be convicted merely on the ground that he had set up a false defence, but the fact that the accused set up a false defence is a circumstances which weighs against him while examining the entire material on record. DW-1 Malkhan Singh had set up a story of a Panchayat having been called in the temple and a quarrel having taken place in it and Subedar Kharag Singh having fired indiscreminately-which story has been found to be false by the learned Court below. Therefore, this conduct of the accused in setting up a false story in defence would be an additional circumstance against the accused/respondents while weighing the material on record.

55. The fourth submission of Sri Apoorv Tiwari is that the place of incident is doubtful. He has highlighted that PW-1 Sukh Singh has stated that when the accused fired at Ramshri and Baliri, some pellets hit the wall behind which he had taken shelter and some pieces of plaster had fallen from the places where the pellets had hit it. He stated in his cross-examination that he had seen the pellets embedded in the wall and lying near it. However, the Investigating Officer has not recovered any pellets or pieces of plaster. Moreover, no empty shells have been recovered. Several injured persons fell in the chowk but there is no mention of blood stains found there. Although some blackening has been shown in the site plan, it could not be caused from the firing because the shots were fired form a considerable distance. These circumstances make the place of incident doubtful. The learned trial Court has also highlighted the facts that PW 1 Sukh Singh had stated that some pellets had hit the wall behind him he had taken shelter but the Investigating Officer did not recover any pellets either from the wall or from any place near it; the witness had further stated that the plaster of the wall had also fallen at places where the pellets hit it, but no plaster was recovered by the Investigating Officer; no empty shells of the cartridges were recovered from the spot; no blood was found from the place of occurrence. The learned Court below came to a conclusion that these circumstances make it doubtful that the incident took place in the chowk between the houses of the accused Phool Singh and PW 1 Sukh Singh. Regarding blackening shown at a place in the site plan, the Court below held that no blackening could be caused by the gun-shots because the same were shot from a considerable distance. On these reasons, the learned Court below held that the statements of the eye-witnesses have not been corroborated regarding the place of incident by material circumstances.

56. The law relating to the effect of a defect in investigation has been discussed and summarized by the Hon'ble Supreme

Court in **Gajoo v. State of Uttarakhand,** (2012) 9 SCC 532, **i**n the following words: -

"20. In regard to defective investigation, this Court in Dayal Singh v. State of Uttaranchal, (2012) 8 SCC 263 while dealing with the cases of omissions and commissions by the investigating officer, and duty of the court in such cases, held as under: (SCC pp. 280-83, paras 27-36)

"27. Now, we may advert to the duty of the court in such cases. In Sathi Prasad v. State of U.P. (1972) 3 SCC 613 this Court stated that it is well settled that if the police records become suspect and investigation perfunctory, it becomes the duty of the court to see if the evidence given in court should be relied upon and such lapses ignored. Noticing the possibility of investigation being designedly defective, this Court in Dhanaj Singh v. State of Punjab, (2004) 3 SCC 654, held: (SCC p. 657, para 5)

"5. In the case of a defective investigation the court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective.'

28. Dealing with the cases of omission and commission, the Court in Paras Yadav v. State of Bihar (1999) 2 SCC 126, enunciated the principle, in conformity with the previous judgments, that if the lapse or omission is committed by the investigating agency, negligently or otherwise, the prosecution evidence is required to be examined dehors such omissions to find out whether the said evidence is reliable or not. The contaminated conduct of officials should not stand in the way of evaluating the evidence by the courts, otherwise the designed mischief would be perpetuated and justice would be denied to the complainant party.

29. In Zahira Habibullah Sheikh (5) v. State of Gujarat (2006) 3 SCC 374, the Court noticed the importance of the role of witnesses in a criminal trial. The importance and primacy of the quality of trial process can be observed from the words of Bentham, who states that witnesses are the eyes and ears of justice. The court issued a caution that in such situations, there is a greater responsibility of the court on the one hand and on the other the courts must seriously deal with persons who are involved in creating designed investigation. The Court held that: (SCC p. 398, para 42)

"42. Legislative measures to emphasise prohibition against tampering with witness, victim or informant have become the imminent and inevitable need of the day. Conducts which illegitimately affect the presentation of evidence in proceedings before the courts have to be seriously and sternly dealt with. There should not be any undue anxiety to only protect the interest of the accused. That would be unfair, as noted above, to the needs of the society. On the contrary, efforts should be to ensure a fair trial where the accused and the prosecution both get a fair deal. Public interest in the proper administration of justice must be given as much importance, if not more, as the interest of the individual accused. In this courts have a vital role to play.'

(emphasis in original)

30. With the passage of time, the law also developed and the dictum of the court emphasised that in a criminal case, the fate of proceedings cannot always be left entirely in the hands of the parties. Crime is a public wrong, in breach and violation of public rights and duties, which affects the community as a whole and is harmful to the society in general.

31. Reiterating the above principle, this Court in NHRC v. State of Gujarat (2009) 6 SCC 767, held as under: (SCC pp. 777-78, para 6)

"6. ... "35. ... The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interest of society is not to be treated completely with disdain and as persona non grata. The courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice--often referred to as the duty to vindicate and uphold the "majesty of the law'. Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a court of law in the future as in the case before it. If a criminal court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. The courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the Judges as impartial and independent adjudicators." (Zahira Habibullah case, SCC p. 395, para 35)'

32. In State of Karnataka v. K. Yarappa Reddy (1999) 8 SCC 715, this Court occasioned to consider the similar question of defective investigation as to whether any manipulation in the station house diary by the investigating officer could be put against the prosecution case. This Court, in para 19, held as follows: (SCC p. 720)

"19. But can the above finding (that the station house diary is not genuine) have any inevitable bearing on the other evidence in this case? If the other evidence, on scrutiny, is found credible and acceptable, should the court be influenced by the machinations demonstrated by the investigating officer in conducting investigation or in preparing the records so unscrupulously? It can be a guiding principle that as investigation is not the solitary area for judicial scrutiny in a criminal trial, the conclusion of the court in the case cannot be allowed to depend solely on the probity of investigation. It is well-nigh settled that even if the investigation is illegal or even suspicious the rest of the evidence must be scrutinised independently of the impact of it. Otherwise the criminal trial will plummet to the level of the investigating officers ruling the roost. The court must have predominance and pre-eminence in criminal trials over the action taken by the investigating officers. The

criminal justice should not be made a casualty for the wrongs committed by the investigating officers in the case. In other words, if the court is convinced that the testimony of a witness to the occurrence is true the court is free to act on it albeit the investigating officer's suspicious role in the case.'

33. In Ram Bali v. State of U.P. (2004) 10 SCC 598, the judgment in Karnel Singh v. State of M.P. (1995) 5 SCC 518 was reiterated and this Court had observed that: (Ram Bali case, SCC p. 604, para 12)

"12. ... In case of defective investigation the court has to be circumspect [while] evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigation officer if the investigation is designedly defective.'

34. Where our criminal justice system provides safeguards of fair trial and innocent till proven guilty to an accused, there it also contemplates that a criminal trial is meant for doing justice to all, the accused, the society and a fair chance to prove to the prosecution. Then alone can law and order be maintained. The courts do not merely discharge the function to ensure that no innocent man is punished, but also that a guilty man does not escape. Both are public duties of the Judge. During the course of the trial, the learned Presiding Judge is expected to work objectively and in a correct perspective. Where the prosecution attempts to misdirect the trial on the basis of a perfunctory or designedly defective investigation, there the court is to be deeply cautious and ensure that despite such an attempt, the determinative process is not subverted. For truly attaining this object of a "fair trial', the court should leave no stone unturned to do justice and protect the interest of the society as well.

(Emphasis supplied)

57. In **State of Karnataka v. Suvarnamma**, (2015) 1 SCC 323, the Hon'ble Supreme Court held that "It is also well settled that though the investigating agency is expected to be fair and efficient, any lapse on its part cannot per se be a ground to throw out the prosecution case when there is overwhelming evidence to prove the offence."

58. When we examine the evidence of the present case keeping in view the scope of powers of this Court while deciding an appeal against acquittal as explained in **Achhar Singh (Supra)** as also in **Gajoo and Suvaranamma (Supra)**, we find that the dying declaration of Phool Singh as well as the statements of the ocular witnesses, namely, PW 1 Sukh Singh, PW 2 Laxman and PW 3 Sobaran Singh, amongst whom PW 2 and PW 3 are the injured witnesses, contain a categorical and unequivocal assertion that the incident occurred in the chowk in front of the house of the accused Phool Singh. As there is no discrepancy regarding the place of incident in the dying declaration as well as in the statement of witnesses, the same do not need any corroboration by any other evidence. There cannot be any doubt that the Investigating Officer ought to have recorded the aforesaid facts during the investigation and he has carried out the investigation in a defective manner, but in the facts and circumstances of the present case, the mere failure of the Investigating Officer in recovering any pellets or empty shells of cartridges or pieces of plaster and

his failure to mention blood stains found at the place of occurrence, would not nullify the categorical statement of the prosecution witnesses so as to demolish the prosecution case. The accused/respondents cannot be acquitted for the mere reason of a defect in investigation when the entire evidence of record proves beyond reasonable doubt that the accused / respondents have committed the offence.

59. Shri Apoorv Tiwari has next submitted that there is no proof that the injuries were caused by the accused-respondents. For supporting any order of conviction the dying declaration must be trustworthy and without any contradictions. He has submitted that PW-5 (Vidya Sagar Tiwari) Head Constable has stated that from the case diary it does not appear that Exhibit A-15 (dying declaration) was written where and in what circumstances and the case does not contain signature of any independent witnesses to prove this statement.

60. The circumstance in which the dying declaration (A-15) was recorded are mentioned in that declaration itself in which the Sub Inspector has written in the beginning that the injured Phool Singh was lying down in the Tractor Trolley alongwith the other injured persons and his condition was serious. There is absolutely no contradiction regarding any material circumstances in the dying declaration of the deceased Phool Singh as well as the eye-witness PW-1 and the injured eye-witnesses PW-2 and 3. All the aforesaid persons have categorically stated that the injuries were caused by the gun-shots fired by the accused-persons. Therefore, the contention of learned counsel for the accused-respondents that there is no proof that the injuries were caused by the accused-respondents has no force.

61. Shri Tiwari has submitted that the principle laid down in **Manjit Singh versus State of Punjab (2019) 8 SCC 529** will not apply because in the present case the witnesses are closely related and have prior enmity. In **Manjit Singh (supra),** the Hon'ble Supreme Court reiterated the well settled principle that "There is no rule that in every criminal case, the testimony of an injured eye-witness needs corroboration from the so-called independent witness(es). When the statement of injured eye-witness is found trustworthy and reliable, the conviction on that basis could always be recorded, of course, having regard to all the facts and surrounding factors.", without putting any rider that the principle is not applicable when the witness are related to each other. Therefore, his submission that the principle laid down in **Manjit Singh (supra)** will not apply to the present case, is misconceived and is rejected.

62. Regarding prompt registration of the first information report, the learned Court below held that the fact that the FIR mentions the fact of arrest of the accused Brijendra, which indicates that the FIR has been prepared subsequently. While coming to this conclusion, the trial Court has ignored the fact that PW 1 Sukh Singh had stated that after the incident, he arranged a tractor of Chhiddi and he transported all the injured persons in the tractor trolley to the police station and thereafter to the hospital. Maharam met on the way and informed that the accused Brijendra had been caught and thereafter he was also made to sit in the tractor trolley and was taken to the police station. While on the way, Sukh Singh dictated the FIR to PW 4 Subedar Kharag Singh at his tube-well, who scribed the same. To the same effect are the statements of PW 2 Lakhan, PW 3 Sobaran Singh and PW 4 Subedar Kharag Singh. PW 1 has

further stated that about ½ hour was spent in scribing the FIR. As injured persons were lying in the tractor trolley, it was driven slowly.

63. From a perusal of the statement of the prosecution witnesses, it is evident that the FIR was obviously written after Maharam told the witnesses that the accused Brijendra had been caught and the police personnel made him to sit on the tractor trolley and that is why the FIR makes a mention of this fact. This does not weaken the prosecution case in any manner.

64. There is another very important factor, which proves that the FIR was lodged promptly. PW-5 Vidya Sagar Tiwari, who was posted as Constable Clerk on the date of incident, has stated that initially the case was registered under Sections 147/148/307 I.P.C. and after receiving the information of death of Phool Singh it was converted into Section 302. Thus it is clear that the FIR had been registered before Phool Singh died and it is proved by all the witnesses that Phool Singh had died on the way from the police station to the Hospital at Agra. Thus, the minor discrepancy in the statement of PW-3 Sobaran Singh who stated in his Cross-examination that Brijendra was arrested ahead of the tube-well of Sukh Singh, would not negate the weight of the other overwhelming evidence on record referred to above that the FIR was lodged promptly.

65. The learned Court below has highlighted that there are discrepencies in the statement of witnesses recorded before the Court and those recorded under Section 161 Cr.P.C. PW 1 Sukh Singh and PW 2 Lakhan have stated that Maharam met him on the way when he was taking the injured to the Police Station and he informed that Brijendra had been arrested. However, in his statement recorded under Section 161 Cr.P.C., PW 2 Lakhan had stated that they had arrested Brijendra with the help of police guard. In his statement recorded under Section 161 Cr.P.C., PW 3 Sobaran Singh had stated that Brijendra was arrested ahead of tube-well of Sukh Singh and there is contradiction in the satements of witnesses regarding arrest of Brijendra. The extract of statement of a person recorded by the police under Section 161 immediately after a gruesom incident of firing by seven persons in broad day-light in the chowk in the village would obviously contain some discrepancies but the discrepancy is not as to any material circumstances which creates doubt about the main incident, i.e. firing by the accused persons and resultant injuries to several persons resulting in death of one person.

66. What comes out of the statements of the witnesses is that after the incident when the police guard and other persons arrived, all the accused persons had ran away towards the South of Phuli's house. They were chased and when the Tractor trolley carrying the injured persons was on the way to the Police Station, Maharam met on the way and told that Brijendra had been caught and thereafter Brijendra was also forced to sit in the tractor trolley and was taken to the Police Station. There is no discrepency in the substance of the evidence as to any material fact.

67. The learned Trial Court has held that the deceased Phool Singh had stated that only Fateh Singh and Giriraj had fired upon him and he did not name any other person who resorted to fire. The dying declaration of Phool Singh (Exhibit A-15) mentions the names of Fateh Singh and

Giriraj Singh as the persons who had shot at Phool Singh, and not at any other persons. However, the learned Court below lost sight of the fact that apart from Phool Singh, Ramshri, Balbiri, Lakhan, Sobaran, Chhiddi and Panna had also got injured due to gun-shots. PW-1 categorically stated that Phool Singh, Giriraj and Fateh Singh were carrying guns and Sher Singh, Virendra, Malkhan and Brijendra were carrying country made pistols. Some person from amongst these persons fired at Ramshri and Balbiri. All these seven persons fired at Phool Singh son of Joravar, Sobaran, Lakhan, Panna and Chhiddi. PW-2 also stated that Phool Singh, Giriraj and Fateh Singh were carrying guns and the rest four were carrying country made pistols. Giriraj fired a shot which hit PW 2 and another shot fired by Giriraj hit Sobaran Singh. Shera fired a shot which hit Panna. These statements have been totally ignored by the learned Court below, which make the finding in this regard perverse. Even otherwise, when in furtherance of an altercation which had taken place in the previous night, seven accused persons had gathered in the chowk in front of the house of the accused Phool Singh, carrying guns and country-made pistols, as an unlawful assembly with the common object to settle the score of the previous day's altercation and the members of the unlawful assembly fired gun-shots at the persons of their target group in prosecution of the common object of the assembly, it is not necessary that each of the persons of the unlawful assembly must be shown to have fired gun-shots and each member of the assembly will be liable for all the acts of the members of the unlawful assembly.

68. In **Manjit Singh v. State of Punjab, (2019) 8 SCC 529**, the Hon'ble Supreme Court was pleased to explain the law regarding the conditions requisite for prosecution of persons forming part of an unlawful assembly who have a common object to commit a wrong, and the relevant passage of the aforesaid judgment is being reproduced below: -

"14.1. The relevant part of Section 141 IPC could be usefully extracted as under:

*"141. **Unlawful assembly.**--An assembly of five or more persons is designated an "unlawful assembly", if the common object of the persons composing that assembly is--*

* * *

***Third.**--To commit any mischief or criminal trespass, or other offence; or*

* * *

Explanation.--An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly."

14.2. Section 149, rendering every member of unlawful assembly guilty of offence committed in prosecution of common object reads as under:

*"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."

14.3. We may also take note of the principles enunciated and explained by this Court as regards the ingredients of an unlawful assembly and the vicarious/constructive liability of every member of such an assembly. In Sikandar Singh, this Court observed as under: (SCC pp. 483-85, paras 15 & 17-18)

"15. The provision has essentially two ingredients viz. (i) the commission of an offence by any member of an unlawful assembly, and (ii) such offence must be committed in prosecution of the common object of the assembly or must be such as the members of that assembly knew to be likely to be committed in prosecution of the common object. Once it is established that the unlawful assembly had common object, it is not necessary that all persons forming the unlawful assembly must be shown to have committed some overt act. For the purpose of incurring the vicarious liability for the offence committed by a member of such unlawful assembly under the provision, the liability of other members of the unlawful assembly for the offence committed during the continuance of the occurrence, rests upon the fact whether the other members knew beforehand that the offence actually committed was likely to be committed in prosecution of the common object.

** * **

17. A "common object" does not require a prior concert and a common meeting of minds before the attack. It is enough if each member of the unlawful assembly has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The "common object" of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. For determination of the common object of the unlawful assembly, the conduct of each of the members of the unlawful assembly, before and at the time of attack and thereafter, the motive for the crime, are some of the relevant considerations. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful.

18. In Masalti v. State of U.P. a Constitution Bench of this Court had observed that: (AIR p. 211, para 17)

"17. ... Section 149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principle that the punishment prescribed by Section 149 is in a sense vicarious and does not always proceed on the basis that the offence has

been actually committed by every member of the unlawful assembly.'"

14.4. In Subal Ghorai, this Court, after a survey of leading cases, summed up the principles as follows: (SCC pp. 632-33, paras 52-53)

"52. The above judgments outline the scope of Section 149 IPC. We need to sum up the principles so as to examine the present case in their light. Section 141 IPC defines "unlawful assembly" to be an assembly of five or more persons. They must have common object to commit an offence. Section 142 IPC postulates that whoever being aware of facts which render any assembly an unlawful one intentionally joins the same would be a member thereof. Section 143 IPC provides for punishment for being a member of unlawful assembly. Section 149 IPC provides for constructive liability of every person of an unlawful assembly if an offence is committed by any member thereof in prosecution of the common object of that assembly or such of the members of that assembly who knew to be likely to be committed in prosecution of that object. The most important ingredient of unlawful assembly is common object. Common object of the persons composing that assembly is to do any act or acts stated in clauses "First", "Second", "Third", "Fourth" and "Fifth" of that section. Common object can be formed on the spur of the moment. Course of conduct adopted by the members of common assembly is a relevant factor. At what point of time common object of unlawful assembly was formed would depend upon the facts and circumstances of each case. Once the case of the person falls within the ingredients of Section 149 IPC, the question that he did nothing with his own hands would be immaterial. If an offence is committed by a member of the unlawful assembly in prosecution of the common object, any member of the unlawful assembly who was present at the time of commission of offence and who shared the common object of that assembly would be liable for the commission of that offence even if no overt act was committed by him. If a large crowd of persons armed with weapons assaults intended victims, all may not take part in the actual assault. If weapons carried by some members were not used, that would not absolve them of liability for the offence with the aid of Section 149 IPC if they shared common object of the unlawful assembly.

53. But this concept of constructive liability must not be so stretched as to lead to false implication of innocent bystanders. Quite often, people gather at the scene of offence out of curiosity. They do not share common object of the unlawful assembly. If a general allegation is made against large number of people, the court has to be cautious. It must guard against the possibility of convicting mere passive onlookers who did not share the common object of the unlawful assembly. Unless reasonable direct or indirect circumstances lend assurance to the prosecution case that they shared common object of the unlawful assembly, they cannot be convicted with the aid of Section 149 IPC. It must be proved in each case that the person concerned was not only a member of the unlawful assembly at some stage, but at all the crucial stages and shared the common object of the assembly at all stages. The court must have before it some materials to form an opinion that the accused shared common object. What the common object of the unlawful assembly is at a particular stage has to be determined keeping in view the course of conduct of the

members of the unlawful assembly before and at the time of attack, their behaviour at or near the scene of offence, the motive for the crime, the arms carried by them and such other relevant considerations. The criminal court has to conduct this difficult and meticulous exercise of assessing evidence to avoid roping innocent people in the crime. These principles laid down by this Court do not dilute the concept of constructive liability. They embody a rule of caution."

14.5. We need not expand on the other cited decisions because the basic principles remain that the important ingredients of an unlawful assembly are the number of persons forming it i.e. five; and their common object. Common object of the persons composing that assembly could be formed on the spur of the moment and does not require prior deliberations. The course of conduct adopted by the members of such assembly; their behaviour before, during, and after the incident; and the arms carried by them are a few basic and relevant factors to determine the common object."

69. In the present case, the prosecution has established beyond any reasonable doubt that in furtherance of an altercation which had taken place in the previous night, seven accused persons had gathered in the chowk in front of the house of the accused Phool Singh on 21-06-1981 at about 03:00 p.m., carrying guns and country-made pistols, as an unlawful assembly with the common object to settle the score of the previous day's altercation. The members of the unlawful assembly used violence by firing gun-shots in prosecution of the common object of the assembly and thus they committed the offence of rioting, being armed with deadly weapons. They fired gun-shots directed towards persons with intention to kill them, which act of the accused persons caused injuries to several persons and resulted in killing one of them and thus they committed the offences of murder and attempt to murder. Once it is established that the unlawful assembly had a common object, it is not necessary that all persons forming the unlawful assembly must be shown to have committed some overt act. For the purpose of incurring the vicarious liability for the offence committed by any member(s) of such unlawful assembly under the provision contained in Section 149, I.P.C., the liability of the other members of the unlawful assembly for the offence committed during the continuance of the occurrence, rests upon the fact whether the other members knew beforehand that the offence actually committed was likely to be committed in prosecution of the common object. By the conduct of the accused persons in gathering in front of the house of the accused Phool Singh, carrying guns and country-made pistols and being a part of the unlawful assembly which resorted to firing, we have no doubt that each member of the assembly had a common object to help the accused Phool Singh and Giriraj Singh in settling the score by resorting to rioting, being armed with deadly weapons, and attempting to murder by firing at Sukh Singh and his associates and committing murder of Sukh Singh. Therefore, all the members of the unlawful assembly are equally liable for the aforesaid offences committed by the members of the aforesaid assembly.

Order

69. In view of the aforesaid discussion, the instant appeal stands allowed. The judgment and order dated 30-

04-1984 passed by the learned Special Judge (Additional Sessions Judge), Agra in Sessions Trial No. 51 of 1982 under Sections 148, 307/149, 302/149 IPC, Police Station Fatehpur Sikri, District Agra, acquiting the accused-respondents is set aside and reversed. The accused-respondent no. 1, 4 and 6 are dead and the appeal has abated as against them. The remaining accused-respondent no. 2 Fateh Singh son of Fauran Singh, no. 3 Virendra Singh son of Bhogi Ram and no. 5 Malkhan Singh son of Sukh Ram are held guilty of committing offences punishable under Sections 148, 307/149, 302/149 IPC, Police Station Fatehpur Sikri, District Agra.

70. Keeping in view the fact that the incident occurred on 21-06-1981 and a period of more than 40 years has elapsed since the incident, as also the fact that presently the accused respondent no. 2 Fateh Singh is aged about 68 years, the accused respondent no. 3 Virendra Singh is aged about 64 years and the accused respondent no. 5 is aged about 85 years, they are awarded the following sentences: -

(i) For the offence under Section 148 I.P.C., the accused-respondent no. 2 Fateh Singh son of Fauran Singh, no. 3 Virendra Singh son of Bhogi Ram and no. 5 Malkhan Singh son of Sukh Ram are sentenced to undergo simple imprisonment for a period of three years and to pay a fine of Rupees FIve Thousand Only (Rs. 5,000/-) each and if they fail to pay the amount of fine, they shall have to undergo imprisonment for a period of one month in lieu thereof.

(ii) For the offence under Section 307/149 I.P.C., the accused-respondent no. 2 Fateh Singh son of Fauran Singh, no. 3 Virendra Singh son of Bhogi Ram and no. 5 Malkhan Singh son of Sukh Ram are sentenced to undergo simple imprisonment for a period of ten years and to pay a fine of Rupees Ten Thousand Only (Rs. 10,000/-) each and if they fail to pay the amount of fine, they shall have to undergo imprisonment for a period of six months in lieu thereof.

(iii) For the offence under Section 302/149 I.P.C., the accused-respondent no. 2 Fateh Singh son of Fauran Singh, no. 3 Virendra Singh son of Bhogi Ram and no. 5 Malkhan Singh son of Sukh Ram are sentenced to undergo simple imprisonment for life and to pay a fine of Rupees Twenty Thousand Only (Rs. 20,000/-) each and if they fail to pay the amount of fine, they shall have to undergo imprisonment for a period of six months in lieu thereof.

(iv) All the aforesaid sentences will run concurrently.

71. The accused-respondent no. 2-Fateh Singh son of Fauran Singh, accused-respondent no. 3-Virendra Singh son of Bhogi Ram and accused-respondent no. 5-Malkhan Singh son of Sukh Ram are directed to surrender before the learned Chief Judicial Magistrate, Agra within a period of 15 days from the date of this order to serve out the sentences awarded to them. In case they do not surrender within the stipulated time, learned Chief Judicial Magistrate, Agra shall commit them to custody as per law.

72. Let a certified copy of this judgment and order be sent to the Court concerned immediately for ensuring its compliance.

(2022)03ILR A485
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.02.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE SUBHASH VIDYARTHI, J.

Government Appeal No. 2349 of 2006

State of U.P. ...Appellant
Versus
Ramesh & Ors. ...Respondents

Counsel for the Appellant:
A.G.A.

Counsel for the Respondents:

A. Criminal Law - The Court did not find infirmity in the judgment of the Trial Court on finding that the testimony of the sole witness P.W. 2 has been proven to be false and as the alleged motive of the offence has also not been found sufficient to indict the accused persons. (Para 30)

Appeal Rejected. (E-10)

List of Cases cited:

1. Amitbhai Anilchandra Shah Vs C.B.I. (2013) 6 SCC 348

2. St.of M.P. Vs Ratan Singh (2020) 12 SCC 630

3. Jayamma Vs St.of Karn. (2021) 6 SCC 213

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

1. Heard the learned AGA on the application seeking leave to file appeal under Section 378 (3) Cr.P.C.

2. By means of the instant application, the appellant-State has sought leave to file appeal against the judgment and order dated 21.01.2006 passed by the learned Sessions Judge, Baghpat in Session Trial No. 330 of 2004 (State vs. Rmesh and another) acquitting the respondent-accused from the charge of offence punishable under Sections 302/34 IPC.

3. The prosecution case, briefly stated, is that on 26.06.2004 at 01:30 a.m., the informant Leela Singh son of Kale Singh lodged a report (Exhibit A-1) alleging that on 25.06.2004 at 08:30 p.m., Karan Singh came to his house and informed that somebody had stabbed the informant's brother Jaidayal in Naiyon Wali Gali and he is lying there. The informant and his family members went there and he took his brother in a Maruti Car to Narendra Mohan Hospital, where the doctors examined and reported him to be dead. After putting the dead body in mortuary, he went to lodge the report. On the basis of the aforesaid report, a case was registered against unknown accused persons.

4. On 27.06.2004, the informant gave another report (Exhibit A-2) stating that after cremation of the dead body of his brother, people were visiting his home and were talking about the murder of his brother Jaidayal, from which he came to know that his brother had been killed by the accused Dheeraj and Ramesh, both sons of Durjan Singh, due to animosity of previous election of Gram Pradhan. A short while before his murder, the deceased Jaidayal had stopped at the shop of Karan Singh and thereafter he was coming home through Naiyon Wali Gali and Radhe son of Chetan had seen the accused-respondents Dheeraj and Ramesh following the deceased in the lane. After Jaidayal got injured, the accused Dheeraj and Ramesh were seen running towards his shop in great

haste, by Gajendra son of Jaipal Singh and Karmveer Singh son of Shakru Singh. At that time only, the informant came to know that after losing the elections the accused-respondents had stated many times that although they had lost the election, they would not let Jaidayal complete the five years' term. The informant got this information from Ramesh son of Gopi and Sakru son of Khushi Ram. In the second information, the informant stated that he could not mention these facts in the FIR as at that time he did not know these facts.

5. On this subsequent information, a case was registered against the accused-respondents Ramesh and Dheeraj. After investigation, the police submitted a charge sheet against the accused-respondents under Section 302/34 IPC. The prosecution examined P.W. 1 - Leela Singh - the informant, who is the brother of the deceased. P.W. 1 supported the allegations levelled in the FIR as well as subsequent information on which the case was registered.

6. P.W.2 - Gajendra was produced as an ocular witness who stated that in the evening of 25-06-2004 he was returning home from Devi Mandir and Karmveer was accompanying him. When P.W.2 and Karmveer were passing through Naiyon Wali Gali at about 08:30 p.m., they saw that the respondent no.2 - Dheeraj had caught hold of the deceased Jaidayal and the respondent no.1 - Ramesh was stabbing him. At the same time, Mukesh and Leelu also came there carrying a torch and they challenged the accused persons, whereupon the accused persons left Jaidayal and walked away from the side of the P.W.2. Jaidayal's wife Rajwati had defeated Dheeraj's wife-Babli in election of Gram Pradhan due to which Dheeraj was annoyed with Jaidayal and he used to say that he will not let him complete the five years' term.

7. P.W. 3 is the Sub-Inspector who had prepared the inquest report in the hospital's mortuary. P.W.4 is the Constable-Clerk who has registered the report. P.W.5 is the doctor who had conducted post-mortem examination on the deceased's dead body, who stated that the deceased died of stab wounds. P.W.6 is the Investigating Officer.

8. In defence, the accused persons produced three witnesses. D.W.1 - Karan Singh is the person who is said to have given information on 26-06-2004 at 8:30 p.m. that the deceased had been stabbed. He has stated that his shop is situated 100 to 125 yards away from the place of occurrence. The deceased came to his shop at about 09:45 p.m. and he stayed there for about 15 minutes. Thereafter he went away taking bidi, match box and lemon and after about five minutes since he left, D.W. 1 got information that Jaidayal had been attacked. He went to the spot and till then Jaidayal was alive. He did not see Gajendra and Lilu there. He had gone to Jaidayal's house to give information of his being injured and had called the deceased's brother Leela Singh, Deepchand, Jaidayal's son Sanju and Gajendra son of Jaipal, who is also from the same family. He had helped in Jaidayal being put in the car.

9. D.W.2 - Satish Kumar said that no such incident had occurred till 09.30 p.m. and he received information of the incident at about 09:45 p.m. but he did not hear the names of the accused persons as the assassins of Jaidayal. D.W. 3 - Dheer Singh is the Pujari of Durga Mandir. He said that he recognises each and every person who

visits the temple and Gajendra and Karmveer did not come to temple in the evening on the date of the incident. D.W. 4 - Karmveer, regarding whom P.W.2 had stated that he was returning from Devi Mandir in the evening of 25.06.2004 along with Karmveer; stated that there are total four temples in the village, out of which three are of Lord Shiva and one is of the Goddess. Dheer Singh is the Pujari of temple of the Goddess. He stated that the deceased was killed at about 10:15 p.m. He did not see the incident and did not hear from anybody that the deceased had been killed by the accused persons.

10. After taking into consideration the statement of all the witnesses, the learned court below came to a conclusion that the prosecution has failed to establish the charges against the accused persons beyond reasonable doubt and acquitted the accused persons by giving them benefit of doubt.

11. The appellant-State has filed the instant application seeking leave to file appeal under Section 378 (3) Cr.P.C. on the grounds that there is sufficient evidence to prove the complicity of the accused persons in commission of the crime but the learned Trial Court has acquitted them without appreciating the material evidence on record. There is no contradictions in the statements of the witnesses and if there are any minor contradictions, the same have occurred only because of lapse of time and loss of memory. The accused persons had a strong motive which was due to the dispute arising out of election of Gram Pradhan. Even if there was a discrepancy in the time of incident, it would not vitiate the prosecution case.

12. We have gone through the statement of the witnesses in detail and scrutinised the findings of the learned court below in light of the grounds of challenge raised by the learned AGA.

13. In the FIR of the incident lodged by the informant (P.W.1) on 26-06-2004 (Exhibit A-1), the allegations are against unknown persons. In the second information lodged on 27.06.2004 (Exhibit A-2), the informant has alleged that from the people visiting his home after cremation of his brother, he came to know that his brother had been killed by the accused-respondents and he had mentioned Gajendra and Karmveer as having seen the accused persons running away from the place of occurrence in a great haste. The learned court below has recorded that after lodging the FIR on 25.06.2004, no subsequent intimation of the same incident could have been registered. No proceedings could have been initiated on the basis of the subsequent report lodged on 27.06.2004 and the second report is not admissible in evidence.

14. In **Amitbhai Anilchandra Shah v. CBI,** (2013) 6 SCC 348, the Hon'ble Supreme Court formulated the following principles regarding Second FIR: -

"58.2. The various provisions of the Code of Criminal Procedure clearly show that an officer-in-charge of a police station has to commence investigation as provided in Section 156 or 157 of the Code on the basis of entry of the first information report, on coming to know of the commission of cognizable offence. On completion of investigation and on the basis of the evidence collected, the investigating officer has to form an opinion under Section 169 or 170 of the Code and forward his report to the Magistrate

concerned under Section 173(2) of the Code.

58.3. Even after filing of such a report, if he comes into possession of further information or material, there is no need to register a fresh FIR, he is empowered to make further investigation normally with the leave of the court and where during further investigation, he collects further evidence, oral or documentary, he is obliged to forward the same with one or more further reports which is evident from sub-section (8) of Section 173 of the Code. Under the scheme of the provisions of Sections 154, 155, 156, 157, 162, 169, 170 and 173 of the Code, only the earliest or the first information in regard to the commission of a cognizable offence satisfies the requirements of Section 154 of the Code. Thus, there can be no second FIR and, consequently, there can be no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or the same occurrence or incident giving rise to one or more cognizable offences.

58.4. Further, on receipt of information about a cognizable offence or an incident giving rise to a cognizable offence or offences and on entering FIR in the station house diary, the officer in charge of the police station has to investigate not merely the cognizable offence reported in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and file one or more reports as provided in Section 173 of the Code. Sub-section (8) of Section 173 of the Code empowers the police to make further investigation, obtain further evidence (both oral and documentary) and forward a further report(s) to the Magistrate. 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, is liable to be interfered with by the High Court by exercise of power under Section 482 of the Code or under Articles 226/227 of the Constitution.

58.5. The first information report is a report which gives first information with regard to any offence. There cannot be second FIR in respect of the same offence/event because whenever any further information is received by the investigating agency, it is always in furtherance of the first FIR."

15. In **State of M.P. v. Ratan Singh,** (2020) 12 SCC 630, the Hon'ble Supreme Court emphasized the above principles and further held that: -

"8. As emphasised by this Court in Amitbhai Anilchandra Shah v. CBI, only the earliest or the first information in regard to the commission of a cognizable offence satisfies the requirements of Section 154, and consequently there cannot be a second FIR. Rather it is absurd or ridiculous to call such information as second FIR. In Subramaniam v. State of T.N., this Court observed that if an FIR is filed after recording the statement of the witnesses, such second information would be inadmissible in evidence. Moreover, in Nallabothu Ramulu v. State of A.P., the Court was of the view that the non-treatment of statements of injured witnesses

as the first information cast doubt on the prosecution version.

9. Thus, not only was there a delay in filing of the FIR (which remained unexplained) which was taken as the basis of the investigation in this case, but also there was a wilful suppression of the actual first information received by the police. These factors together cast grave doubts on the credibility of the prosecution version, and lead us to the conclusion that there has been an attempt to build up a different case for the prosecution and bring in as many persons as accused as possible."

16. Immediately after registration of the FIR on the information given by the informant Leela Singh on 26-06-2004, the investigation of the case commenced. There is no provision for lodging a second FIR and all statements or information given to the police regarding the incident, in respect of which an FIR has already been registered, are to be treated as statements given to the police in the course of investigation.

17. Section 162 Cr.P.C. provides as follows: -

"162. Statements to police not to be signed: Use of statements in evidence.-- (1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made."

18. Thus there is a prohibition against any statement made by any person to a police officer in the course of an investigation being signed by such person and being used for any purpose at any inquiry or trial in respect of any offence under investigation at the time when such statement was made. Therefore, the learned Court below has rightly held that the second information given by the informant to the police on 27-06-2004 (Exhibit A - 2) is inadmissible in evidence and no proceedings could be initiated on the basis of this report.

19. Now we proceed to take up the first ground of learned AGA that all the eye witnesses had proved incident and the learned court below has not appreciated with their statements in the right prospective.

20. P.W.2 - Gajendra is the sole witness who is said to be an eye witness of the said incident. P.W. 1 - Leela Singh has stated that Gajendra is related to him. Had he witnessed the incident, he must have given information of it to Leela Singh who reached the spot of the incident immediately after the incident. However, P.W. 1 has stated that he came to know about involvement of the accused persons on 27.06.2004. The conduct of P.W.2 - Gajendra in not giving information of the incident to PW-1 for two days is not at all natural and this makes the correctness of his statement doubtful and unbelievable.

21. P.W.2 - Gajendra has stated that he and Karmveer had witnessed the incident in the light of a torch and at the same time Mukesh and Lilu also came from southern side carrying a torch and when they challenged the accused persons in torch light, the accused persons left the

deceased and walked away from the side of P.W.2. He said that he had recognized the accused persons and raised an alarm taking their names, that they have killed Jaidayal and several persons had come hearing his call. Admittedly, the informant P.W. 1 had also reached the place of incident immediately. If the claim of P.W. 2 was true, P.W. 1 would have come to know that his brother had been killed by the accused persons and in such a situation, the names of the accused persons as well as the alleged ocular witness, P.W.2 - Gajendra and Karmveer must be there in the FIR - Exhibit -A1. However, the fact that Exhibit-A1 was registered against unknown persons, indicates that P.W.2 had not witnessed the incident.

22. P.W.2 - Gajendra has stated that he witnessed the incident along with Karmveer but Karmveer has appeared as D.W. 4 and he has clearly stated that he did not see Jaidayal being killed. He has also said that in the evening of the incident, he did not visit the temple of the goddess with Gajendra. This also proves that P.W.2 - Gajendra was not present at the time and place of occurrence and his statement is false.

23. Therefore, the ground taken by the learned AGA that the eye witness account of the incident had been ignored by the learned court below, is without any force. The learned Session Judge has examined the statement of the witnesses in detail and has recorded a finding that P.W.2 - Gajendra is not an eye witness of the incident and we find that the aforesaid finding is based on a proper appreciation of the evidence available on record and is not at all perverse.

24. Regarding the second ground of seeking leave to file appeal i.e. the accused persons had a strong motive to commit the crime, suffice it to say that firstly the existence of motive alone is not sufficient to convict any accused persons of an offence in absence of sufficient material being available to establish their guilt. Secondly, wife of the deceased-Jaidayal was elected as Pradhan defeating Babli wife of the accused-respondent no.2, Dheeraj but neither any challenge to her election was made by filing any case nor did any dispute or altercation follow it. Moreover, the murder of Jaidayal would not terminate the tenure of his wife as the Gram Pradhan. The wife of the deceased had already completed four years out of the five years' term as Gram Pradhan and the remaining period of merely one year of the term of the deceased's wife cannot form sufficient ground of murder of Jaidayal due to defeat of Babli-wife of Dheeraj four years ago.

25. Keeping in view the aforesaid fact, we find that the finding of the learned court below that alleged motive of commission of the offence by the accused persons is not sufficient to indict them on the offence suffers from no infirmity.

26. Regarding the last ground pressed by the learned AGA that the discrepancy in the time of incident did not weaken the prosecution case, the learned court below has recorded that the FIR Exhibit-A1 initially did not contain any time of the incident and it mentions the date of incident as 25-06-2004 and time "Adam Tehrir", which means absent in the report. Subsequently, it has been scored off and 08:30 p.m. has been mentioned with a different ink. This indicates that till lodging of the FIR, the informant did not know the time of the occurrence.

27. P.W. 3, Sub-Inspector Geeta Singh who had prepared the inquest report -

Exhibit - A 3, has stated that the date and time of the incident was mentioned in the inquest report as 10:15 p.m. as per opinions of the Panch and the time of death has been mentioned as 10:45 p.m. This fact is corroborated from the fact that Narendra Mohan Hospital is situated about 20 to 25 Kms. away from the place of the incident. The informant took his injured brother to Narendra Mohan Hospital in a Maruti Car. During night hours it was possible to reach Narendra Mohan Hospital from the place of the incident within 25-30 minutes. The time of admission of the deceased in Narendra Mohan Hospital is 10:45 p.m., which indicates that the incident did not occur at 08.:30 p.m., but it occurred at around 10:00 p.m. P.W. 1 - Karan Singh also stated that the deceased had come to his house at about 09.45 p.m. and he stayed there for about 15 minutes and thereafter went away.

28. Keeping in view the aforesaid facts the learned court below recorded a finding that the incident did not occur at 08.30 p.m. but it occurred at about 10:00 p.m. and the time of incident has been mentioned in the FIR at 08.30 p.m. by making interpolations subsequently on the basis of legal advice, which obviously would have an adverse impact on the prosecution case.

29. In **Jayamma v. State of Karnataka,** (2021) 6 SCC 213, the Hon'ble Supreme Court has been pleased to reiterated the well settled law that the power of scrutiny exercisable by the High Court under Section 378 CrPC should not be routinely invoked where the view formed by the trial court was a "possible view". The judgment of the trial court cannot be set aside merely because the High Court finds its own view more probable, save where the judgment of the trial court suffers from perversity or the conclusions drawn by it were impossible if there was a correct reading and analysis of the evidence on record. To say it differently, unless the High Court finds that there is complete misreading of the material evidence which has led to miscarriage of justice, the view taken by the trial court which can also possibly be a correct view, need not be interfered with. This self-restraint doctrine, of course, does not denude the High Court of its powers to reappreciate the evidence, including in an appeal against acquittal and arrive at a different firm finding of fact.

30. As the testimony of the sole eye witness P.W.2 has been proved to be false and as the alleged motive of the offence has also not been found sufficient to indict the accused persons, we find that the judgment and order passed by the learned Session Judge acquitting the respondent-accused persons does not suffer from any infirmity and the findings forming basis of the aforesaid judgment are in any case, not perverse. The grounds for seeking leave to file appeal against the aforesaid judgment and order are without force.

31. The application seeking leave to file an appeal is **rejected**.

32. Since the application granting for leave to appeal is rejected, consequently the appeal also stands dismissed.

(2022)03ILR A491
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 25.02.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MRS. SAROJ YADAV, J.

Government Appeal No. 1000120 of 2007

State of U.P. ...Appellant

Versus

Asha Ram ...Respondent

Counsel for the Appellant:
Sri Vishwas Shukla, A.G.A.

Counsel for the Respondent:

A. Criminal Law - The Court did not find any ground to disturb the acquittal of the accused under Section 376/511 of the IPC recorded by the Trial Court. (Para 15)

Appeal Rejected. (E-10)

List of Cases cited:

1. Acchar Singh Vs St.of H.P. 2021 SCC Online HP 870

2. Geeta Devi Vs St. of U.P. & ors. 2022 SCC Online SC 57

3. Chandrappa Vs St.of Karn. (2007) 2 SCC (Cri) 162

(Delivered by Hon'ble Mrs. Saroj Yadav, J.)

1. This appeal along with application under Section 378(3) of the Code of Criminal Procedure 1973 (in short "Cr.P.C.") has been filed by the State-appellant against the judgment and order passed by Additional Sessions Judge/F.T.C., Court No. 5, District Gonda in Sessions Trial No. 80 of 2006, under Sections 376/511 of The Indian Penal Code, 1860 (in short "IPC"), wherein the accused respondent has been held guilty and punished under Section 354 IPC in place of Sections 376/511 IPC.

2. Heard Sri Vishwas Shukla, learned Additional Government Advocate appearing on behalf of the State-appellant.

3. Shorn off unnecessary details, the facts necessary for disposal of this appeal are:-

A First Information Report (in short "F.I.R.") was registered in pursuance of the order passed on the application under Section 156(3) Cr.P.C. moved by the complainant. It was alleged in the FIR that daughter of the complainant Km. "X" aged about 10 years was coming back to the village after putting sugarcane into the field on 21.11.2004 at about 12.30 PM during the day. When she reached near Devi Patan Bank, the accused respondent Asha Ram took her away and gone into the bushes behind the bank and made attempt to commit rape on her. The girl/victim raised noise then Radhey Shyam, Pappu, Rakesh and many other people of the village reached there, only then the victim could be saved. The complainant was on duty for administering Polio drops at a nearby School. So after hearing the noise raised by her daughter, he also reached there and came to know about the incident. He went to the Police Station but his FIR was not registered. He also moved an application to the Superintendent of Police, Gonda but no action was taken. Thereafter he moved an application under Section 156(3) Cr.P.C. in the court and the Court passed the order, only then the FIR was registered against the accused respondent.

4. The case was investigated and charge sheet submitted against the accused-respondent. The Magistrate concerned after taking cognizance of the offence committed the case to Sessions Court for trial. The Sessions Court framed charges against the accused respondent. He denied the charges and claimed to be tried. The prosecution in order to prove charges levelled against the accused respondent examined the victim as P.W. 1, complainant and father of the victim Mithai Lal as P.W. 2, brother of the victim Rakesh as PW 3, Constable Ram Kumar as PW 4 & Satish Kumar Misra Sub-inspector/Investigating Officer of the case as P.W. 5.

5. Necessary documents were also proved by the prosecution i.e. Exhibits 1 to 5. Thereafter statement of the accused respondent was recorded under Section 313 Cr.P.C., wherein he stated that witnesses have deposed falsely and he has been implicated due to enmity. He also examined Mohd. Ishaq as D.W. 1 in defence.

6. Learned Trial Court after hearing the arguments of both the sides on the basis of evidence available on record came to the conclusion that P.W. 2 and P.W. 3 father and brother of the victim respectively were not eye witnesses of the crime and that only offence under Section 354 IPC was committed by the accused respondent. The reasons for such conclusion have been given by the Trial Court that there are contradictions in the evidence of witnesses of facts and the independent witness mentioned in the FIR has not been examined. Old enmity has also been pleaded by the accused respondent. On the basis of evidence available on record, the Trial Court concluded that only offence under Section 354 IPC has been committed by the accused respondent and held guilty and punished accused-respondent accordingly.

7. Being aggrieved of this judgment, the present appeal has been preferred by the State.

8. Learned A.G.A. assailed the impugned judgment submitting that learned Trial Court discarded the evidence of the victim, complainant as well as brother of the victim without any proper and legal reason. Learned Trial Court did not appreciate the evidence in the right perspective. Impugned judgment is based on surmises and conjecutres. Hence the impugned judgment and order is illegal, not sustainable in the eyes of law and liable to be set aside. Hence the accused respondent should be punished under Sections 376/511 IPC.

9. Considered the submissions advanced by learned A.G.A., perused the impugned judgment and order and the record of the Trial Court.

10. Admittedly, the witnesses Radhey Shyam and Pappu mentioned in the FIR has not been examined. The witness Kanchhed Verma, who has been mentioned in the charge sheet was also not examined by the prosecution. The victim has been examined as P.W. 1, she was only 10 years old at the time of incident and 12 years old when her statement was recorded in the Court. She has stated before the Court that the accused took her away and when he opened her underwear, she raised hue and cry, then her father came there and the accused ran away when her father scolded him. Upon her cry, Kanhaiya, Tilak Ram, Radhey Shyam etc. also came there. She has stated that in her cross-examination that as soon as Asharam caught her, she raised noise and before reaching near the bush, her father came there. She has further stated that first of all her father reached upon her cry. This statement of victim girl shows that the act of the appellant Asharam travels only upto the offence defined under Section 354 IPC. P.W. 2-father of the victim and the complainant of the case has stated in the FIR that first of all Radhey Shyam, Pappu and Rakesh and other people of the village reached there and he also reached after sometime as he was on duty for administering Polio drops in a nearby School. P.W. 3 - brother of the victim, who is elder to the victim by 9 years as he himself has told in the cross-examination,

has stated that on the date of incident, his sister was coming back from the field and accused took her away in the bushes behind the bank. Upon her cry, he, Pappu and Radhey Shyam reached there and saw the accused running. P.W. 2-father of the victim, has stated that his son Rakesh was coming behind her daughter at the time of incident. This is a major contradiction. Perusal of the statement of P.W. 2 and 3 make it clear that they were not present at the spot and they did not see the incident. Independent witness has not been examined though mentioned in the FIR. Old enmity with the complainant has also been pleaded by the accused respondent and there is no independent witness to prove the factum of attempt to rape. Hence, the learned Trial Court has rightly convicted the accused respondent under Section 354 IPC instead of Section 376/511 IPC.

11. The aforesaid analysis makes it clear that prosecution failed to prove charges levelled under Sections 376/511 IPC against the accused respondent beyond reasonable doubt.

12. Learned A.G.A. could not evince that the findings given by the Court below while acquitting the accused-respondent were factually or legally incorrect.

13. Hon'ble Apex Court in the case of **Achhar Singh Vs. State of Himachal Pradesh reported in 2021 SCC Online HP 870** in this regard has laid down as under:-

"It is thus a well crystalized principle that if two views are possible, the High Court ought not to interfere with the trial Court's judgment. However, such a precautionary principle cannot be overstretched to portray that the "contours of appeal" against acquittal under Section 378 CrPC are limited to seeing whether or not the trial Court's view was impossible. It is equally well settled that there is no bar on the High Court's power to re-appreciate evidence in an appeal against acquittal11. This Court has held in a catena of decisions (including ***Chandrappa v. State of Karnataka, (2007) 4 SCC 415, 42. State of Andhra Pradesh v. M. Madhusudhan Rao, (2008) 15 SCC 582 20-21 and Raveen Kumar v. State of Himachal Pradesh, 2020 SCC Online SC 869, 11.)*** *that the Cr.P.C does not differentiate in the power, scope, jurisdiction or limitation between appeals against judgments of conviction or acquittal and that the appellate Court is free to consider on both fact and law, despite the self-restraint that has been ingrained into practice while dealing with orders of acquittal where there is a double presumption of innocence of the accused".*

14. We do not find any factual or legal error in the appreciation of evidence by the trial Court while acquitting the accused-respondent under Sections 376/511 IPC and convicting him under Section 354 IPC only. Moreover, the view taken by the trial Court is a possible view. Hon'ble Apex Court recently in ***Geeta Devi Versus State of Uttar Pradesh & Others, 2022 SCC Online SC 57***, has rehashed the principle of law laid down in ***Chandrappa Versus State of Karnataka (2007) 2 SCC (Cri) 162***, which is as under:-

" 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."

15. The trial Court has given valid, convincing and satisfactory reasons while passing the order of acquittal for not

relying on the evidence of victim. For the aforesaid reasons, there appears no ground to disturb the acquittal of the respondent/accused under Sections 376/511 of IPC recorded by the trial Court.

16. We, therefore, do not consider it to be a fit case for grant of leave to appeal to the appellant. The application seeking leave to appeal is, accordingly, rejected. The appeal is also **dismissed.**

(2022)03ILR A495
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.02.2022

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Matters Under Article 227 No. 228 of 2022
(CIVIL)

Shri Gordhan & Ors. ...Petitioners
Versus
Smt. Bohati & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ashish Kumar Singh, Sri Ajay Kumar Singh

Counsel for the Respondents:
Sri Javed Husain Khan, Sri Chetan Chatterjee

A. Practice & Procedure - The Court rejected the objection by the petitioner who are defendants against additional written statement. (Para 20)

Petition Rejected. (E-10)

List of Cases cited:

1. Vidyawati Vs Man Mohan & ors. 1995 SCC (5) 431 *(distinguished)*

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

1. Heard Sri Ashish Kumar Singh, learned counsel for the petitioners and Sri Chetan Chatarjee, learned counsel for the respondent nos.8 and 9 through video conferencing.

2. This petition has been filed under Article 227 of the Constitution of India by the defendants against the order dated 23.04.2019 passed in Original Suit No.48 of 1992 (Zile Singh Vs. Sanmukh and others) whereby the Court of Additional Civil Judge-I (Senior Division), Saharanpur has rejected the application of petitioners (Paper No. 26Ga), praying for rejection of written statement filed by respondent no.8 and 9 and the order dated 24.11.2021 passed by Additional District Judge, Court No.1, Saharanpur passed in Civil Revision No.60 of 2019 (Gordhan and others Vs. Zile Singh) confirming the order of trial Court dated 23.04.2019.

3. The suit has been instituted by the respondent nos.1 to 6 for specific performance of contract on the ground that one Sanmukh had entered into a registered agreement to sale dated 27.11.1991 with the respondent nos. 1 to 6 in respect of property in dispute.

4. In the Original Suit No. 48 of 1992, Sanmukh filed written statement denying execution of agreement to sale. The relevant paragraph nos.23, 24, 26, 27 of written statement are extracted herein below:

"23- यह ककि ववाददी किवा यह किहनवा गलत हहै ककि प्रकतववाददी ननं० 1 ननेसम्पतत्ति मन्द्रजवा ववाद पत्र मद (घ) किवाववाददी किने सवाथ कवक्रय किरनने किवा अननुबनंध अनंकिन 16,0000/- रूपयने मम ककियवा हहो यवा इस सम्बन्ध मम प्रकतववाददी ननं० 1 ननेे

ववाददी किने कहत मम कद० 27-11-91 किहो किहोई अननुबनंध पत्र तहरदीरव कनष्पवाकदत किरवाकिर सबरतजस्ट० किवायववार्यालय दनेवबन्द तजलवा सहवारनपनुर मम पनंजदीकिकत किरवायवा हहो यवा अनंकिन 55,000/- रू० उकअननुबन्ध पत्र किने पनंजदीकिरण किने समय प्रकतववाददी ननं० -1 ननेववाददी सने अकग्रिम धनरवाकशि किने रूप मम नकिद प्रवाप ककियने हहो।

24- यह ककि ववाददी किवा यह किहनवा गलत हहै ककि ववाददी व प्रकतववाददी ननं -1 किने बदीच अननुबनंतधत पत्र किकी मनुख्य शितर्या कनम्न तहैय पवाई हो बललकि ववाददी प्रकतववाददी ननं० -1 किकी बदीच मम किहोई महवायदवा सम्पतत्ति मन्द्रजवा ववाद पत्र मद अ किहो बनेचनने किकी बवावत नहहीं हहआ इसतलए उसदी शितर्या किने तहैय हहोनने यवा यह तहैय हहोनने किवा किहोई प्रश्न हदी पहैदवा नहहीं हहोतवा ककि प्रकतववाददी ननं० 1 सम्पतत्ति मद (अ) मन्द्रजवा ववाद पत्र किवा बहैनवामवा कदनवानंकि 21-1-93 तकि ववाददी यवा उसकिने नवाकमत व्यकक किने कहत मम कनष्पवाकदत किरवाकिर पनंजदीकिकत किरवायनेगवा और शिनेष धनरवाकशि अनंकिन एकि लवाख पवानंच हजवार रूपयने बहैनवामने किने पनंजदीकिरण किने समय ववाददी सने प्रवाप किरनेगवा। और नवा हदी यह स्वदीकिवार हहै ककि ववाददी किने कहत मम बहैनवामवा किरनने किने समय तकि कितथत लनेखपत्र किहो प्रकतववाददी ननं० 1 ककिसदी अन्य व्यकक किने कहत मम हस्तवान्तररत नहहीं किरनेगवा और सम्पतत्ति किहो हर प्रकिवार किने भवार सने मनुक रखनेगवा।

26- यह ककि ववाददी किवा यह किहनवा भदी गलत हहै ककि ववाददी व प्रकतववाददी ननं० 1 किने बदीच कितथत इकिरवारनवामम किने समय यह शितर तहैय पवाई हहो ककि यकद प्रकतववाददी ननं० -1 सम्पतत्ति बहैय तलब किवा बहैनवामवा ववाददी किने कहत मम किरनने सने चचूकि किरनेगवा तहो ऐसदी सचूरत मम ववाददी किहो यह अतधकिवार ककियवा गयवा हहो ककि वह समक्ष न्यवायवालय मम ववाद दवायर किरकिने न्यवायवालय किने मवाध्यम सने बहैनवामवा किरवा लने और सम्पतत्ति पर जववाब प्रवाप किर लने। यवा ऐसदी सचूरत मम प्रकतववाददी सनं० 1 ववाददी किने समस्त हजर व खचर किहो अदवा किरनने किवा तजम्मनेदवार हहोगवा।

27- यह ककि ववाददी व प्रकतववाददी ननं० -1 किने बदीच किहोई मनुहवायदवा बवावत बनेचनने आरवाजदी मन्द्रजवा ववाद पत्र मय अ नहहीं हहआ हहै। और न हदी प्रकतववाददी ननं० 1 किने कितथत दस्तवावनेज तजसकिहो ववाददी एकिरवारनवामवा जवाकहर किरतवा हहै।ववाददी किने हकि मम बतहोर इकिरवारनवामवा जवाकहर किरतवा हहै ववाददी किने हकि मम बतहोर इकिरवारनवामवा मवाहदवा बय मवानतनेहहए तहरदीर व तकिमदील किकी असतलयत यह हहै ककि प्रकतववाददी ननं० 1 सने मनुस्तककिल तहोर पर ग्रिवाम किवालरमतजलवा किरनवाल हररयवाणवा मम रहनने लगवा हहै प्रकतववाददी

मनुजदीब किने पनुत्र भदी वहहीं रहतने हहै प्रकतववाददी सनं० 1 किने पनुत्र रवाजनेशि किहो किनु छ जमदीन ग्रिवाम किवालरूम मम खरदीदनदी थदी। तजसकिने तलए 40000/- रूपयने किकी आवश्यकितवा थदी। तजनकिवा तजक्र प्रकतववाददी ननं० 1 नने ववाददी किने सवाथ ककियवा। जहो ककि ववाददी व प्रकतववाददी ननं० 1 किवा आपस मम किवाफकी उठनवा बहैठनवा थवा तथवा प्रकतववाददी ननं० 1 किवा ववाददी पर पचूरवा कवश्ववास थवा नवम्बर सन 1991 मम प्रकतववाददी ननं० 1 नने ववाददी सने 40,000/-रू० उधवार दनेनने किने तलए किहवा ववाददी प्रकतववाददी ननं० -1 किहो 40,000/- रू० बततौर किजर्या तदीन रूपयवा सहैकिडवा मवाहववार सचूद पर दनेनने किहो तहैयवार हहआ और ववाददी नने प्रकतववाददी ननं० 1 सवाथ यह भदी शितर्या रखदी ककि सम्पकतत मद अ मन्द्रजवा ववाद पत्र प्रकतववाददी ननं० 1 किने यहहॉ रहन किरनदी पडनेगदी आपसदी बवातचदीत किने बवाद प्रकतववाददी ननं० 1 सने किजर्या किकी रकिम पर दहो रुपयने 75 पहैसने सहैकिडवा प्रकतमवाह पर किजर्या दनेनेनने किहो रवाजदी हहो गयवा मगर उसमम यह शितर्या रखदी ककि 14 महदीनने किकी बजवाय मय असल किजर्या दस्तवावनेज रहनवामवा मम प्रकतववाददी सनं० 1 दवारवा लनेनवा तहरदीर किरवायवा जवायनेगवा। यवाकन किजर्या किकी अदवायगदी 55,000/-रू० तलखवाई जवायनेगदी तवाककि प्रकतववाददी ननं० 1 पर किजर्या किकी ववापसदी किवा दबवाव रह सकिने।"

5. During the pendency of suit, Sanmukh had died on 30.03.2018. After the death of Sanmukh, respondent nos. 8 and 9, who are the legal heirs of late Sanmukh have been impleaded in the suit as defendant no.1/1 and 1/2 who file their written statement (paper no. 248-A2) on 14.01.2019 wherein they admitted in paragraph no.4 of their additional written statement about sale of property in dispute. Paragraph 4 of the additional statement is extracted herein below:

"4- यह ककि प्रकतववाददीगण मनुजदीब किने कपतवा किवा मचूल कनववास ववालवा ग्रिवाम किवालररों उफर्या किवालरम ववाद हवाजवा मम तलप सम्पतत्ति ववालने मतौजने बड़गवागाँव सने अत्यतधकि दचूरदी पर लस्थत थवा। तथवा दहोनहो गवानंवरों किकी दचूरदी अत्यतधकि हहोनने किने किवारण दहोनहो गवानंवरों मम किवाश्त किकी जवानदी सम्भव नहदी रह गयदी थदी। अततः वषर्या 1991 मम प्रकतववाददीगण मनुजदीब किने कपतवा नने अपनदी सम्पतत्ति वकणर्यात ववाद पत्र किहो तजलने तसनंह किहो कवक्रय किरनवा तय किर तलयवा थवा। तथवा ववाददी तजलने तसनंह सने प्रश्नगत सम्पतत्ति किहो 1,60,000/- रूपयने मम कवक्रय किरनवा तय किरकिने एकि दस्तवावनेज तजलनेतसनंह किने कहत मम ब्यवानने किने रूप मम 55000/- रूपयने प्रवाप किरकिने कनष्पवाकदत किरवायवा थवा।"

6. The petitioner, who claims to be the purchaser of the property in dispute by sale deed dated 08.05.1992, filed objection (paper no. 26Ka) praying therein that the

additional written statement filed by respondent nos.8 and 9 may not be taken on record for the reason that the stand taken by them in their written statement is contrary to the stand taken by their father in his written statement. It is pleaded that the father of the respondent nos.8 and 9 has denied the execution of agreement to sale dated 27.11.1991 and thus, the stand of respondent nos.8 and 9 in their written statement admitting the sale of property by their father is contrary to the stand taken by their father and, therefore, the additional written statement of respondent nos.8 and 9 cannot be taken on record in view of Order 22 Rule IV Sub-rule 2 of CPC.

7. The respondent nos.8 and 9 filed their objection to the petitioners' application 26-Ga2 on 23.04.2019 praying that application 26-Ga2 of petitioners may be rejected.

8. The trial Court by order dated 23.04.2019 rejected the objection of petitioners holding that the objection which has been taken by the petitioners in their application (paper 26Ga) cannot be looked into at this stage as only written statements have been filed and evidence in the suit has yet to be led by the parties. Accordingly, it concluded that it is not appropriate at this stage to correct the averments of respondent nos.8 and 9 in the additional written statement.

9. The petitioners preferred revision against the order dated 23.04.2019. The revisional Court also by order dated 24.11.2021 rejected the revision affirming the order passed by the trial Court.

10. Challenging the aforesaid impugned orders, learned counsel for the petitioners contended that both the courts below have committed manifest error in rejecting the application of petitioners 26Ga inasmuch as both the courts below has failed to appreciate that it is established on record that the additional written statement of respondent nos.8 and 9 contains pleading contrary to the pleading by their father in his written statement which is not permissible under Order 21 Rule IV Sub-rule 2. Thus, he submits that as the issue of jurisdiction is involved, therefore, the orders of court below are not sustainable. In support of his submission, he has placed reliance upon judgment ***Vidyawati Vs. Man Mohan & Ors., 1995 SCC (5) 431.***

11. Per-contra, learned counsel for the respondents contended that the petitioners are defendant and have no locus to challenge the additional written statement filed by the respondent nos.8 and 9. He submits that both the courts below have not committed any jurisdictional error in rejecting the application of petitioners and as such the writ petition is liable to be dismissed. He further submits that each defendant has to stand on his own legs and has to prove his case and therefore, for this reason also the application of petitioner 26Ga was misconceived and has been rightly rejected.

12. I have heard learned counsel for the petitioners and learned Standing Counsel.

13. The suit has been instituted by respondent no. 1 to 6 stating that a registered agreement to sale has been entered into between them and Sanmukh (defendant no. 2) i.e. father of respondent no. 8 and 9. In additional statement, Sanmukh had denied the execution of any agreement to sale dated 27.11.1991. After

the death of Sanmukh, respondent no. 8 and 9, substituted as heirs of Sanmukh, filed their additional written statement admitting that their father had entered into agreement to sale dated 27.11.1991.

14. Undisputedly, the petitioners claim to be the owner of the property by virtue of sale deed dated 08.05.1992 executed by Sanmukh in their favour with respect to property in dispute. Petitioners are impleaded as defendant in the suit and they have to stand on their own legs to succeed in the suit.

15. The petitioners at this stage cannot be said to be aggrieved by filing of additional written statement by respondent no. 8 and 9. The petitioners have filed written statement and have to stand on their own legs. It is also settled in law that the petitioners cannot have better title than the Sanmukh and once the respondent no. 1 to 6 proves that agreement to sale was executed by late Sanmukh, the law will take its own course.

16. The matter can be viewed from another angle. Admittedly, the petitioners are alien to agreement to sale, therefore, in view of judgement of Apex Court in *Gurmit Singh (Supra)*, they are neither necessary nor proper party in the suit and by abundance precaution they have been impleaded as party in the suit. Paragraph 5.1 and 5.2 of said judgement are reproduced herein below:

"5.1 At the outset, it is required to be noted that the original plaintiffs filed the suit against the original owner ? vendor ? original defendant no.1 for specific performance of the agreement to sell with respect to suit property dated 3.5.2005. It is an admitted position that so far as agreement to sell dated 3.5.2005 of which the specific performance is sought, the appellant is not a party to the said agreement to sell. It appears that during the pendency of the aforesaid suit and though there was an injunction against the original owner ? vendor restraining him from transferring and alienating the suit property, the vendor executed the sale deed in favour of the appellant by sale deed dated 10.07.2008. After a period of approximately four years, the appellant filed an application before the learned trial Court under Order 1 Rule 10 of the CPC for his impleadment as a defendant. The appellant claimed the right on the basis of the said sale deed as well as the agreement to sell dated 31.3.2003 alleged to have been executed by the original vendor. The said application was opposed by the original plaintiffs. The learned trial Court despite the opposition by the original plaintiffs allowed the said application which has been set aside by the High Court by the impugned judgment and order. Thus, it was an application under Order 1 Rule 10 of the CPC by a third party to the agreement to sell between the original plaintiffs and original defendant no.1 (vendor) and the said application for impleadment is/was opposed by the original plaintiffs. Therefore, the short question which is posed for consideration before this Court is, whether the plaintiffs can be compelled to implead a person in the suit for specific performance, against his wish and more particularly with respect to a person against whom no relief has been claimed by him?

5.2 An identical question came to be considered before this Court in the case of Kasturi (supra) and applying the principle that the plaintiff is the dominus litis, in the similar facts and circumstances

of the case, this Court observed and held that the question of jurisdiction of the court to invoke Order 1 Rule 10 CPC to add a party who is not made a party in the suit by the plaintiff shall not arise unless a party proposed to be added has direct and legal interest in the controversy involved in the suit. It is further observed and held by this Court that two tests are to be satisfied for determining the question who is a necessary party. The 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. It is further observed and held that in a suit for specific performance the first test can be formulated is, to determine whether a party is a necessary party there must be a right to the same relief against the party claiming to be a necessary party, relating to the same subject matter involved in the proceedings for specific performance of contract to sell. It is further observed and held by this Court that in a suit for specific performance of the contract, a proper party is a party whose presence is necessary to adjudicate the controversy involved in the suit. It is further observed and held that the parties claiming an independent title and possession adverse to the title of the vendor and not on the basis of the contract, are not proper parties and if such party is impleaded in the suit, the scope of the suit for specific performance shall be enlarged to a suit for title and possession, which is impermissible. It is further observed and held that a third party or a stranger cannot be added in a suit for specific performance, merely in order to find out who is in possession of the contracted property or to avoid multiplicity of the suits. It is further observed and held by this Court that a third party or a stranger to a contract cannot be added so as to convert a suit of one character into a suit of different character. In paragraph 15 and 16, this Court observed and held as under:"

17. For the aforesaid reason, this Court finds that the petitioners are not aggrieved by the filing of written statement by respondent no. 8 and 9 and thus, their objection was not maintainable.

18. Now coming to the merit of the case, this Court finds that the Court below has recorded finding that the parties have filed their written statement and evidences are yet to be filed by the parties. Now, the question that arises whether the stand taken by the respondent no. 8 and 9 is contrary to the stand taken by the late Sanmukh in his written statement at this stage or at the stage of trial. This Court believes that the question as to whether the stand of respondent no. 8 and 9 in written statement is contrary to the stand taken by late Sanmukh, can be looked into at the stage of trial for which an issue has got to be framed and necessary evidence is to be led by the parties, on the basis of which the adjudication of the said issue is possible. This Court finds no illegality in the view taken by the Court below that the stage to consider as to whether the stand of respondent no. 8 and 9 in their written statement is contrary to the stand taken by late Sanmukh in his written statement. As only the pleadings have been exchanged in the suit and evidence is yet to be led by the parties.

19. This Court may also take note of the fact that the agreement to sale is a registered document and therefore, the Court below has rightly rejected the application of the petitioners for rejecting

additional statement of respondent no. 8 and 9 on the ground stated above.

20. Now coming to the judgment relied upon counsel for the opposite party in the case of Vidyawati (supra) the Apex Court has dismissed the appeal of Vidyawati who was impleaded as legal heir in a suit instituted by respondent-plaintiff, in which the petitioner had filed additional written statement claiming title and interest in the property on the basis of Will said to have been executed by Smt. Champawati, which was dismissed by the trial Court by order dated 06.08.1994 holding that it is not open to the present applicant to assert her own right or hostile title to the suit. It was held that if legal representatives wants to raise any individual point, which deceased party could not raise, he must get himself impleaded in his personal capacity or must challenge the decree in separate suit. The facts of the case of Vidyawati are different from the present case inasmuch as in the said case the objection against filing of additional written statement filed by legal representatives of deceased-defendant which was contrary to the written statement of deceased defendant, was taken by plaintiff in the suit and in such view of the fact the Apex Court held as above, but in the present case the petitioners are defendant and as they have to stand on their own legs they cannot file any objection, therefore, the objection by the petitioner against additional written statement is not maintainable. Thus, the judgment of Apex Court passed in the case of Vidyawati is not applicable in the present case.

21. For the reasons given above, the writ petition is dismissed with no order as to cost.

(2022)03ILR A501

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.02.2022

BEFORE

THE HON'BLE J.J. MUNIR, J.

Matters Under Article 227 No. 479 of 2019
(CIVIL)

M/S Jai Prakash Associates Ltd., G.B. Nagar ...Petitioner
Versus
High Tech Tyre Retreaders Pvt. Ltd., Muzzafarnagar & Anr. ...Respondents

Counsel for the Petitioner:
Sri Rohan Gupta, Sri Harshit Gupta

Counsel for the Respondents:
Sri Rameh Chandra Agrahari, Sri Mohit Kumar, Sri Sumit Daga

A. Interpretation of Statute - Micro, Small and Medium Enterprises Development Act, 2006 - Section 19 - Arbitration & Conciliation Act, 1996 - Section 34 - The jurisdiction of the District Judge is dependent upon the condition of pre-deposit of 75% of the sum of the money due under the award. However, the Supreme Court in *Goodyear India* case indicated that the Statute gives freedom to the Court to direct the condition of pre-deposit to be complied with,, if felt necessary, by a deposit in installments. But it is made clear that in whatever way the condition of pre-deposit of 75% is complied with, the condition to the extent of deposit of 75% has to be complied with. (Para 10& 12)

Petition Disposed of. (E-10)

List of Cases cited:

1. Goodyear India Ltd. Vs Norton Intech Rubbers Pvt. Ltd. & anr (2012) 6 SCC 345

(Delivered by Hon'ble J.J. Munir, J.)

1. Against an award passed by the U.P. State M & S.E.F. Council, Kanpur exercising jurisdiction under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 (Act No.27 of 2006) (for short, 'the Act of 2006), the petitioner has made an application to the District Judge under Section 19 of the Act last mentioned. The petitioner is a purchaser of goods supplied by respondent no.1 and a claim for the unpaid price to the tune of Rs.2,97,57,909/- was raised by the suppliers. This claim was referred to the arbitration of the U.P. State M & S.E.F. Council, Kanpur, who passed an award dated 04.10.2017. By the award aforesaid, the petitioner was ordered to pay a total sum of Rs.2,74,42,197/- together with interest in terms of Section 16 of the Act of 2006, till realization.

2. The petitioner has challenged the aforesaid award under Section 34 of the Arbitration Act read with Section 19 of the Act of 2006. Along with the application seeking to set aside the award, an application was made seeking exemption from deposit of the decretal amount. The learned District Judge has proceeded to reject the application seeking exemption on the ground that Section 19 postulates that application to set aside an award cannot be entertained unless 75% of the amount due under the award has been deposited. Section 19 of the Act of 2006 reads:

"19. Application for setting aside decree, award or order.--No application for setting aside any decree, award or other order made either by the Council itself or by any institution or centre providing alternate dispute resolution services to which a reference is made by the Council, shall be entertained by any court unless the appellant (not being a supplier) has deposited with it seventy-five per cent of the amount in terms of the decree, award or, as the case may be, the other order in the manner directed by such court:

Provided that pending disposal of the application to set aside the decree, award or order, the court shall order that such percentage of the amount deposited shall be paid to the supplier, as it considers reasonable under the circumstances of the case, subject to such conditions as it deems necessary to impose."

3. A perusal of Section 19 of the Act of 2006 makes it pellucid that the jurisdiction of the District Judge to entertain objections against an award postulates a deposit of 75% of the sum due under the award. The phraseology of the Statute is clear and leaves no option with the District Judge. The provision mandates that unless 75% of the money due under the award is deposited, the District Judge cannot assume jurisdiction and proceed to hear objections under Section 19.

4. Now, before this Court under Article 227, the petitioner has challenged the award dated 04.10.2017 passed by the U.P. State M & S.E.F. Council, Kanpur as also the order dated 17.12.2018 passed by the District Judge refusing to exempt the petitioner from making good the statutory deposit.

5. Mr. Rohan Gupta, learned Counsel for the petitioner has been at pains to say that there is illegality in the award that goes to the root of the matter and, therefore, this Court ought to exercise jurisdiction under Article 227 of the Constitution in order to do effective justice.

6. Mr. Mohit Kumar and Mr. Sumit Daga, learned Counsel for respondents submit that this petition is not maintainable

because both the reliefs cannot be granted. In their submission, the award cannot be challenged before this Court, inasmuch as the petitioner has a remedy under the Statute before the District Judge.

7. Upon hearing the learned Counsel for parties, this Court finds that there are two parts to the challenge. The first is to the award dated 04.10.2017, about which it is evident that the petitioner has a statutory remedy under Section 19 of the Act of 2006. In fact, the petitioner has availed that remedy by preferring an application to the learned District Judge. This part of the challenge clearly is not maintainable in view of the available alternative remedy, already availed.

8. So far as the challenge to the order of the learned District Judge is concerned, this Court is of opinion that the District Judge has no discretion in the matter to exempt the petitioner from the statutory condition of pre-deposit of 75% of the sum of money due under the award. In fact, the jurisdiction of the District Judge is dependent upon the condition of pre-deposit inasmuch as the words employed in the Statute are *"shall be entertained by any court unless the appellant (not being a supplier) has deposited with it seventy-five per cent"*. Therefore, in the absence of the requisite pre-deposit of 75%, the objections preferred by the petitioner cannot be considered.

9. At this stage, learned Counsel for the petitioner has invited the attention of the Court to the holding of their Lordships of the Supreme Court in **Goodyear India Ltd. v. Norton Intech Rubbers Private Limited and Another, (2012) 6 SCC 345.** In the said case, it has been held:

"11. Having considered the submissions made, both on behalf of the petitioner and on behalf of the respondents, we do not see any reason to interfere with the views expressed, both by the learned Single Judge, as also the Division Bench with regard to Section 19 of the 2006 Act. It may not be out of place to mention that the provisions of Section 19 of the 2006 Act, had been challenged before the Kerala High Court in Kerala SRTC v. Union of India[(2010) 1 KLT 65] , where the same submissions were negated and, subsequently, the matter also came up to this Court, when the special leave petitions were dismissed, with leave to make the predeposit in the cases involved, within an extended period of ten weeks. We may also indicate that the expression "in the manner directed by such court" would, in our view, indicate the discretion given to the court to allow the predeposit to be made, if felt necessary, in instalments."

10. The aforesaid position of the law in no way whittles down condition of pre-deposit. All that is said there is that it is in the discretion of the Court to direct the pre-deposit mandated by the Statute to be made in the manner as the Court finds fit. The decision in **Goodyear India Ltd.** indicates that the Statute gives freedom to the Court to direct the condition of pre-deposit to be complied with, if felt necessary, by a deposit in installments.

11. No doubt, while passing the impugned order, the learned District Judge has not examined the aforesaid possibility or passed orders bearing in mind the limited freedom that he has in directing in what way the condition of pre-deposit is complied with.

12. In this view of the matter, it is directed that the learned District Judge shall pass appropriate orders bearing in mind the totality of circumstances requiring the petitioner to comply with the requirement of pre-deposit in such manner as in the discretion of the Court may be found appropriate. It is made clear that in whatever way the condition of pre-deposit of 75% is complied with, the condition to the extent of deposit of 75% has to be complied with. While passing the orders regarding the manner in which the condition of pre-deposit is to be complied with, the learned District Judge shall take into account, if there is any money paid already under the award, which shall be adjusted.

13. It is further directed that subject to the petitioner complying with the terms of the pre-deposit as directed by the District Judge, the District Judge shall proceed with and decide the application under Section 19 of the Act of 2006 within a period of six months, after hearing both parties, in accordance with law.

14. This petition is **disposed of** in terms of the aforesaid orders.

15. Let a copy of this order be communicated to the learned District Judge, Kanpur Nagar by the Registrar (Compliance).

(2022)03ILR A504
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.01.2022

BEFORE

THE HON'BLE J.J. MUNIR, J.

Matters Under Article 227 No. 7759 of 2021
(CIVIL)

Isht Deo Gupta ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Awadesh Kumar Malviya, Sri Sanjeev Kumar Sharma

Counsel for the Respondents:
C.S.C., Sri Shivam Yadav, Sri Sudhir Mehrotra

A. Interpretation of Statute - U.P. Urban Planning and Development Act, 1973: Section 18(6) - Any order that doesn't fall strictly within the terms of the statutory provision creating a right of appeal is not appealable. (Para 10)

Writ Petition Rejected. (E-10)

List of Cases cited:

1. Tamil Nadu Control Board Vs Sterile Industries (India) Ltd. & ors. (2019) SCC OnLine SC 221

(Delivered by Hon'ble J.J. Munir, J.)

The Court is convened via video conferencing.

2. This petition under Article 227 of the Constitution is directed against an order of Mr. J.K. Dwivedi, the learned Additional District Judge, Court No. 16, Kanpur Nagar dated 22.09.2021, dismissing Misc. Appeal No. 54 of 2019 and affirming an order/notice issued by the Assistant Secretary, Kanpur Development Authority, Kanpur Nagar cancelling the petitioner's allotment of a plot of land, with a direction for refund of the advance consideration deposited towards execution of a lease of the said plot.

3. The facts giving rise to this petition are as follows :

One Rakesh Kumar Gupta was allotted a house bearing House No. 6, H.I.G., Block W-1, Saket Nagar, Kanpur Nagar under a self-financing scheme floated by the Kanpur Development Authority, Kanpur Nagar1 in accordance with the allotment made vide Allotment No. 26(डी)भू०/के०डी०ए० dated 07.10.1983. It is claimed that Rakesh Gupta deposited the entire consideration for execution of the lease deed, being a sum of Rs. 1 lacs relating to the said house, but the deed was not executed. However, in consequence of the allotment made, possession was delivered to Rakesh Gupta over the house in dispute on 23.05.1984. Rakesh Gupta resided continuously in the house in dispute based on the letter of allotment, together with delivery of possession made to him by the Authority. Rakesh Gupta was issueless. He executed a unregistered Will dated 29.12.1995 in the petitioner's favour, bequeathing him the house in dispute. The petitioner is Rakesh Gupta's nephew (brother's son). During his lifetime, Rakesh Gupta was issued with a notice by the Authority, asking him to deposit a further sum of Rs. 1,98,170/-. Rakesh Gupta challenged the said additional demand by means of a writ petition before this Court, being Civil Misc. Writ Petition No. 245 of 1999, which was disposed of by an order dated 06.01.1999, granting liberty to the petitioner to represent his claim before the Authority, who were put under a direction to decide the petitioner's claim within a period of two months of production of a certified copy of that order. It is the petitioner's case that Rakesh Gupta served the said order upon the Authority, whereupon, he was issued a further notice, requiring him to deposit an escalated sum of Rs. 4,86,620/-.

4. Thereupon, Rakesh Gupta instituted Original Suit No. 807 of 1999 in the Court of the Civil Judge (Senior Division), Kanpur Nagar, praying for a permanent injunction against the Authority forbearing them from cancelling his allotment or dispossessing him. Pending suit, Rakesh Gupta passed away on 10.01.2021. The petitioner claiming succession relating to the house in dispute, to have opened out under the last will and testament of Rakesh Gupta dated 29.12.1995 in his favour, applied for substitution in the suit. He was substituted as Plaintiff No. 1/1. The said suit was tried and dismissed vide judgment and decree dated 18.12.2018. The petitioner, who claims to be in possession of the suit property in the right inherited from Rakesh Gupta submitted a representation dated 12.02.2019, pressing his claim to the execution of an appropriate deed of conveyance in terms of the allotment made in favour of Rakesh Gupta. The Authority vide their order dated 02.05.2019, rejected the petitioner's application dated 12.02.2019 on the ground that in the lifetime of the late Rakesh Gupta, the Authority had considered his representation made in this behalf, in compliance with the orders of this Court dated 06.01.1999 passed in Civil Misc. Writ Petition No. 245 of 1999 and the Vice Chairman vide his order dated 19.04.1999 had permitted Rakesh Gupta to deposit a sum of Rs. 4,60,044/- in the Authority's account up to 18.05.1999, but he had failed to do so. It was further said in the order that consequently, the Vice Chairman of the Authority had cancelled the allotment made in favour of Rakesh Gupta. It was also stipulated that the petitioner may receive the sum of money deposited towards allotment/lease relating to the house in dispute by Rakesh Gupta, upon

presentation of the original receipts. It is the aforesaid order dated 02.05.2019 passed by the Authority, whereagainst the petitioner carried a miscellaneous appeal to the District Judge of Kanpur Nagar, who entertained and registered the same as Misc. Appeal No. 54 of 2019.

5. The appeal aforesaid, upon assignment, came up for determination before the Additional District Judge, Court No. 16, Kanpur Nagar. On 22.09.2021, the appeal was heard and dismissed on merits.

6. Aggrieved by the order dated 22.09.2021 passed by the learned Additional District Judge, the petitioner has instituted the present writ petition.

7. Heard Mr. Awadhesh Kumar Malviya, learned Counsel for the petitioner, Mr. Shivam Yadav, learned Counsel for respondent nos. 2 and 3, Mr. Sudhir Mehrotra, learned Special Counsel appearing on behalf of the High Court and Mr. K.R. Singh, learned Chief Standing Counsel for respondent no. 1.

8. By an order dated 20.01.2022, this Court required the learned Additional District Judge, Court No. 16, Kanpur Nagar to indicate under what provision of the law, he has entertained and decided Misc. Appeal No. 54 of 2019, inasmuch as what was under challenge before him was a mere letter or an administrative communication from the Secretary to the Authority, addressed to the petitioner. It was indicated in this Court's order dated 20.01.2022 that learned Counsel for the petitioner was not able to point out the provision of law under which an appeal would lie to the District Judge of the district from a virtual letter issued by the Authority. This Court has received a report from the learned District Judge, Kanpur Nagar, where the jurisdiction of the District Judge/Additional District Judge to entertain and decide a miscellaneous civil appeal has been traced to the provisions of sub-Sections (6) and (4) of Section 18 of the U.P. Urban Planning and Development Act, 19732. The relevant part of the report submitted by the District Judge, Kanpur Nagar, also dated 20.01.2022 reads to the following effect :

The Kanpur Development Authority vide its letter No. डी/223/सं०स०(जोन-3)/का०वि०प्रा०/2018-19 dated 02.05.2019, informed Sri Isht Deo Gupta through Sri Rakesh Gupta, informing him about the cancellation of allotment of the said property. It was informed him that the representation of Sri Rakesh Gupta was disposed of on 19.04.1999 by the then Vice Chairman, KDA in compliance of the order dated 06.01.1999 passed by Hon'ble High Court, Allahabad in Petition No. 245/1999, Rs. 4,60,444/- were to be deposited by the allottee by 18.05.1999 but he failed to comply with the order, therefore, the allotment was cancelled, against which Misc. Civil Appeal No. 54 of 2020 Isht Deo Gupta Vs. K.D.A. & others, was presented before the District Judge, Kanpur Nagar.

It appears that on the aforesaid set of facts under the provisions contained in Section 18(4) of U.P. Urban Planning and Development Act, 1973, cause of action arose to the appellant.

Perusal of the record also shows that communication vide letter dated 02.05.2019 of Kanpur Development Authority falls within the ambit of Section 18(4) of U.P. Urban Planning and

Development Act, 1973. Further the provisions of Section 18(6) of U.P. Urban Planning and Development Act, 1973, reads as thus-

"(6) Any person aggrieved by an order under sub-section (4) may, within 30 days from the date of knowledge thereof, prefer an appeal to the District Judge whose decision shall be final."

9. The moot question before this Court is whether an appeal under sub-Section (6) of Section 18 of the Act of 1973 was maintainable before the learned District Judge and a fortiori could have been heard and decided on merits by the learned Additional District Judge, as done by the order impugned. It would be apposite to quote the provisions of Section 18 of the Act of 1973, in extenso :

18. Disposal of land by the Authority or the local Authority concerned.(1) Subject to any directions given by the State Government in this behalf, the Authority or, as the case may be, the local Authority concerned may dispose of

(a) any land acquired by the State Government and transferred to it, without undertaking or carrying out any development thereon; or

(b) any such land after undertaking or carrying out such development as it thinks fit.

to such persons, in such manner and subject to such terms and conditions as it considers expedient for securing the development of the development area according to plan.

(2) Nothing in this Act shall be construed as enabling the Authority or the local Authority concerned to dispose of land by way of gift, but subject thereto, references in this Act, to the disposal of land shall be construed as references to the disposal thereof in any manner, whether by way of sale, exchange or lease or by the creation of any easement, right or privilege or otherwise.

(3) Notwithstanding anything contained in Sub-section (2), the Authority or the local Authority concerned may, create a mortgage or charge over such land (including any building thereon) in favour of the Life Insurance Corporation of India, the Housing and Urban Development Corporation, or a banking company as defined in the Uttar Pradesh Public Moneys (Recovery of Dues) Act, 1972 or any other financial institution approved by general or special order in this behalf by the State Government.

(4) Where vacant land has been disposed of under this section by way of lease for making constructions within the time with right of forfeiture of the lease and re-entry upon failure to make constructions within such time, and the lessee fails without sufficient reason, to make the constructions or a substantial portion thereof, within the stipulated time or such extended time as the lessor may grant, the lessor may, subject to the provisions of Sub-section (4-A) forfeit the lease and re-enter upon the land:

Provided that no forfeiture and re-entry shall be made unless the lessee has been allowed reasonable opportunity to show cause against the proposed action.

(4-A) Where a lessee fails to make construction within the stipulated time, and the extended time, if any, under Sub-section (4) so that the total period from the date of lease exceeds five years, a charge at the rate of two per cent of the prevailing market value of the concerned land shall be realised every year from him by the lessor and if from the date of imposition of the said charge a further period of five years elapses the lease shall stand forfeited and the lessor shall re-enter upon the land :)

[Provided that where the period of five years has expired before the commencement of the Uttar Pradesh Urban Planning and Development (Amendment) Act, 1997, or where the period of five years expires within one year after such commencement, the charge shall be realizable after a period of one year from the date of such commencement.]

(5) Upon such forfeiture and re-entry, the premium paid by the lessee for such land shall be refunded without any interest, after deducting-

(a) the amount, if any, due to the lessor under that lease, and

(b) a sum equivalent to 5 per cent of the premium, for administrative expenses.

(6) Any person aggrieved by an order under Sub-section (4) may, within 30 days from the date of knowledge thereof, prefer an appeal to the District Judge whose decision shall be final.

(7) The land so re-entered upon after forfeiture of lease may be disposed of in accordance with the provisions of Sub-sections (1) and (2).

10. A perusal of sub-Section (4) of Section 18 indicates that what is postulated by the aforesaid provision is a concluded lease of vacant land - a conveyance executed by the Authority in favour of a person for the purpose of raising constructions thereon. It is further envisaged by sub-Section (4) that the lease should carry a covenant about time within which a lessee would raise constructions as stipulated. A further covenant has to be there that in the event of lessee's failure to raise construction within the stipulated time or a substantial portion thereof within that time, the lessor, that is to say, the Authority, would forfeit the lease and re-enter. It is from an order passed by the Authority forfeiting a lease of open land and deciding to re-enter in exercise of powers of sub-Section (4) of Section 18 on account of the lessee's failure to raise constructions within the covenanted time that an appeal is provided to the District Judge under sub-Section (6) of Section 18. It is salutary principle of law that an appeal is a creature of Statute. There is no inherent right of appeal. An appeal lies from an order whenever the Statute provides it. It lies to the forum to which the Statute provides and by the person whom the Statute envisages. Any order that doesn't fall strictly within the terms of the statutory provision, creating a right of appeal is not appealable. An order that is somehow akin to the order from which the Statute provides an appeal is not appealable.

11. About the principle that appeal is a creature of statute and no appeal lies, if, by the terms of the statute, it is not envisaged against the kind of order that is sought to be appealed, reference may be

made to the decision of the Supreme Court in **Tamil Nadu Pollution Control Board v. Sterlite Industries (India) Limited and others3** where it has been held :

31. In Arcot Textile Mills Ltd. v. Regl. Provident Fund Commr. [Arcot Textile Mills Ltd. v. Regl. Provident Fund Commr., (2013) 16 SCC 1 : (2014) 3 SCC (L&S) 358], appeals lay to the Tribunal constituted under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, under Section 7-I of the Act. Whereas appeals lay against orders passed under Section 7-A of the Act, which provided for determination of monies due from employers, no appeal lay against orders made under Section 7-Q of the said Act, which spoke of interest payable by the employer. This Court held: (SCC p. 10, para 20)

"20. On a scrutiny of Section 7-I, we notice that the language is clear and unambiguous and it does not provide for an appeal against the determination made under Section 7-Q. It is well settled in law that right of appeal is a creature of statute, for the right of appeal inheres in no one and, therefore, for maintainability of an appeal there must be authority of law. This being the position a provision providing for appeal should neither be construed too strictly nor too liberally, for if given either of these extreme interpretations, it is bound to adversely affect the legislative object as well as hamper the proceedings before the appropriate forum. Needless to say, a right of appeal cannot be assumed to exist unless expressly provided for by the statute and a remedy of appeal must be legitimately traceable to the statutory provisions. If the express words employed in a provision do not provide an appeal from a particular order, the court is bound to follow the express words. To put it otherwise, an appeal for its maintainability must have the clear authority of law and that explains why the right of appeal is described as a creature of statute. (See Ganga Bai v. Vijay Kumar [Ganga Baiv. Vijay Kumar, (1974) 2 SCC 393], Gujarat Agro Industries Co. Ltd. v. Municipal Corpn. of the City of Ahmedabad [Gujarat Agro Industries Co. Ltd. v. Municipal Corpn. of the City of Ahmedabad, (1999) 4 SCC 468 : 1994 SCC (L&S) 993], State of Haryana v. Maruti Udyog Ltd. [State of Haryana v. Maruti Udyog Ltd., (2000) 7 SCC 348], Super Cassettes Industries Ltd. v. State of U.P. [Super Cassettes Industries Ltd. v. State of U.P., (2009) 10 SCC 531 : (2009) 4 SCC (Civ) 280], Raj Kumar Shivhare v. Directorate of Enforcement [Raj Kumar Shivhare v. Directorate of Enforcement, (2010) 4 SCC 772 : (2010) 3 SCC (Civ) 712], Competition Commission of India v. SAIL [Competition Commission of India v. SAIL, (2010) 10 SCC 744].)"

In para 21, this Court further went on to hold that in case an order under Section 7-A speaks of delay in payment as well as interest, a composite order passed would be amenable to appeal under Section 7-I, as interest is only parasitic on the principal sum due under Section 7-A. However, if an independent order is passed under Section 7-Q for interest alone, the same was held to be not appealable.

12. Here, this Court finds that the petitioner, assuming that he is a legatee under Rakesh Gupta's Will and entitled to the property in dispute, was not the lessee of a vacant land disposed of by the Authority in his favour through a concluded lease, where the covenant was to construct within a specified period of time. It is a case where there was a mere

allotment with delivery of possession made in favour of Rakesh Gupta, entitling him to seek execution of a lease upon payment of the due sale consideration. Whatever be the merits of the parties' case, there was never a lease about open land in existence executed by the Authority carrying a stipulation about time within which the lessee must construct. Rakesh Gupta was never a lessee. He was a mere allottee. Sub-Section (4) of Section 18 does not envisage action by way of cancellation of allotment, entitling the allottee to the execution of a lease. It speaks about forfeiture of a concluded lease with a decision to re-enter by the Authority for the lessee's failure to construct or substantially construct within the covenanted time. Therefore, an order of the kind passed against Rakesh Gupta, cancelling his allotment is not an order even remotely made under sub-Section (4) of Section 18. Quite apart, the order dated 02.05.2019 issued by the Authority is not even an order cancelling Rakesh Gupta's allotment. It is just a communication of the fact to the petitioner that at some point of time in the past, Rakesh Gupta's allotment had been cancelled by the Authority on account of non-payment of the specified consideration agreed upon by parties. Also, for another reason, the order of the Authority would not be one that falls within the terms sub-Section (4) of Section 18. It is so because what was allotted to Rakesh Gupta was a constructed house and not open land to construct upon.

13. Thus, in the opinion of this Court, no appeal under sub-Section (6) of Section 18 of the Act of 1973 lay to the District Judge from the order dated 02.05.2019 passed by the Authority. It is, therefore, held that Misc. Appeal No. 54 of 2019 ought not to have been entertained by the District Judge or decided on merits by the Additional District Judge, as it was neither competent nor maintainable. It is made clear that this Court has not expressed its opinion about the rights of the petitioner, either way, and if some remedy is open to the petitioner under the law against the action of the Authority, he is free to pursue it.

14. No other point was pressed.

15. In the result, this petition **fails** and stands ***dismissed.***

16. Costs easy.

17. Let this order be communicated to the Additional District Judge, Court No. 6, Kanpur Nagar through the learned District Judge, Kanpur Nagar and to the learned District Judge, Kanpur Nagar by the Registrar (Compliance).

(2022)03ILR A510
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.01.2022

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE JAYANT BANERJI, J.

Special Appeal Defective No. 20 of 2022

Krishna Mohan Tiwari ...Petitioner
Versus
District Inspector of Schools, Allahabad & Anr. ...Respondents

Counsel for the Petitioner:
Sri Siddharth Khare, Sri Ashok Khare (Sr. Adv.)

Counsel for the Respondents:
C.S.C.

A. Service Law – U.P. Secondary Education Services and Selection Board Act, 1982 - Section 16(1), 16-E(11) - Intermediate Education Act, 1921 - Section 16-E – Education – Appointment -Substantive appointment defined in the Rules framed under the Act of 1982 does not include *ad-hoc* appointment which may not exceed eleven months in academic session. (Para 11)

In the present case, a substantive vacancy occurred on the retirement of one Jai Narain Vishwakarma on 30.06.1998 and the Committee of Management, without following the statutory provisions of the Act of 1982, made advertisement on 11.04.1998/16.04.1998 and selected and appointed the petitioner who allegedly joined on 31.08.1998. Thus, appointment of the petitioner was void as the procedure prescribed u/sub-section (1) of S.16 of the Act of 1982 had not been followed at all. (Para 4, 10)

Special appeal dismissed. (E-4)

Precedent distinguished:

1. Santosh Kumar Singh Vs St. of U.P. & ors., 2015 (5) AWC 4719 (Para 5)

2. Sushil Kumar Yadav Vs St. of U.P. & ors., 2018 (1) AWC 462 (Para 5)

Present appeal challenges judgment and order dated 06.10.2021, passed by learned Single Judge.

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

1. Heard Shri Ashok Khare, learned Senior Advocate assisted by Shri Siddharth Khare, learned counsel for the appellant and the learned Standing Counsel appearing for the State-respondents.

2. This special appeal has been filed praying to set aside the order dated 06.10.2021 passed by a learned Single Judge in Writ-A No.13736 of 2001 (Shri Krishna Mohan Tiwari vs. D.I.O.S. Allahabad & Ors.), whereby the writ petition filed by the appellant was dismissed.

3. Undisputed facts of the present case are that one Jai Narain Vishwakarma was Lecturer in Civics who was superannuated on 30.06.1998. Thus, a substantive vacancy occurred on retirement of the aforesaid Jai Narain Vishwakarma but no requisition was made by the Committee of Management to fill up the post of Lecturer in Civics. The procedure prescribed under the provisions of the U.P. Secondary Education Services and Selection Board Act, 1982 was not followed at all by the Committee of Management and instead the Committee of Management itself advertised the post on 11.04.1998/16.04.1998 and appointed the petitioner on the post of Lecturer, who allegedly joined on 31.08.1998.

4. Learned Single Judge, while referring to various provisions of the U.P. Intermediate Education Act, 1921, particularly in view of the provisions of Section 16(2) of the U.P. Secondary Education Services and Selection Board Act, 1982, came to the conclusion that the appointment of the petitioner was void as the procedure prescribed under sub-section (1) of Section 16 of the Act of 1982 had not been followed at all.

5. Learned counsel for the petitioner-appellant has relied upon a Full Bench judgment of this Court in the case of **Santosh Kumar Singh vs. State of U.P. & Ors.** reported in **2015 (5) AWC 4719** and

submits that in view of the provisions of Section 16-E of the Intermediate Education Act, 1921, the Committee of Management has power to make ad-hoc appointments. He also relied upon Single Bench judgment of this Court in the case of **Sushil Kumar Yadav vs. State of U.P. & Ors.** reported in **2018 (1) AWC 462.**

6. We have carefully considered the submissions of the learned counsel for the petitioner-appellant and we find no force in his submissions.

7. It has been admitted before us by learned counsel for the appellant that the petitioner-appellant was appointed by the Committee of Management against a substantive vacancy pursuant to advertisement dated 11.04.1998/16.04.1998 issued by the Committee of Management. That substantive vacancy occurred on retirement of one Jai Narain Vishwakarma on 30.06.1998. The petitioner was appointed by the Committee of Management and he joined on 31.08.1998. The provisions of Section 16(1) of the Act of 1982 were not followed at all. Thus, in terms of the procedure contained in sub-section (1) of Section 16 of the Act of 1982, the appointment of the petitioner by the Committee of Management was void.

8. The reliance placed by the learned counsel for the petitioner-appellant on the Full Bench judgment of this Court in the case of **Santosh Kumar Singh** (supra) is of no help to the petitioner. In the aforesaid judgment, the Full Bench has framed question no.(c) as under :-

"Whether under Section 16-E of the Intermediate Education Act, 1921 (Act of 1921), there is a power with the Committee of Management **to make ad-hoc appointment against short term vacancies** and if so then for what period."

9. The aforequoted question was answered by the Full Bench in paragraph 19 as under:-

"(c) Under Section 16-E of the Intermediate Education Act, 1921, the **Committee of Management is empowered to make an appointment against a temporary vacancy caused by the grant of leave to an incumbent for a period not exceeding six months or in the case of death, termination or otherwise, of an incumbent occurring during an educational session**. An appointment made under sub-section (11) of Section 16-E as provided in the proviso thereto shall, in any case, not continue beyond the end of educational session during which the appointment was made"

10. Thus, the Full Bench in the case of **Santosh Kumar Singh** (supra) has dealt with the situation where the ad-hoc appointment was to be made against a temporary vacancy caused by the grant of leave to an incumbent for a period not exceeding six months or in case of death, termination or otherwise, of an incumbent occurring during an educational session. The facts of the present case are that a substantive vacancy was occurred on the retirement of one Jai Narain Vishwakarma on 30.06.1998 and the Committee of Management, without following the statutory provisions of the Act of 1982, made advertisement on 11.04.1998/16.04.1998 and selected and appointed the petitioner who allegedly joined on 31.08.1998. Thus, the judgment of the Full Bench has no application on facts of the present case.

11. The next judgment in the case of **Sushil Kumar Yadav** (supra) relied upon by the learned counsel for the petitioner-appellant is also of no help to the petitioner inasmuch as the facts were that two substantive vacancies occurred on 30.06.2011 and 30.06.2014 respectively and the Management sent the requisitions on 01.04.2011 and 17.06.2015 but the Selection Board did not recommend any candidate. Consequently, the Management advertised the vacancy on the aforesaid posts on 25.06.2017 for ad-hoc appointment. On these facts, the learned Single Judge, while referring the provisions of Section 16-E(11) of the Act of 1982, held that the substantive appointment defined in the rules framed under the Act of 1982 does not include ad-hoc appointment which may not exceed eleven months in academic session. Thus, the judgment of the learned Single Judge in the case of **Sushil Kumar Yadav** (supra) has no application on facts and circumstances of the present case.

12. Thus, for all the reasons stated above, we do not find any error or illegality in the impugned order passed by the learned Single Judge.

13. The special appeal lacks merit and is, therefore, **dismissed.**

(2022)03ILR A513
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.03.2022

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE AJAI KUMAR SRIVASTAVA -I, J.

Special Appeal No. 75 of 2022

State of U.P. & Anr ....Appellant
Versus
Ram Pratap Singh & Ors. ...Respondents

Counsel for the Appellant:
C.S.C.

Counsel for the Respondents:
Sri Srideep Chatterjee, Sri Prashant Singh Atal, Sri Satyanshu Ojha

A. Service Law – First Statute of University – Ch. XII – Board's power to determine the classification of teaching staff of University – Earlier GO dated 22.07.1999 provide the pay scale to be paid w.e.f. 13.03.1992 and nomenclature of post as the Lecturers/Assistant Professor – However, by subsequent GO dated 18.2.2000, the w.e.f date was changed as 22.07.1999 and nomenclature of post was changed as the Senior Research Assistants – Validity challenged – Ratification of the decision earlier taken in 85th meeting by the Board of Management in 86th meeting, whether taken place or not – Finding of Single Judge to the effect that the decision of 85th meeting was not ratified in subsequent meeting was held by the Division Bench not sustainable in the eye of law – Division Bench held that it is not a case where the decision taken in an earlier meeting was not considered for ratification in the subsequent meeting. It was rather considered and decided not to ratify the same – Division Bench further held that it is in this background it appears that the State Government while issuing GO dated 18.02.2000 has modified the earlier order dated 22.07.1999. (Para 5, 38 and 42)

Special appeal allowed. (E-1)

(Delivered by Hon'ble Devendra Kumar Udadhyaya, J.)

1. Heard Shri Amitabh Rai, learned Additional Chief Standing Counsel representing the appellants-State

authorities, Shri S. K. Kalia, learned Senior Advocate, assisted by Shri Srideep Chatterjee, learned counsel representing the respondent nos.1 to 19 and Shri Satyanshu Ojha, learned counsel representing Narendra Dev University of Agriculture and Technology, Kumarganj, Faizabad (hereinafter referred to as "the University"). We have also perused the records available before us on this special appeal.

2. This intra-court appeal has been filed impeaching the judgment and order dated 19.02.2021 passed by the learned Single Judge in Writ Petition No.327 (S/B) of 2000 whereby the writ petition has been allowed, the Government Order impugned therein, dated 18.02.2000 has been quashed and a direction has been issued to treat the respondent nos.1 to 19 as Teacher/Assistant Professor and to make them available all consequential benefits as admissible to their posts.

3. We may note that under challenge in the writ petition before the learned Single Judge was the Government Order dated 18.02.2000 whereby the earlier Government Order dated 22.07.1999 was partially modified and the respondent nos.1 to 19 (who were petitioners in the writ petition before the learned Single Judge and will be referred to as such hereinafter) were granted U.G.C. (University Grants Commission) pay scale with effect from the date of issuance of the earlier Government Order dated 22.07.1999. It was further provided that nomenclature of the petitioners be changed to Research Assistant and in future no post by the said name or any other name shall be created.

4. We may also note that by means of the Government Order dated 22.07.1999 which was modified by the subsequent Government Order dated 19.02.2000, U.G.C. pay scale of Rs.2200-4000/- was made available to the petitioners with effect from the date they were declared as Teachers i.e. with effect from 13.03.1992 provided they fulfilled the eligibility criteria of teachers and the work being performed by them was classified as the work of a teacher.

5. By means of the Government Order dated 22.07.1999 the pay scale of Rs.2200-4000/- was made available w.e.f. 13.03.1992 whereas by the subsequent Government Order dated 18.02.2000 this pay scale was made available w.e.f. 22.07.1999 that is from the date the said Government Order was issued and not from 13.03.1992 which is the date on which these petitioners are said to have been declared as Teachers. By the Government Order dated 18.02.2000, apart from making the pay scale of Rs.2200-4000/- admissible to the petitioners w.e.f. 22.07.1999, the State Government also provided that their nomenclature be also changed to Senior Research Assistant.

6. As observed above, it is this Government Order dated 18.02.2000 which was assailed by the petitioners by filing the writ petition no.327 (S/B) of 2000 which has been allowed by means of the order dated 19.02.2021 which is under appeal herein.

7. Shri Amitabh Rai, learned Additional Chief Standing representing the appellants-State authorities has vehemently argued that the learned Single Judge while passing the order under appeal has not appreciated the correct position of fact and law and that the learned Single Judge has clearly ignored the fact that the Government Order dated 18.02.2000 was

passed by the State Government taking into account the fact that the resolution of the Board of Management of the University, dated 13.03.1992 whereby the petitioners were declared as Teachers was not affirmed in the subsequent meeting of the Board of Management of the University and as such the claim of the petitioners could be accepted only from the date of approval by the State Government for grant of U.G.C. pay scale which was approved by the Government Order dated 22.07.1999 and not prior to the said date.

8. It has also been argued on behalf of the appellants that as per the scheme of U.P. Krishi Evam Prodyogik Vishwavidyalaya, Adhiniyam, 1958 and the First Statutes framed thereunder, emoluments of academic staff shall be such as may be approved by the Board of Management on recommendation of U.G.C provided that no grant to meet any portion of emolument shall be available from the State Government unless prior approval of the State Government is obtained and is placed before the Board of Management. However, the learned Single Judge has not considered the said statutory scheme which vitiates the judgement and order under appeal. It has also been argued that the University is though an autonomous body, having been established under a State Legislation which grants only academic autonomy to the University but University is completely dependent on the State Government for finances and hence it is the prerogative and discretion of the State Government to make available a particular pay scale to any academic staff with effect from a date fixation of which is the sole preserve of the State Government. It has, thus, been argued that the modification/amendment made by the Government Order dated 28.02.2000 making the pay scale of Rs.2200-4000/- effective with effect from 22.07.1999 was perfectly lawful and within the competence of the State Government, however, the learned Single Judge has not appreciated the aforesaid legal position which renders the judgment and order under appeal liable to be set aside.

9. Opposed to the submissions and prayer made on behalf of the appellants-State authorities, learned Senior Advocate representing the respondent nos.1 to 19/petitioners has argued that the reasons indicated in the order dated 18.02.2000, which was under challenge before the learned Single Judge, are not tenable and hence the judgment and order under appeal does not suffer from any error of either of law or of fact hence the same deserves to be affirmed in this special appeal.

10. Learned Senior Advocate representing the the respondent nos.1 to 19/petitioners has further submitted that the grounds being pressed into service by the learned State Counsel in this appeal do not find mentioned in the Government Order dated 18.02.2000 and as such it is not open to the State Counsel to argue something which is missing in the order which was under challenge before the learned Single Judge. It has also been submitted by the leaned Senior Advocate representing the respondent nos.1 to 19/petitioners that in pursuance of the Government Order dated 22.07.1999 all the petitioners were made available the benefit arising out of the said Government Order and they were also adjusted/appointed as Lecturers/Assistant Professors and hence there was no occasion for the State to have modified the said order by issuing the subsequent Government Order dated 18.02.2000. His further submission is that the petitioners

were declared as Teachers/Lecturers by the Board of Management of the University in its meeting held on 13.03.1992 and since under Chapter XII of the First Statutes read with section 28(d) of the Act, it is the Board of Management which is empowered to classify the teaching staff of the University and to give appropriate designation, the State Government had rightly made available the U.G.C. pay scales with effect from the date of such classification i.e. with effect from 13.03.1992. Learned Senior Advocate also submits that it is settled principle of law that validity of any Government Order is to be tested on the reasons and grounds indicated therein and since the grounds being urged in this Special Appeal by the appellants-State authorities do not find mentioned in the Government Order dated 18.02.2000 as such the submissions of the learned State Counsel are not tenable. Further submission of the learned Senior Advocate appearing on behalf of the respondent nos.1 to 19/petitioners is that by the Government Order dated 18.02.2000 it is not only that the U.G.C. pay scale has been made available to the respondents-petitioners with effect from 22.07.1999 in place of 13.03.1992 but also that the nomenclature of their post has been change to Senior Research Assistant which post stood abolished long ago and as a matter of fact the said post did not exist in the University on 18.02.2000. His submission thus is that judgment and order under appeal does not suffer from any error so as to call for any interference by this Court in the instant Special Appeal which deserves to be dismissed.

11. Shri Satyanshu Ojha, leaned counsel representing the University has supported the submissions made by the learned State Counsel appearing for the appellants-State authorities.

12. We have given our thoughtful consideration to the rival submissions made by the learned counsel appearing for the respective parties.

13. To appreciate the issues involved in this case, we need to note certain background facts in brief.

14. The petitioners were appointed on the post of Senior Research Associates between the year 1986-88 in the University. The Board of Management of the University vide its resolution dated 15.10.1990 decided that all the employees of the University shall be granted U.G.C. pay scales. Accordingly, the said decision of the Board of Management was also intimated to the State Government. The Board of Management on 26.03.1991 resolved to grant U.G.C. pay scale of Rs.2200-4000/- to the Research Associates with immediate effect. The State Government, in the light of the resolution of the Board of Management of the University dated 26.03.1991 sought clarification vide its order dated 29.04.1991 if the petitioners are performing functions, duties and work of teachers. The said query was replied by the Vice Chancellor in affirmation vide his letter dated 08.05.1991. Accordingly, by means of the Government Order dated 18.06.1991 the State Government directed the University that if the Senior Research Associates fulfill the eligibility of teachers they be declared as such. The Vice Chancellor, replied vide his letter dated 15.10.1991 that as per the section 2(k) of the Act, Senior Research Associates fulfill the conditions of being a teacher.

15. From a perusal of the Government Order dated 22.07.1999 it is apparent that by means of the Government Order dated 29.11.1991 the State Government directed the University that in case the Senior Research Associates fulfill the eligibility of Teachers, the University should take steps to declare them as Teachers as per the provisions contained in Chapter XII of the First Statutes. Pursuant to the said Government Order dated 29.11.1991 the Board of Management of the University in its 85th meeting held on 13.03.1992 on the recommendation of the Academic Council of the University passed a resolution declaring the respondents/petitioners as teachers and referred the matter to the State Government for grant of U.G.C. pay scale of Rs.2200-4000/-. However, the State Government vide its order dated 14.10.1993 instead of granting pay scale of Rs.2200-4000/- to the petitioners granted them the revised pay scale of Rs.1740-3000/-. The said Government Order also provided that nomenclature of Research Assistants be changed to Project Assistants as the cadre of Research Assistant was declared "a dying cadre" on 06.06.1981. The Board of Directors in its 92nd meeting held on 05.09.1994 decided that the nomenclature of the post of the petitioners be altered from Research Associates to Project Assistants and they be made available the pay scale of Rs.1740-3000/-.

16. The petitioners thereafter filed Writ Petition No.1082 (S/B) of 1995. In the said writ petition this Court, noticing that no counter affidavit was filed by the respondents therein despite several directions having been issued for the said purpose by the Court, passed an order on 07.05.1999 to the effect that the respondents therein shall either pay the pay scale of teachers/Assistant Professors to the petitioners or they shall show cause as to why the same cannot be given to the them.

17. Pursuant to and in compliance of the said order dated 07.05.1999 the matter was considered by the State Government which issued the Government Order dated 22.07.1999 and directed that the petitioners be made available pay scale of Rs.2200-4000/- with effect from the date they have been declared/classified as teachers i.e. with effect from 13.03.1992, provided they fulfilled the requisite qualification as prescribed by the U.G.C. It was further directed that these petitioners (Senior Research Assistants) be adjusted against the post of teachers in the pay scale of Rs.2200-4000/-. We may note that at the relevant point of time the prescribed pay scale admissible to the lowest cadre of teachers in the University that is the Lecturers/Assistant Professors was Rs.2200-4000/-. Thus, by the said Government Order dated 22.07.1999 the petitioners were not only made available the pay scale of Rs.2200-4000 but also were ordered to be adjusted against the post of Lecturers/Assistant Teachers.

18. It is also noticeable that the State Government while issuing the Government Order dated 22.07.1999 had taken into consideration certain aspects including its own Government Order dated 29.11.1991 whereby the University was directed to take steps for declaring petitioners as teachers in terms of the provisions contained in Chapter XII of the First Statutes if the petitioners fulfilled the requisite eligibility for teachers. The State while issuing the Government Order dated 22.07.1999 also noted in the said order that pursuant to the Government Order dated 29.07.1999 the Board of Management of the University on the recommendation of

Academic Council had taken the decision in its meeting held on 13.03.1992 whereby these petitioner/Senior Research Associates were classified/declared as teachers. By the said Government order dated 22.07.1999 it was also provided that the cadre of Research Associate shall be dying cadre and no appointment against the post of Senior Research Associate shall be made in future in any circumstance. Thus it appears to be based on consideration of the fact that the petitioners were already declared/classified as teachers by the Board of Management of the University in its meeting held on 13.03.1992. The Government Order dated 22.07.1999 also noticed that such classification, under the scheme of the First Statutes, is well within the authority or power of the Board of Management of the University. This Government Order dated 22.07.1999 also notices that such classification/declaration of the petitioners being teachers has been made by the Board of Management in its meeting held on 13.03.1992 on the recommendation of the Academic Council which, as per the provisions contained in Chapter XII of the First Statutes, is the legal requirement.

19. Learned Single Judge in his judgment and order dated 19.02.2021 has extracted the provisions of Chapter XII of the First Statutes which we also intend to reproduce which is as under:

"CHAPTER-XII

CLASSIFICATION OF THE TEACHERS OF THE UNIVERSITY

"Section 28(d):

1. The Board of Management shall, from time to time, determine after considering the recommendation of the Academic Council in this behalf, the classification of the teaching staff of the University and appropriate designations, i.e. Professors, Associate Professors/ Readers, Assistant Professor / Lecturers and the like. The Board shall also have power to later or modify such classification in any particular case.

2. The teachers of the University shall be employed on a whole-time basis on the scales of pay approved for the University provided that the proportion of time of the teachers to be devoted to teaching, research and extension or administrative duties should be specified in their contract of employment."

20. A perusal of the aforequoted provision of Chapter XII of the First Statutes of the University clearly shows that it is the Board of Management of University which is empowered to determine the classification of teaching staff of the University and to accord appropriate designations, that is, Professors, Associate Professors, Readers, Assistant Professors, Lecturers and the like. This, of course, can be done by the Board of the Management of the University on the recommendation of the Academic Council.

21. The State Government while issuing Government Order dated 22.07.1999 thus appears to have taken into account the provisions contained in Chapter XII of the First Statute and has based its decision on the classification/declaration of the petitioners as teachers made by the Board of the Management in its meeting held on 13.03.1992 and as such made available the pay U.P.G. pay scale of Rs.2200-4000/- to the petitioners which at the relevant point of time was the pay scale

admissible to the post at the lowest pedestal amongst the teachers i.e. Lecturers/Assistant Professors.

22. It is also to be noted that the matter relating to implementation of the Government Order dated 22.07.1999 was considered by the Board of Management in its 104th meeting held on 31.07.1999 whereby it was decided to implement the same and on approval of the Vice-Chancellor all the petitioners (Senior Research Associates) were found fulfilling the conditions contained in the Government Order dated 22.07.1999 and accordingly they were made available the benefit of U.G.C. pay scale of Rs.2200-4000/- with effect from 13.03.1992. By means of an order passed on 12.01.2000 all the petitioners were adjusted against the post of Assistant Professors. Thus, the Government Order dated 22.07.1999 was implemented by the decision taken by the Board of Management in its 104th meeting held on 22.07.1999 and by issuing consequential orders by the University authorities on 11.08.1999 and 12.01.2000 whereby these petitioners were made available the benefit of U.G.C. pay scale of Rs.2200-4000 and were also absorbed/adjusted against the post of Assistant Professors.

23. It is only after the Government Order dated 22.07.1999 was given effect to and the petitioners were provided the benefits which had accrued to them on the basis of the Government Order dated 22.07.1999 that the State Government issued the order on 18.02.2000 which was challenged before the learned Single Judge.

24. When we examine the Government Order dated 18.02.2000 which was under challenge before the learned Single Judge, what we find is that by the said order the earlier Government Order dated 22.07.1999 was modified and U.G.C. pay scale made available to the petitioners was made available with effect from 22.07.1999 and not with effect from 13.03.1992. By the said order the nomenclature of the post of the petitioners was changed from Lecturers/Assistant Professors to Senior Research Assistants.

25. The Government Order dated 18.02.2000 recites the reasons for issuing the same and the reason recited is that since the pay scale of the incumbents holding the post of Research Assistant has been revised with effect from the date of issuance of the Government Order in respect of them as such to maintain parity in the policy of the State Government while making available upgraded/higher pay scale from the date of issuance of Government Order to be issued for the said purpose, the Government Order dated 22.07.1999 issued in respect of the petitioners required partial modification/amendment in the Government Order dated 22.07.1999.

26. We may also note that as per Government Order dated 22.07.1999 it was not that pay scale of the petitioners was being upgraded or they were being provided higher pay scale; rather they were treated to have been classified as teachers and accordingly they were made available the pay scale admissible to the teachers at the lowest pedestal i.e. Assistant Professors/Lecturers. It is not a case of upgradation of pay scale; rather it is a case where the petitioners, having been classified by the Board of Management of the University in terms of the provisions contained in Chapter XII of the First Statute as teachers were made available the pay scale of Rs.2200-4000. By means of the Government Order dated 22.07.1999 it

is not only that the petitioners were made available the pay scale of Rs.2200-4000 but they were also adjusted/absorbed as Assistant Professors/Lecturers and further that it is in this background that the cadre of Research Associates was declared to be dying cadre. In other words it is not a case where the incumbents holding their posts were given the benefit of upgraded or higher pay scale while they remained posted on the same post, it is rather a case where the petitioners while working as Research Associates were classified/declared as teacher and thus U.G.C. pay scale admissible to a teacher in the lowest pedestal i.e. Lecturer/Assistant Professor was made available to the petitioners as well. However, reason indicated in the Government Order dated 18.02.2000 is based on the understanding that it was a case of upgradation of pay scale rather than assignment of pay scale as if peetitioners were not classified or declared as teacher.

27. So far as the submission made by the learned State Counsel representing the appellants-State authorities to the effect that the resolution of the Board of Management of the University passed in its 85th meeting held on 13.03.1992 was not affirmed in subsequent/next meeting and hence the U.G.C. pay scale could not be extended from the date of 85th meeting held on 13.03.1992 is concerned, we may note that there was nothing brought on record of the writ petition by the State to demonstrate that the said decision dated 13.03.1992 taken by the Board of Management was subsequently annulled, cancelled or rescinded. Counter affidavit filed by the State authorities is on record which we have perused. In the said counter affidavit what was stated was that the State Government had issued Government Order dated 14.10.1993 acting in accordance with the recommendations of the Indian Council of Agricultural Research (ICAR) according to which the Project Assistants were to be appointed on contract basis in the pay scale of Rs.1740-3000/-. The counter affidavit filed by the State also indicated that the University had sent incorrect information to the State Government that the petitioners were declared as Teachers by the Management and that the said fact was wrong and further that the State Government acted on the basis of information provided by the University and allowed the U.G.C. pay scale of Rs.2200-4000/- to the petitioners.

28. This counter affidavit further stated that the State Government had learnt that the petitioners were not teachers/Lecturers of the University as defined by the U.G.C. and since they were not teachers they were not entitled for the pay scale of Rs.2200-4000/-. The stand thus taken by the State Government while opposing the writ petition was that this wrong was undone by the State Government by issuing the Government Order dated 18.02.2000. The relevant paragraph of the counter affidavit filed by the State before the learned Single Judge in the writ petition is para 6 which is reproduced herein below:

"6. That the contents of paras 9 & 10 of the writ petition are misconceived and the same are denied. On behalf of the Govt. the deponent wants to clarify that the cadre of Research Assistant etc. has been declared to be dying cadre vide G.O. dated 6.6.1981.

The University Grant Commission hereinafter referred to as

"UGC" pay scales are admissible to the 'Teachers' only. The petitioners were not teachers as such they could not have been allowed the UGC pay scales. The University had sent incorrect information to the State Government that the petitioners were declared as Teachers by the Board of Management. In fact it was perse wrong. The State Govt. had acted on the basis of incorrect information provided by the University and it has allowed the UGC pay scale of Rs.2200-4000 to 19 petitioners. Since this Hon'ble Court had passed an interim order in WP No.108 (S/B/95 on 07.05.99, the Govt. had allowed the above said pay scales on the basis of an incorrect and wrong information submitted by the University. Subsequently, the State Govt. learnt that the petitioners were not teachers, lecturers of the University as defined by the UGC. Since they were not teachers they were not entitled for UGC pay scales of Rs.2200-4000. This wrong was undone by the State Govt. It has acted bonafidely and honestly while implementing the the incorrect legal procedure. Accordingly to G.O. dated 18.02.2000 it was issued modifying the earlier order dated 22.07.99 by which UGC pay scale was illegally allowed to the 19 petitioners. The higher pay scales ought not to have been allowed to the petitioners under law as the State Govt. cannot act against the statutory directions, pay scales provided by the UGC for the teachers of University.

In view of the above it is clear that the State Government had to issue a modified order on 18.02.2000, undoing the wrong, mistake committed by it. By providing UGC scales to the petitioners without any legal basis the University did not provide correct information to the State Govt. The Govt. under law is bound to act in accordance with law. An administrative mistake can always be corrected subsequently. It is settled law that an administrative order can always be reviewed, modified or recalled if it is against the provisions of law, relevant service rules. The State Government has statutorily duty to act in accordance with University Rules and bye-laws made hereunder. Under these provisions the UGC pay scale is being available to teachers only. However, it is relevant to mention that ICAR, New Delhi has now recommended 5500-9000 for Research Assistant working in the pay scale of Rs.1740-3000."

29. In the entire counter affidavit, the ground being urged before us that the decision of the Board of Management taken in its 85th meeting held on 13.03.1992 classifying/declaring the petitioners as teacher was not affirmed in the subsequent meeting, is missing. Even otherwise as observed above, nothing was brought on record of the writ petition by the State which could indicate that the said decision of the Board of Management taken in its 85th meeting held on 13.03.1992 was altered or varied or cancelled or annulled in any subsequent meeting.

30. Having observed as above, we may now notice the case set up by the University before the learned Single Judge in the writ petition. University had filed a short counter affidavit in the writ petition and had admitted in para 5 thereof that the Board of Management in its meeting held on 13.03.1992 vide Resolution No.85:16 resolved to declare those Senior Research Associates who were appointed prior to 13.12.1988 and possessed the qualification of atleast second class in M.Sc. in

Agriculture or its equivalent Science subject, as Teacher/Lecturer. It was further averred in the short counter affidavit filed by the University in the writ petition that the said Resolution No.85:16, dated 13.03.1992 was not approved by the Board of Management in its subsequent 86th meeting. The minutes of 86th meeting held on 30.01.1993 of the Board of Management were also enclosed with the said short counter affidavit filed by the University. In respect of the first agenda item relating to ratification of the minutes of 85th meeting, which was considered in the 86th meeting of the Board of Management and it was observed that in the resolution placed at agenda item no.85:16 and 85:17 in place of the words "and the like" the word "allied" has been inscribed on account of typographical error which may be read as "and the like". It was further decided to ratify the decisions taken in the 85th meeting except the decision taken at agenda item nos.85:16 and 85:17. In respect of agenda item no.85:16 and 85:17 it was decided by the Board of Management in its 86th meeting that the matter be referred for legal opinion and thereafter these matters may be placed again before the Board of Management.

31. It was further stated by the University in its reply filed to the writ petition that the State Government in the meantime vide Government Order dated 14.10.1993 had made available the revised pay scale of Rs.1740-3000/- to the petitioners and also designated them as Project Assistants and in pursuance of the Government Order dated 14.10.1993 the Vice Chancellor issued an order on 27.10.1993 whereby all the petitioners were intimated that they have been appointed as Project Assistants in the revised pay scale of Rs.1740-3000/-

32. Resolution of the Board of Management passed in its 85th meeting held on 13.03.1992 at agenda item no.85:16 is quoted as under:

" नरेन्द्र देव कृषि एवं प्रोद्योगिक विश्व विद्यालय फैजाबाद के प्रबन्ध परिषद की 85वीं बैठक दिनांक 13–03–1992 के मद संख्या 85रू16 में लिये गये निर्णय का उद्धरण।

85रू16 नरेन्द्र देव कृषि एवं प्रोद्योगिक विश्व विद्यालय विश्वविद्यालय में कार्यरत सीनियर रिसर्च को षशिक्षकष की श्रेणी में वर्गीकृत किये जाने पर विचार एवं निर्णय:-

उक्त प्रस्ताव पर सम्यक विचारोपरान्त निर्णय लिया गया कि विद्वत् परिषद की सुस्तुति पर दिनांक 31–12–1988 तक नियुक्त हुये सीनियर रिसर्च एसोसिएट जो कृषि अथवा सजातीय विज्ञान में एम0एस0सी को ;कम से कम द्वितीय श्रेणीद्ध की योग्यता रखते हो उन्हें शिक्षक/लेक्चरर एण्ड एलाइड घोषित किया गया। यह निर्णय भी लिया गया कि प्रबन्ध परिषद के उपरोक्त निर्णय से राज्य सरकार को अवगत कराते हुये उन्हें प्र0जी0सी0 वेतन मान दिये जाने हेतु अनुमोदन तथा शासनादेश निर्गत किये जाने का अनुरोध किया जाय।

प्रबन्ध परिषद ने यह निर्णय लिया कि दिनांक 31–12–1988 के उपरान्त उक्त पद नाम से विश्व विणलय में कोई नियुक्ति न की जाय और न ही भविष्य मे इसे उदाहरण स्वरूप प्रस्तुत किया जायेगा।"

33. The resolution of the Board of Management passed in its 86th meeting held on 30.01.1993 in respect of agenda item no.85:16 and 85:17 of the 85th meeting is extracted herein below:

85रू1 गत 85वीं बैठक की कर्यावाही की पुष्टि।

85वीं बैठक की कार्यवाही की पुष्टि के समय सचिव ने बतायाकि कार्यवाही की मद संख्या 85रू16 एवम 85रू17 में ष्एण्ड दिलाइकष् के स्थान पर टंकण की त्रुटिवश अलाइड छप गया हैजिसे एण्ड दि लाइक पढा जाये। सदस्यों ने विचार व्यक्त कियाकि प्रबन्ध परिषद ने इन मदों के अन्तगर्त जो निर्णय लिया थाउसके अनुसार उन्हें शिक्षक शोभित किया गया था। अतःः85रू16 एवं 85रू17 की मदों को छोडकर शेष कार्यवाही कीपुष्टि की गयी। कार्यवाही की मद संख्या 85रू16 एवम 85रू17 के विषय में यह निर्णय लिया गया कि इन प्रकरणों पर विधिकराय ले जी जाये और इसके उपरान्त प्रबन्ध परिषद के समक्ष पुनः प्रस्तुत किया जाय।"

34. Though nothing further was pleaded either by the University before the learned Single Judge in the writ petition, however, for better clarity of the facts we had required thelearned counsel representing the University to place before us the resolution of the Board of Management passed in its meetings held subsequent to 86th meeting. The said resolutions of the Board of Management have been taken on record.

35. In the minutes of 87th meeting of the Board of Management held on 27.03.1993 it has been recorded that after due deliberation it is decided that since the issue has far reaching consequences as such the State Government be requested to get the matter decided latest by 30.09.1993. In the 88th meeting held on 26.06.1993 though the issued was deliberated, however, no decision was taken by the Board of Management.

36. In the 89th meeting of the Board of Management held on 21.09.1993, the matter was again considered and it was decided that the decision taken earlier shall stand deferred. The relevant extract of the decision so taken by the Board of Management in its 89th meeting is extracted hereunder:

"89:15 अध्यक्ष महोदय की अनुमति से अन्य विषय।

(क) वरिष्ठ शोध सहायकों एवम शोध सहायकों को प्रध्यापक घोषित किये जाने के सम्बन्ध में विस्तृत विचार विमर्श हुआ तथा निणर्य लिया गया कि पूर्व में लिये गये निणर्य अभी स्थगित माने जायें। कृषि सविच, उ0 प्र0 शासन ने बताया कि इन प्रकरणों पर शासन के स्तर पर तीनों कृषि विश्वविद्यालयों की समस्याओं को लेकर गम्भीरतापूर्वक विचार चल रहा है तथा आशा व्यक्त की कि प्रकरणों पर अगली बैठक के पूर्व कोई समुचित निणर्य ले लिया जायेगा।"

37. Thus, from the above facts, what is manifest is that though in the 85th meeting of the Board of Management held on 13.03.1992 a decision was taken that the petitioners be declared/classified as teachers and they also be made available the benefit of U.G.C. pay scale of Rs.2200-4000, however, the said decision was never ratified; rather in the 86th meeting while considering the agenda relating to ratification of the decisions taken in the 85th meeting, it was decided to ratify all other decisions except the decision taken in respect of agenda item no.85:16 and 85:17 and it was further decided that legal opinion on the issue be obtained. In the 87th and 88th meetings the matter was again deliberated but no decision was taken, however, in the 89th meeting of the Board of Management held on 21.09.1993 it was clearly decided that the earlier decision taken in respect of declaration/classification of the Senior Research Assistants and Research Assistants as teachers shall stand deferred. In these background facts, what we find is that the decision declaring/classifying the petitioners as teachers was never finalized by the Board of Management.

38. Learned Single Judge while considering the aforesaid argument has observed that the fact that the decision of the Board of Management dated 13.03.1993 was not approved in the subsequent meeting of the Board of Management cannot be a ground for denial of benefits to the petitioners. Such finding, in our considered opinion, is not sustainable in the eye of law for the reason that the decision taken in 85th meeting of the Board of Management was never ratified in any of the subsequent meetings including the 86th meeting. Had the ratification of the decisions taken in 85th meeting was not considered in the subsequent meeting, it could not be said that the decision taken in the 85th meeting

did not become final. However, in the instant case the decision taken in 85th meeting by the Board of Management classifying/declaring the petitioners as teachers was taken up and deliberated for ratification by the Board of Management in its 86th meeting where a conscious decision was taken to ratify all other decisions taken in the 85th meeting except the decision taken in respect of agenda item no.85:16 and 85:17. Thus, it is not a case where the decision taken in an earlier meeting was not considered for ratification in the subsequent meeting. It was rather considered and decided not to ratify the same.

39. The minutes of 85th meeting of the Board of Management held on 13.03.1992 and the 86th meeting held on 30.01.1993 were on record of the writ petition as enclosures with the counter affidavit filed by the University. The decision thus, taken by the Board of Management in its 86th meeting appears to have been lost sight of by the learned Single Judge while passing the judgment and order dated 19.02.2021 which is being assailed before us in the instant Appeal.

40. It is true that minutes of the 89th meeting of the Board of Management where a decision to defer the earlier decision taken in 85th meeting declaring Senior Research Assistants and Research Assistants as teachers was taken, were not on record of the writ petition, however, the minutes of 86th meeting held on 30.01.1993 were on record where the decision taken in the 85th meeting was clearly and explicitly not ratified/approved/affirmed.

41. The decision taken in the 86th meeting of the Board of Management held on 30.01.1993 has thus, clearly escaped the attention of the learned Single Judge. In view of the decision taken in the 86th meeting and subsequently in the 89th meeting of the Board of Management, it is not possible to infer or arrive at a conclusion that the petitioners were ever declared/classified as teachers as per the provisions contained in Chapter XII of the First Statutes.

42. In absence of declaration/classification of the petitioners as teachers, their claim for grant of U.G.C. pay scale of Rs.2200-4000/- admissible to the post of Assistant Professors/Lecturers with effect from 13.03.1992, in our considered opinion, was not tenable. It is in this background it appears that the State Government while issuing Government Order dated 18.02.2000 has modified the earlier order dated 22.07.1999 not only making available the benefit of the pay scale of Rs.2200-4000/- with effect from the date of issuance of the Government Order dated 22.07.1999 and not with effect from 13.03.1992 but also clearly directing that the nomenclature of the post of the petitioners be changed to Senior Research Assistants. The Government Order dated 18.02.2000 thus, appears to have been issued based on the fact that the petitioners were not recognized/treated/classified/declared as teachers (Assistant Professors or Lecturers). The said decision of the State Government appears to be in conformity with the decision of the Board of the Management taken in its 86th meeting.

43. If the decision of the Board of Management taken in its 85th and 86th meeting are read together i.e. in conjunction with each other, what we find is that their classification/declaration as

teachers cannot be said to be conclusive or final for the reason that the decision of 85th meeting was not ratified in the 86th meeting or any subsequent meeting. It has even been deferred as per the decision taken by the Board of Management in its 89th meeting held on 21.09.1993.

44. A reading of the judgment dated 19.02.2021 passed by the learned Single Judge which is under appeal herein reveals that after noticing the submissions made on behalf of the respective parties the provisions of Chapter XII of the First Statutes have been extracted and it has been opined by the learned Single Judge that the order impugned therein, dated 18.02.2000 does not record reasons as to why the petitioners shall be paid salary with effect from the date of issuance of the Government Order. It has also been recorded by the learned Single Judge that once by following the procedure prescribed by the Statutes the designation of Teacher/Assistant Professor was granted to the petitioners, however, without assigning cogent reason such benefit could not be withdrawn by issuing subsequent Government Order.

45. The fallacy, which we notice, in the said findings recorded by the learned Single Judge is that the decision to declare the petitioners or classify them as teachers by the Board of Management was never ratified; rather in the 86th meeting the Board of Management clearly and consciously did not ratify the said decision by recording that all decisions taken in 85th meeting were ratified except the decisions taken at the agenda item nos.85:16 and 85:17. This aspect of the matter thus appears to have been missed by the learned Single Judge and hence no consideration in this regard appears to be available in the judgment and order under appeal.

46. We may also notice that the Board of Management in its 92nd meeting held on 05.09.1994 decided to make available the pay scale of Rs.1740-3000/- to the incumbents holding the post of Senior Research Associate/Research Assistant and other equivalent posts. The State Government by means of the order dated 14.10.1993 also directed that the incumbent holding the post of Senior Research Associate/Research Assistant/Extension Assistant who were appointed in the pay scale of Rs.570-900 after 06.06.1981 shall be made available the revised pay scale of Rs.1740-3000/- Though this decision appears to have been challenged by the petitioner by filing the Writ Petition No.108 (S/B) of 1995, however, without adjudication of the issue the said writ petition was dismissed as not pressed vide order dated 03.03.2000.

47. It is worth noticing that by issuing Government Order dated 18.02.2000 the petitioners have been provided the promotional pay scale of Rs.2200-4000 with effect from 22.07.1999. The said Government Order dated 18.02.2000 thus does not make available the benefit of pay scale of Rs.2200-4000/- to the petitioners in their capacity of teachers (Assistant Professors/Lecturers), rather it provides promotional pay scale i.e. higher scale of pay than what the petitioners while working as Senior Research Associates were getting. Accordingly, the nomenclature of the post was also directed to be changed from Senior Research Associate to the Senior Research Assistant. These aspects of the matter thus appear to have been missed out by the learned Single

Judge while adjudicating the validity of the Government Order dated 18.02.2000.

48. The most relevant aspect of the matter which ought to have been taken into consideration by the learned Single Judge is as to whether the petitioners stood classified/declared as teachers. However, without taking into account the decision taken by the Board of Management in its 86th meeting learned Single Judge has relied upon the decision taken in 85th meeting and has thus given a finding that once the petitioners were declared teachers in the meeting of the Board of Management held on 03.03.1992, they were entitled to be given the pay scale of Rs.2200-4000/- as is admissible to a teacher (Lecturer/Assistant Professor) from the said date and hence the earlier Government Order dated 22.07.1999 was rightly issued.

49. The fallacy in the said reasoning lies in ignoring the decision of the Board of Management taken in its 86th meeting held on 30.01.1993 whereby the decision taken in the 85th meeting was consciously not ratified.

50. For the reasons given and discussion made above, in our final analysis we do not find ourselves in agreement with the judgment and order dated 19.02.2021 passed by the leaned Single Judge which is under appeal before us.

51. The special appeal is, thus, **allowed.**

52. The judgment and order dated 19.02.2021 passed by the learned Single Judge in Writ Petition No.327 (S/B) of 2000 is hereby set aside.

53. However, having regard to the overall facts and circumstances of the case we direct that no recovery or adjustment of any amount from the respondent nos.1 to 19/petitioners shall be made if they have been paid their salaries/emoluments in terms of the earlier Government Order dated 22.07.1999. Having directed as above for not making any recovery or adjustment of any amount from the petitioners, we also direct that the petitioners shall be treated to have been working on the post of Senior Research Assistants and not on the post of Teacher (Lecturer/Assistant Professor) but they shall be continued to be paid salary in the pay scale of Rs.2200-4000/- with the benefit of revision of pay scales which might have been effected from time to time till date or which may be effected in future.

54. There will be no order as to costs.

(2022)03ILR A526
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.03.2022

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE JASPREET SINGH, J.

Special Appeal No. 167 of 2021
arising out of Writ -C No. 5314 of 2021

Muhammad Saghir Khan ...Appellant
Versus
U.P. Sunni Central Board of Waqf, Lko. & Ors. ...Respondents

Counsel for the Appellant:
Sri Arshan Ahsan Siddiqui

Counsel for the Respondents:
Sri S.Q.H. Rizvi, Sri Gopesh Tripathi

A. Allahabad High Court Rules, 1952 – Ch. VIII R. 5 – Waqf Act, 1995 – Special

Appeal against the Judgment passed in writ proceeding emerges from the order of Waqf Tribunal – Maintainability – Held, in view of the embargo placed by Ch. VIII R. 5 of the Allahabad High Court Rules, 1952, the special appeal would not be maintainable against such an order passed by a Single Judge of the Court exercising powers under Article 226 or 227 of the Constitution of India. (Para 17)

B. Constitution of India – Article 226 – Waqf Act, 1995 – Writ – Maintainability – Alternative remedy available under the Waqf Act – Single Judge dismissed writ petition on the ground of alternative remedy – Validity challenged – Held, the order of Civil judge if treated to be an order of a Civil Court would not be amenable to a writ of certiorai under Article 226 – Held further, if the order is treated to be an order passed by the Tribunal under the Waqf Act then also the said order can be assailed by taking recourse to the statutory remedy available under the Waqf Act and the writ petition may not be the appropriate remedy – Virudhunagar's case relied upon. (Para 15 and 16)

Special Appeal dismissed. (E-1)

List of Cases cited :-

1. Whirlpool Corp.Vs Registrar of Trade Marks, Mumbai & ors.; (1998) 8 SCC 1

2. Syed Yakub Vs K.S. Radhakrishanan & ors.; AIR 1964 SC 477

3. Sheet Gupta Vs St. of U.P. & ors.; 2009 SCC Online All 1613

4. Radhey Shyam & anr. Vs Chhabi Nath & ors.; (2015) 5 SCC 423

5. Virudhunagar Hindu Nadargal Dharma Paribalana Sabai & ors. Vs Tuticorin Educational Society & ors.; (2019) 9 SCC 538

6. Authorized Officer, State Bank of Travancore & anr. Vs Mathew K.C.; (2018) 3 SCC 85

7. CIT Vs Chhabil Dass Agarwal; (2014) 1 SCC 603

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

1. Heard Sri Arshad Ahsan Siddiqui, learned counsel for the appellant and Sri S.Q.H. Rizvi, learned Counsel for the respondents.

2. The instant appeal has been preferred against the judgment and order dated 23.02.2021 passed by the learned Single Judge in Writ Petition No. 5314 (MS) of 2021 (Mohd. Saghir Khan Vs. U.P. Sunni Central Board, Waqf and Others) whereby the writ petition was dismissed on the ground of availability of alternate statutory remedy.

3. The learned counsel for the appellant submits that the learned Single Judge has erred in dismissing the writ petition on the ground of availability of alternate remedy despite a specific ground having been raised that the order impugned in the writ petition was wholly without jurisdiction and such an order could be assailed in a writ petition in view of the decision of the Apex Court in the case of **Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others** reported in **(1998) 8 SCC 1.**

4. It has further been urged that the learned Single Judge has failed to notice that the order impugned in the writ petition was wholly without jurisdiction as it had been passed by the Civil Court by usurping the jurisdiction of a Waqf Tribunal and such an order was not liable to be sustained and was amenable to the writ of certiorari as held by the Apex Court in the case of **Syed Yakub Vs. K.S. Radhakrishanan and Others reported in AIR 1964 SC 477.**

5. Thus, it is urged that the learned Single Judge in the aforesaid backdrop

ought not to have relegated the appellant to the remedy of filing a revision under the provisions of the Waqf Act as the the order impugned was passed by the Civil Court which did not have jurisdiction to pass the said order, hence, the Special Appeal deserves to be allowed.

6. Per contra, the learned counsel for the respondents has urged that the instant Special Appeal is not maintainable in view of the fact that the order impugned emerges from proceedings of a Civil Court/Tribunal under the provisions of Waqf Act, hence, in light of a full Bench decision of this Court in the case of **Sheet Gupta Vs. State of U.P. and Others** reported in **2009 SCC Online All 1613** the appeal deserves to be dismissed.

7. Having heard the learned counsel for the parties and from the perusal of the material available on record, it appears that one Sri Shekh Mohd. Yakub challenged an order dated 18.07.1985 whereby the Waqf Board had appointed Sri Anwar Rashid Khan as Mutawalli of Waqf No. 4. Madarasa Rahmania, Raebareli. This challenge was made before the Civil Judge/the Waqf Tribunal, Raebareli and registered as Case No. 74 of 1985 (Shekh Mohd. Yakub Vs. U.P. Central Sunni Board, Waqf and Others).

8. The said case came to be decided ex-parte by means of judgment dated 22.08.1986 by the Civil Judge/Waqf Tribunal and the order dated 18.07.1985 by which Sri Anwar Rashid Khan was appointed as Mutawalli was set aside and it was further held that the property in question was not a waqf property but was a self-acquired property of Sheikh Mohd. Yakub.

9. The Waqf Board thereafter preferred Revision No. 179 of 1986 before the High Court, which was allowed by means of judgment dated 12.11.2007 and the matter was remanded to the Court concerned to decide the case afresh. The record further indicates that after remand, the matter was again considered by the Tribunal and by means of order dated 20.05.2014 it once again decreed the suit and the order dated 18.07.1985 was set aside.

10. Being aggrieved against the aforesaid order dated 20.05.2014, the appellant preferred a writ petition before the learned Single Judge which has been dismissed on the ground of availability of statutory remedy of Revision as provided under the Waqf Act by means of order dated 23.03.2021, which is under challenge in the instant appeal.

11. In order to ascertain whether the Special Appeal under Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952 is maintainable, it will be gainful to glance at the said provision which reads as under:-

"5. Special Appeal.-- An appeal shall lie to the Court from a Judgment not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made by the Court subject to the superintendence of the Court and not being an order made in the exercise of revisional jurisdiction or in the exercise of its power of superintendence or in the exercise of criminal Jurisdiction or in the exercise of jurisdiction conferred by Article 226 or Article 227 of the Constitution in respect of any judgment, order or award -- (a) of a tribunal, Court or statutory arbitrator made or purported to be made in the exercise or purported of jurisdiction under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in

the State List or the Concurrent List in the Seventh Schedule to the Constitution, or (b) of the government or any Officer or authority, made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any such Act of one Judge."

12. If the facts of the instant case are noticed in context with the submissions made by the learned counsel for the appellant, it would clearly reveal that the proceedings were initiated under the Uttar Pradesh Waqf Act, 1960. At the relevant time, the Civil Judge was vested with the powers of the Waqf Tribunal and as noticed above the order passed by the Waqf Tribunal was assailed in a civil revision before this Court and while allowing the civil revision, the matter was remanded to the Tribunal to re-consider the matter, which was done by means of the order dated 20.05.2014.

13. By the time, the matter was remanded vide order dated 12.11.2007. The Uttar Pradesh Waqf Act, 1960 had been repealed and the Waqf Act of 1995 came into force.

14. Now either way, whether the order dated 20.05.2014 passed by the Civil Judge, Raebareli is treated to be an order passed by a Civil Court in its plenary jurisdiction or a Tribunal exercising powers under the Waqf Act, the fact remains that against such an order, the appellant if aggrieved has an alternate and statutory remedy available under the C.P.C. or the Waqf Act, 1995 as the case may be.

15. The order of Civil judge if treated to be an order of a Civil Court would not be amenable to a writ of certiorai under Article 226 of the Constitution of India as held by the Apex Court in **Radhey Shyam and Another Vs. Chhabi Nath and others** reported in **(2015) 5 SCC 423** and the relevant portion reads as under:-

"18. While the above judgments dealt with the question whether judicial order could violate a fundamental right, it was clearly laid down that challenge to judicial orders could lie by way of appeal or revision or under Article 227 and not by way of a writ under Articles 226 and 32.

19. Another Bench of three Judges in Sadhana Lodh v. National Insurance Co. Ltd. [(2003) 3 SCC 524 : 2003 SCC (Cri) 762] considered the question whether remedy of writ will be available when remedy of appeal was on limited grounds. This Court held: (SCC p. 527, para 6)

"6. The right of appeal is a statutory right and where the law provides remedy by filing an appeal on limited grounds, the grounds of challenge cannot be enlarged by filing a petition under Articles 226/227 of the Constitution on the premise that the insurer has limited grounds available for challenging the award given by the Tribunal. Section 149(2) of the Act limits the insurer to file an appeal on those enumerated grounds and the appeal being a product of the statute it is not open to an insurer to take any plea other than those provided under Section 149(2) of the Act (see National Insurance Co. Ltd. v. Nicolletta Rohtagi [(2002) 7 SCC 456 : 2002 SCC (Cri) 1788]). This being the legal position, the petition filed under Article 227 of the Constitution by the insurer was wholly misconceived. Where a statutory right to file an appeal has been provided for, it is not open to the High Court to entertain a petition under Article 227 of the Constitution. Even if where a remedy by way of an appeal has not been

provided for against the order and judgment of a District Judge, the remedy available to the aggrieved person is to file a revision before the High Court under Section 115 of the Code of Civil Procedure. Where remedy for filing a revision before the High Court under Section 115 CPC has been expressly barred by a State enactment, only in such case a petition under Article 227 of the Constitution would lie and not under Article 226 of the Constitution. As a matter of illustration, where a trial court in a civil suit refused to grant temporary injunction and an appeal against refusal to grant injunction has been rejected, and a State enactment has barred the remedy of filing revision under Section 115 CPC, in such a situation a writ petition under Article 227 would lie and not under Article 226 of the Constitution. Thus, where the State Legislature has barred a remedy of filing a revision petition before the High Court under Section 115 CPC, no petition under Article 226 of the Constitution would lie for the reason that a mere wrong decision without anything more is not enough to attract jurisdiction of the High Court under Article 226 of the Constitution.

21. Thus, it has been clearly laid down by this Court that an order of the civil court could be challenged under Article 227 and not under Article 226."

27. Thus, we are of the view that judicial orders of civil courts are not amenable to a writ of certiorari under Article 226. We are also in agreement with the view [Radhey Shyam v. Chhabi Nath, (2009) 5 SCC 616] of the referring Bench that a writ of mandamus does not lie against a private person not discharging any public duty. Scope of Article 227 is different from Article 226."

16. On the other hand, if the order is treated to be an order passed by the Tribunal under the Waqf Act then also the said order can be assailed by taking recourse to the statutory remedy available under the Waqf Act and the writ petition may not be the appropriate remedy. The Apex Court in the case of **Virudhunagar Hindu Nadargal Dharma Paribalana Sabai and others vs. Tuticorin Educational Society and others** reported in **(2019) 9 SCC 538** had the occasion to consider the issue of jurisdiction under Article 226 of the Constitution of India viz a viz the availability of adequate statutory remedy and it held as under:-

"11. Secondly, the High Court ought to have seen that when a remedy of appeal under Section 104(1)(i) read with Order 43, Rule 1(r) of the Code of Civil Procedure, 1908, was directly available, Respondents 1 and 2 ought to have taken recourse to the same. It is true that the availability of a remedy of appeal may not always be a bar for the exercise of supervisory jurisdiction of the High Court. In A. Venkatasubbiah Naidu v. S. Chellappan [A. Venkatasubbiah Naidu v. S. Chellappan, (2000) 7 SCC 695] , this Court held that "though no hurdle can be put against the exercise of the constitutional powers of the High Court, it is a well-recognised principle which gained judicial recognition that the High Court should direct the party to avail himself of such remedies before he resorts to a constitutional remedy.

12. But courts should always bear in mind a distinction between (i) cases where such alternative remedy is available before civil courts in terms of the provisions of Code of Civil Procedure, and (ii) cases where such alternative remedy is available under special enactments and/or statutory rules and the fora provided therein

happen to be quasi-judicial authorities and tribunals. In respect of cases falling under the first category, which may involve suits and other proceedings before civil courts, the availability of an appellate remedy in terms of the provisions of CPC, may have to be construed as a near total bar. Otherwise, there is a danger that someone may challenge in a revision under Article 227, even a decree passed in a suit, on the same grounds on which Respondents 1 and 2 invoked the jurisdiction of the High Court. This is why, a 3-member Bench of this Court, while overruling the decision in *Surya Dev Rai v. Ram Chander Rai [Surya Dev Rai v. Ram Chander Rai, (2003) 6 SCC 675] , pointed out in Radhey Shyam v. Chhabi Nath [Radhey Shyam v. Chhabi Nath,* (2015) 5 SCC 423 : (2015) 3 SCC (Civ) 67] that "orders of civil court stand on different footing from the orders of authorities or tribunals or courts other than judicial/civil courts".

17. Thus, the view taken by the learned Single Judge relegating the appellant to avail the alternate statutory remedy, cannot be said to be erroneous. However, the writ petition filed before the learned Single Judge either under Article 226 or 227 of the Constitution of India, which emerges from proceedings from the Civil Court/Tribunal under the Waqf Act and in view of th embargo placed by Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952, the special appeal would not be maintainable against such an order passed by a Single Judge of the Court exercising powers under Article 226 or 227 of the Constitution of India. A full Bench of this Court in Sheet Gupta's case (supra) has held as under:

"18. Having given our anxious consideration to the various plea raised by the learned counsel for the parties, we find that from the perusal of Chapter VIII Rule 5 of the Rules a special appeal shall lie before this Court from the judgment passed by one Judge of the Court. However, such special appeal will not lie in the following circumstances:

1. The judgment passed by one Judge in the exercise of appellate jurisdiction, in respect of a decree or order made by a Court subject to the Superintendence of the Court;

2. The order made by one Judge in the exercise of revisional jurisdiction;

3. The order made by one Judge in the exercise of the power of Superintendence of the High Court;

4. The order made by one Judge in the exercise of criminal jurisdiction;

5. The order made by one Judge in the exercise of jurisdiction conferred by Article 226 or Article 227 of the Constitution of India in respect of any judgment, order or award by

(i) the tribunal,

(ii) Court or

(iii) statutory arbitrator

made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution of India;

6. the order made by one Judge in the exercise of jurisdiction conferred by

Article 226 or 227 of the Constitution of India in respect of any judgment, order or award of

(i) the Government or

(ii) any officer or

(iii) authority,

made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any such Act, i.e. under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution of India.

20. The exercise of original jurisdiction by any tribunal, Court or statutory arbitrator or exercise of appellate or revisional jurisdiction by the Government or any officer or authority is to be under any U.P. Act or any Central Act with respect to the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution of India. The powers have to be exercised under the Act and not given by the Act. As held by the Apex Court in the case of Dr. Indramani Pyarlal Gupta (supra) the words "powers exercised under the Act' would comprehensively embrace in its power conferred by any bye laws or delegated legislation. If the appellate or revisional powers has been conferred by the Government trough an order issued under the delegated provisions of the Act then it is definitely a power exercised under the Act and in that event no special appeal under Chapter VIII Rule 5 of the Rules would lie against the judgment and order passed by the learned single Judge. In the present case, we find that the Commissioner had exercised powers conferred under Clause 28 of the Distribution Order, 2004, which order has been passed under the provisions of the Act, therefore, the appellate power has been exercised under the Act and, thus, no special appeal would lie. It may be mentioned here that right of an appeal is a statutory right and not a vested right and can be hedged by conditions as held by the Apex Court in the cases of Smt. Ganga Bai (supra) and Vijay Prakash & Jawahar (supra). The Division Bench of this Court while deciding the case of Ram Dhyan Singh (supra), has incorrectly taken the view that the order should be passed in exercise of appellate or revisional jurisdiction conferred by some Act whereas under Chapter VIII Rule 5 of the Rules, a special appeal would not lie if the appellate or revisional jurisdiction have been conferred on an authority under any U.P. Act or Central Act relating to any of the entries enumerated in the State List or Concurrent List of the Seventh Schedule of the Constitution of India."

18. In so far as the reliance placed by the learned counsel for the appellant on the decision in Whirlpool Corporation's case (supra) is concerned, the proposition of law as enumerated therein is not disputed, however, the fact remains that the appellant has a statutory remedy of filing a revision under the Waqf Act, 1995 and the Apex Court in the case of ***Authorized Officer, State Bank of Travancore and another vs. Mathew K.C.*** reported in ***(2018) 3 SCC 85*** has held as under:-

"5. The discretionary jurisdiction under Article 226 is not absolute but has to be exercised judiciously in the given facts of a case and in accordance with law. The

normal rule is that a writ petition under Article 226 of the Constitution ought not to be entertained if alternate statutory remedies are available, except in cases falling within the well-defined exceptions as observed in *CIT v. Chhabil Dass Agarwal [CIT v. Chhabil Dass Agarwal, (2014)* 1 SCC 603] , as follows: (SCC p. 611, para 15)

"15. Thus, while it can be said that this Court has recognised some exceptions to the rule of alternative remedy i.e. where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in *Thansingh Nathmal case [Thansingh Nathmal v. Supt. of Taxes, AIR 1964 SC 1419] , Titaghur Paper Mills case [Titaghur Paper Mills Co. Ltd. v. State of Orissa,* (1983) 2 SCC 433 : 1983 SCC (Tax) 131] and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."

19. Thus, in light of the proposition as noted above also considering the dictum of the Apex Court in the case of Vidhunagar (Supra), the appellant could not encompass its case within the exceptions as enumerated in the case of ***CIT Vs. Chhabil Dass Agarwal reported in (2014) 1 SCC 603***, hence, the case of Whirlpool (supra) will not come to the rescue of the appellant. Even the case of **Syed Yakub (supra)** has no applicability in light of the decision of **Radhey Shyam (supra)** as noted above. Moreover, the learned counsel for the appellant could not dispute the embargo placed by the the binding precedent of the Full Bench of **Sheet Gupta (supra),** which is squarely applicable to the present case.

20. In light of the detailed discussion, this Court is of the considered view that the Special Appeal is not maintainable and it is accordingly dismissed. No order as to costs.

(2022)03ILR A533
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.02.2022

BEFORE

THE HON'BLE RAJAN ROY, J.

WRIT A No. 364 of 2022
and other cases

Vivek Kumar Upadhyay ...Petitioner
Versus
State Of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rakesh Chandra Tewari

Counsel for the Respondents:
C.S.C., Rishabh Tripathi

A. Service Law – Intermediate Education Act, 1921 – Section 16-E – UP Secondary Education Services Selection Board, Rules, 1998 – Rule 11-(2) (b) – Post of Principal – Selection and appointment – Requirement of being two senior most Lecturer of institution, non-fulfillment thereof – Effect – Held, none of the

petitioners were amongst the two senior most teachers either on the date of occurrence of vacancy or sending of requisition so as to fall within the zone of consideration under Rule 11(2)(b) of Rules, 1998, therefore, their claim falls. (Para 27 and 56)

B. Constitution of India – Article 226 – Locus standi – Advertisement issued – Petitioners failed to challenge it – Consequence – Held, the petitioners do not have any locus standi to maintain the writ petition in their present form, especially as, they have not challenged the said advertisements on the ground of inordinate delay of about 10 or more years in holding the selections. (Para 61)

Writ petitions dismissed. (E-1)

List of Cases cited :-

1. Nand Kishore Prasad Vs U.P. Secondary Education Services Commission, Allahabad & ors.; 1990 (1) UPLBEC 539

2. Civil Misc. Writ Petition No. 31736 of 2011; Shayam Lal & anr. Vs St. of U.P. & ors. decided on 29.08.2011

3. Writ A No. 36881 of 2000; Prem Kishor Sharma Vs U.P. Secondary Education Services Selection Board & ors.

4. Smt. Sadhna Vs St. of U.P. & ors.; 2017 (6) ADJ 418

5. Special Appeal No. 258 of 2010; Bhola Nath Singh Vs St. of U.P. decided on 12.03.2010

6. Civil Misc. Writ Petition No. 32406 of 2011; Jagdish Prasad Pandey Vs St.of U.P. & ors. decided on 16.08.2011

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

1. Heard Shri Ashit Chaturvedi, learned Senior Counsel along with Sri K.M. Shukla, Shri R.C. Tiwari, Shri Shard Pathak and Shri Amrendra Nath Tripathi, learned counsel appearing for the petitioners, Shri Raj Kumar Singh Suryavanshi and Shri Raishabh Tripathi, learned counsel for the Board and learned Additional Chief Standing Counsel for the State.

2. All the writ petitions involve similar facts and issues, therefore, they were heard together and are now being decided by a common judgment.

3. The relief prayed for in the Writ Petitions and the facts of the case need to be mentioned as far as they are relevant.

4. The relief clause in Writ Petition No. 372 of 2022 reads as under:-

"I. Issue a writ, order or direction in the nature of Certiorari thereby quashing the impugned Condition No.5 of Circular dated 5.1.2022 by means of which the date 25.2.2014 has been fixed for considering the eligibility criteria two senior most teachers for holding the post of Principal of recognized institutions recognized under the provisions of Uttar Pradesh Intermediate Education Act 1921.

II. Issue a writ, order or direction in the nature of Mandamus commanding the opposite party No.2 to take into consideration the eligibility of two senior most teachers, including the petitioner, for holding selection on the post of Principal of Rajarshi Tandon Inter College, Ram Nagar Athgawan, Pratapgarh under the provisions of Uttar Pradesh Secondary Education Service Selection Board Act, 1982 and Rules made there under as 10.1.2022, which is the last date for sending the details of them before the Board by the concerned District Inspector of Schools."

5. In this case the petitioner claims to be working as Ad-hoc Principal of the

Institution in question w.e.f. 13.04.2021. It is stated that the post of Principal in the institution fell vacant on superannuation of Shri Nagendra Nath Tiwari on 30.06.2013. Accordingly, on a requisition being sent the same was advertised by the Board on 31.12.2013 by Advertisement No. 3 of 2013. In view of the averments made in Paragraph No. 6 of the writ petition, it is evident that the petitioner was not amongst the two senior most teachers of the institution at the time of occurrence of vacancy nor at the time of sending of requisition to the Board or issuance of aforesaid advertisement for the purposes of consideration under Rule 11-(2)(b) of the Uttar Pradesh Secondary Education Services Selection Board Rules, 1998 (hereinafter referred to as 'the Rules, 1998) and it is only in 2021 that he was made Ad-hoc Principal possibly being the senior most or amongst two senior most teachers.

6. The selection in pursuance to the advertisement issued on 31.12.2013 could not be completed. According to the petitioner on 05.01.2022 a Circular was issued for uploading details of the two senior most teachers on the Official Website of the Board. The requisite information was required to be sent/uploaded by a particular cut off date and the details of the petitioner have been sent on 06.01.2022 by the D.I.O.S. and the same have been uploaded, as asserted, on 08.01.2022, but, the interview letter was not issued to the petitioner and as per the averments made in Paragraph 15 of the writ petition, this is on account of the fact that the petitioner did not fulfill the requisite eligibility conditions as on 25.02.2014 which was last date for filing application for being considered for appointment as per the Advertisement No. 3 of 2013.

7. In Paragraph No. 15 it has also been stated that the petitioner joined his service as Lecturer in the Institution on 24.11.2004. As he was not a trained teacher, therefore, in order to be eligible for the post of Principal, 10 years experience was required which was not complete as on 25.02.2014. He acquired the qualification of B.Ed. and became a trained teacher in February, 2015 i.e. subsequent to the relevant date which is 25.02.2014. There is no averment in the writ petition that the petitioner was eligible, having the requisite qualification and experience for the post of Principal when the vacancy occurred, or the requisition was sent or on the relevant date when the Advertisement No. 3 of 2013 was issued. In fact during the course of argument it was fairly accepted that on the relevant date the petitioner did not have requisite experience for the post of Principal. There is no averment in the writ petition that the petitioner was was amongst the two senior most teachers in the institution at that time.

8. The relief clause of Writ - A No. 364 of 2022 reads as under :-

"(A) To issue a Writ, Order or Direction in the nature of Certiorari quashing the impugned condition laid down in para 3 of the impugned release dated 02.01.2022. (Annexure No.1) by means of which the date 25.2.2014 has been fixed for considering the eligibility criteria two senior most teachers for holding the post of Principal of recognized institutions recognized under the provisions of Uttar Pradesh Secondary Education Service Selection Board Act, 1921.

(B) To issue a Writ, Order or Direction in the nature of mandamus commanding the opposite party No.2 to

take into consideration the eligibility of two senior most teachers, including the petitioner, for holding selection on the post of Principal of recognized institutions under the provisions of Uttar Pradesh Secondary Education Service Selection Board Act, 1921 as 16.01.2022, which is the last date for sending their details before the Board by the concerned District Inspector of Schools."

9. In this case also the grievance of the petitioner is that the cut off date for determining the eligibility is being treated as 25.02.2014 based on the advertisement No. 3 of 2013 and as the petitioner did not fulfill the requisite eligibility conditions i.e. qualification and experience on the said date, therefore, he is not being considered, although, he is officiating on the post of Principal in the institution concerned since 19.06.2016. He was promoted to the post of Lecturer on 01.04.2016 which was allegedly confirmed by opposite party no. 3 on 27.05.2016. It is not the case of the petitioner that he was amongst the two senior most teachers of the institution when the vacancy occurred on the post of Principal and thereafter advertisement was issued on 30.12.2013. In fact from the pleadings it appears he became the senior most and was given officiation of the post of Principal only in 2016. The case of the petitioner is that his eligibility for appointment should be considered as on 08.01.2022 which is the last date for uploading information in pursuance to the Circular dated 02.01.2022 etc. issued by the opposite parties in respect to the Advertisement No. 3 of 2013.

10. The advertisement being the same as in the first writ petition it may be reiterated that the selection was not completed and subsequently in January, 2022 certain circulars have been issued which shall be dealt with hereafter. It is nowhere mentioned in the writ petition that the petitioner was eligible and within the zone of consideration for appointment as Principal in 2013 when the vacancy occurred and/or the advertisement was issued. In fact, it is the admitted position that he was not eligible as on 25.02.2014 which was the last date for submission of application in pursuance to the said advertisement. In fact during the course of argument it was fairly accepted that on the relevant date the petitioner did not have the requisite experience for the post of Principal. However, it is the case of the petitioner that said advertisement was only for candidates from the open market and not for the two senior most teachers, therefore, their eligibility should be determined on a separate date which in this case should be 08.01.2022. This is also the case in the earlier writ petition referred hereinabove.

11. The relief clause of Writ- A No. 241 of 2022 reads as under:-

"(i) Issue a writ, order or direction in the nature of Certiorari thereby quashing the impugned panel dated 29.12.2021 issued by Opposite Party No.4 in pursuance of advertisement no. 01/2011, so far it relates to selection & allocation of Opposite Party No.6, on the post of Principal in the institution in question, as contained as Annexure No. 1 to this writ petition.

(ii) Issue a writ, order or direction in the nature of Certiorari thereby quashing the consequential order dated 03.01.2022 issued by the Opposite Party No.3 in pursuance of the Panel dated 29.12.2021, issued by Opposite Party No 4,

as contained as Annexure No. 2 to this writ petition."

12. In this case the petitioner has challenged the empanelment of candidates dated 29.12.2011 issued by the opposite party no. 4 in pursuance to the Advertisement no. 1 of 2011 in which the opposite party no. 6 has been selected for appointment as Principal in the institution in question, meaning thereby, the selection has already been held in pursuance to the Advertisement No. 1 of 2011, in this case.

13. The petitioner claims to have joined the institution on the post of Lecturer on 18.09.2007. He claims that his name figures at Serial No. 1 in the seniority list of Lecturers of the institution issued for the year 2020-21. He was made Ad-hoc Principal vide order dated 28.09.2019. The post of Principal was advertised vide Advertisement No. 1 of 2011. In pursuance to which, the opposite parties no. 6 and 7 have been selected as stated in Para 14 of the writ petition. There is no averment in the writ petition that the petitioner was a trained teacher. During the course of argument learned counsel for petitioner asserted that his services as Subject Expert were liable to be counted and based thereon he is eligible as of now for the post of Principal, however, the requisite factual foundation is absent in the writ petition in this regard. The cut off date for determining the eligibility, based on the Advertisement No. 1 of 2011, is 25.08.2011, as informed by learned counsel for petitioner himself. The counsel asserted that he was a trained teacher possessing qualification of B.Ed., therefore, he required only four years experience in addition to the qualification prescribed. Although, as stated, in the writ petition the qualification of the petitioner is nowhere mentioned, nevertheless, this aspect would be considered subsequently. In any case there is no assertion in the writ petition that the petitioner was amongst the senior most teachers eligible for being considered for appointment as Principal under Rule 11-(2)(b) of the Rules, 1998 at the relevant time in pursuance to the Advertisement No. 1 of 2011. There is no averment in the writ petition that the petitioner was eligible having requisite qualification and experience for the post of Principal when the vacancy occurred or on the relevant date when the Advertisement No. 1 of 2011 was issued. In fact during the course of argument it was fairly accepted that on the relevant date the petitioner did not have the requisite experience for the post of Principal.

14. The relief clause of Writ - A No. 254 of 2022 is as under:-

"(i) Issue a writ, order or direction in the nature of Certiorari thereby quashing the impugned panel dated 29.12.2021 issued by Opposite Party No.4 in pursuance of advertisement no. 01/2011, so far it relates to selection and appointment of Opposite Party No.6, on the post of Principal in the institution in question, as contained as Annexure No 1 to this writ petition.

(ii) Issue a writ, order or direction in the nature of Mandamus commanding the Opposite Parties to give an opportunity to the petitioner to participate in the selection process for the Post of Principal of the institution being the second senior most Lecturer of the institution as per provisions of Board Rules, 1998."

15. In this case also the petitioner has challenged the empanelment of candidates

dated 29.12.2021 in pursuance to the Advertisement No. 1 of 2011 so far as it relates to selection and appointment of opposite party no. 6. Here also the petitioner claims to have been appointed as Subject Expert for teaching Intermediate classed in the institution in question vide appointment letter dated 01.12.2001. She was appointed as Lecturer vide letter dated 01.11.2007, therefore, she claims that considering her services as Subject Expert she was eligible and had the experience for selection as Principal, however, there is no averment in the writ petition that she was amongst the two senior most teachers at the relevant time when the vacancy on the post of Principal occurred and/or the advertisement was issued in respect thereof. In fact, in Para 10 it has been stated that Shri Balram Pandey and Shri Sadabriksh were two senior most lecturers at the relevant time. Shri Balram Pandey retired on 30.06.2013 and after his retirement the name of next senior most lecturer should have been sent which was not done, therefore, the empanelment is bad. The cut off date for fulfilling the eligibility criteria was 25.08.2011 in this case also as the advertisement was the same i.e. 01/2011. In para 11 it has been stated that in the seniority list for the year 2013-14 her name finds place at Serial No. 2, therefore, her name should have been sent for consideration in pursuance to the Advertisement No. 1 of 2011 which was not done instead the opposite party no. 6 has been selected for appointment. In Para 14 it is stated that on a representation by the petitioner, the District Inspector of Schools forwarded the matter to the Board vide letter dated 10.12.2013, but, the Board did not do anything in the matter. Interview for the post in question was held on 31.01.2014 and at that time the petitioner was the second senior most teacher in the institution, but, her name was not considered by the Board. There is no averment in the writ petition that the petitioner was eligible having the requisite qualification and experience for the post of Principal when the vacancy occurred or on the relevant date when the Advertisement No. 3 of 2013 was issued. In fact during the course of argument it was fairly accepted that on the relevant date the petitioner did not have the requisite experience for the post of Principal.

16. The relief clause of Writ - A No. 268 of 2022 reads as under:-

"(i) Issue a writ, order or direction in the nature of Certiorari thereby quashing the impugned panel dated 29.12.2021 issued by Opposite Party No.4 in pursuance of advertisement no. 01/2011, so far it relates to selection and allocation of Opposite Party No.6, on the post of Headmaster in the institution in question, as contained as Annexure No. 1 to this writ petition.

(ii) Issue a writ, order or direction in the nature of Mandamus commanding the Opposite Parties to give an opportunity to the petitioner to participate in the selection process for the Post of Headmaster of the institution being the senior most Teacher of the institution as per provisions of Board Rules, 1998."

17. Here also the petitioner challenges the empanelment of candidates dated 29.12.2021 so far as it relates to selection and allocation of opposite party no. 6 on the post of Headmaster in the institution. Petitioner claims to have been appointed as Ad-hoc Assistant Teacher on 27.08.1990. He claims that ultimately he was appointed against vacant post on 14.02.1992 in

pursuance of an order of the High Court. Financial concurrence was granted in this regard by the D.I.O.S. on 11.03.1992. His services on the post of Assistant Teacher were regularized on 19.01.1999. The facts in this regard are slightly incongruous, nevertheless, they are, as stated in the writ petition. In Para 9 it has been averred that the petitioner is senior most Assistant Teacher of the institution and at present post of Headmaster is lying vacant. Consequently, he was promoted as Headmaster on Ad-hoc basis under Section 18 of the U.P. Board Act, 1982 and his signatures were attested on 29.04.2017, therefore, obviously the said Ad-hoc appointment as Headmaster is of year 2017. In the writ petition it has been stated that Shri Harish Chandra Dhar Dubey and Shri Haribux Singh were the two senior most teachers whose names were sent in pursuance to the Advertisement No. 1 of 2011 for consideration for appointment as Principal, but, before the interview could be held on 31.01.2014 Shri Harish Chandra Dhar Dubey retired. In Para 18 it is claimed that on 31.01.2014 when the interview was held the petitioner was at Serial No. 2 in the seniority list, as such, his name ought to have been forwarded for being considered for selection, but, this was not done. Shri Hari Bux Singh, the senior most teacher, whose name had been forwarded, was considered and got selected, but, prior to declaration of result, he retired from service on 31.03.2017 on attaining the age of superannuation. The petitioner's grievance is that inspite of the fact that he was amongst the two senior most teachers as on 31.01.2014 his claim was not forwarded nor considered. The cut off date for fulfilling the eligibility criteria of qualification and experience was 25.08.2011 in this case also as informed by learned counsel for petitioner. There is no averment in the writ petition that the petitioner was eligible having the requisite qualification and experience for the post of Principal when the vacancy occurred or on the relevant date when the Advertisement No. 1 of 2011 was issued. In fact during the course of argument it was fairly accepted that on the relevant date the petitioner did not have the requisite experience for the post of Principal.

18. The relief clause of Writ - A No. 317 of 2022 reads as under:-

"(i). issue a writ, order or direction in the nature of Certiorari quashing the impugned requisition sent by the District Inspector of Schools, Gonda on 27/07/2013 (contained as Annexure No.9 to this Writ Petition) and also to quash the impugned advertisement No.3/2013 by which the direct recruitment to the post of Principal of the respondent no.5 institution is being conducted in the year 2021 (contained Annexure No.10 to this Writ Petition)."

19. In this case, the petitioner has challenged the requisition sent by the D.I.O.S. on 21.07.2013 for the vacant post of Principal, the advertisement bearing No. 3 of 2013, in respect to which selection is being conducted, in 2021/22 after almost 9 years of the exercise having been initiated.

20. On 25.01.2022 Shri Amrendra Tripathi, learned counsel for the Board had asserted before the Court that even in 2013 the petitioner was amongst the senior most teachers, however, from the pleadings in the writ petition this assertion is belied. The petitioner claims to have been appointed in the LT Grade on 12.12.1990 which was approved on 25.06.1991 by the D.I.O.S.

His services were regularized on 16.03.1996 as claimed. He was promoted to the post of Lecturer on 12.05.2003 which was approved by the Joint Director of Education on 13.10.2011. In 2010 Shri Mahendra Bahadur Singh, the selected Principal retired from service and thereafter, one Shri Ram Saran Singh was appointed as Ad-hoc Principal and he continued till June, 2014, as stated in Para 13 of the writ petition. After his retirement in June, 2014 one Shri Rajendra Prasad, the senior most lecturer was appointed as Ad-hoc Principal and he continued up to 15.05.2017, as stated in Para 14 of the writ petition, therefore, obviously the petitioner was not the senior most teacher at the relevant time when the vacancy occurred in 2010 nor when the advertisement was issued in 2013. As per Para 15 it is only in 2017 that he being the senior most lecturer, was appointed as Principal on Ad-hoc basis on 15.05.2017.

21. The case of the petitioner is that requisition for the vacant post of the Principal was sent by the D.I.O.S. on 27.07.2013 without the same having been sent by the Management to him. The Management never determined the vacancy, therefore, the D.I.O.S. should not have sent the requisition without complying Rule 11-(2)(b) of the Rules, 1998. In Para 28 reference has been made to a letter dated 05.01.2022 of the opposite party no. 6 by which information had been sought regarding the details of the two senior most lecturers under Rule 11-(2)(b) of the Rules, 1998. In Para 29 it has been stated that from the letter of opposite party no. 6 dated 08.01.2022 and order of opposite party no. 4 dated 08.01.2022, it is evident that the Advertisement No. 3 of 2013 was issued illegally in respect to the Institution in question.

22. In Paragraph 26 to 27 it has been stated that a writ petition bearing Writ - A No. 14975 of 2019 was filed wherein certain orders were passed on 30.09.2019 with respect to non completion of selection pursuant to Advertisement No. 3 of 2013. As representation was not decided, as ordered by the Court, therefore, Contempt Application No. 670 of 2020 was filed which was disposed of on 04.11.2020 based on the statement made by the learned counsel for the Board that every endeavour shall be made to complete the selection process by May, 2021. When the process of selection was not completed another Contempt Application No. 3069 of 2020 was filed in which time for completing the selection process was extended till 31.12.2021 vide order dated 24.11.2021 and the same was subsequently corrected to 21.01.2022. There is no averment in the writ petition that the petitioner was eligible having the requisite qualification and experience for the post of Principal when the vacancy occurred or on the relevant date when the Advertisement No. 3 of 2013 was issued. In fact during the course of argument it was fairly accepted that on the relevant date the petitioner did not have the requisite experience for the post of Principal. Selection has not been completed as yet.

23. The following questions arise for consideration in all these writ petitions:-

1. Whether the petitioners were eligible and within the zone of consideration for selection and appointment on the post of Principal which fell vacant in their Institution under Rule 11-(2)(b) of the U.P. Secondary Education Services Selection Board, Rules, 1998 and were advertised in pursuance to the Advertisement No. 1 of 11 or

Advertisement No. 3 of 2013, as the case may be ?

2. Whether the eligibility of petitioners and their claim to be in the zone of consideration for selection and appointment as Principal under Rule 11(2)(b) of the Rules, 1998 is to be considered with respect to the date fixed for calling the candidates for interview in pursuance to the Advertisement No. 1 of 2011 or 3 of 2013, as the case may be, if not; whether the petitioners have locus standi to maintain these writ petitions staking their claim for being considered in pursuance to the said Advertisements for appointment under Rule 11(2)(b) of the Rules, 1998 on the post of Principal of the Institution wherein they claim to be working as Ad-hoc Principal as of now ?

24. As is evident from the discussion made hereinabove, the process of selection or appointment on the post of Principal by direct recruitment started either in the year 2011 or in the year 2013.

25. At this stage, it is not out of place to mention that the post of Principal is to be filled by direct recruitment and there is no avenue of regular promotion to the said post. However, there are two sources from which direct recruitment is made. One is from the open market for which candidates have to apply in pursuance to the vacancies advertised. Second source is of two senior most teachers of the institution where the post of Principal is vacant and the same has been advertised by the Board. Though, there are two sources of recruitment but so far as the selection process and the assessment of suitability of candidates is concerned, there is no distinction between two sources, meaning thereby, candidates from both the sources have to face the same selection and their suitability has to be assessed in the same manner, which has to be done on the basis of interview only as there is no written examination prescribed. Nothing to the contrary could be pointed out by learned counsel for the parties in this regard.

26. It is also not out of place to mention that even if a Lecturer is not amongst the two senior most Lecturers of the Institution so as to fall within the ambit of Rule 11-(2)(b) of the Rules, 1998, even then, he can very well apply for direct recruit on the post of Principal in pursuance to the advertisement issued based on open market recruitment, if he is otherwise eligible.

27. It is not the case of any of the petitioners herein that even though they were not amongst the two senior most teachers they had applied for being considered for direct recruitment from the open market in pursuance to the Advertisement No. 1 of 2011 or Advertisement No. 3 of 2013, as the case may be. In fact none of the petitioners have been able to establish that they were eligible and were fulfilling the qualification and/or experience, on the relevant date for being considered in pursuance to the said selections. In fact, none of the petitioners have been able to establish before the Court that they were amongst the two senior most teachers in the year of recruitment when the vacancies occurred and were determined and / or when the requisition was sent and vacancies were advertised. The facts clearly show that the factual position is otherwise, as already discussed.

28. The Uttar Pradesh Secondary Education Services Selection Board Act, 1982 (hereinafter referred to as "the Act,

1982') came into effect from 20.04.1998. Ever Since then all recruitment to the post of Principal or Headmaster of an education institution is to be undertaken by the Board constituted under the said Act, 1982.

29. Section 2 (k) of the Act, 1982 defines "Teacher' to mean a person employed for imparting instruction in an institution and includes a Principal or a Headmaster.

30. Section 2 (l) defines "year of recruitment' to mean a period of twelve months commencing from first date of July of a calendar year.

31. Section 10 of the said Act, 1982, as existing at the relevant time, read as under:-

"10. Procedure of selection by direct recruitment.-(1) For the purpose of making appointment of a teacher, by direct recruitment the management shall determine the number of vacancies existing or likely to fall vacant during the year of recruitment and in the case of a post other than the post of Head of the Institution, also the number of vacancies to be reserved for the candidates belonging to the Scheduled Castes, the Scheduled Tribes and other Backward Classes of citizens in accordance with the Uttar Pradesh Public Services (Reserva- tion for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994, and notify the vacancies to the Board in such manner and through such officer or authority as may be prescribed.

(2) The procedure of selection of candidates for direct recruitment to the posts of teachers shall be such as may be prescribed :

Provided that the Board shall, with a view to inviting talented persons, give wide publicity in the State to the vacancies notified under sub-section (1)."

32. As is evident from the above quoted provision the Management is required to determine the number of vacancies existing or likely to fall vacant during the year of recruitment which as defined in Section 2(l) is from first date of July of a calendar year, obviously till 30 June of the next calendar year. The manner of notification of vacancies to the Board is to be such as may be prescribed. The procedure of selection of candidates for direct recruitment to the post of teachers including Principal and Headmasters shall be such as may be prescribed.

33. The aforesaid prescription is contained in the U.P. Secondary Education Services Selection Board Rules, 1998 (hereafter referred as "the Rules, 1998'). As per Rule 10 thereof- Principal of an Intermediate College or Headmaster of a High School is to be filled by direct recruitment.

34. Rule 11 of the Rules, 1998 deals with determination and notification of vacancies.

35. Sub-rule (1) of Rule 11 of the Rules, 1982 deals with determination of vacancies by the Management in accordance with Sub-section (1) of Section 10 of the Act, 1982 as quoted hereinabove and their notification through the Inspector to the Board in the manner provided thereafter.

36. As per Sub-rule (2)(a) of Rule 11 of the Rules, 1998 - the statement of vacancies for each category of posts to be

filled in by direct recruitment including the vacancies that are likely to arise due to retirement on the last day of the year of recruitment, shall be sent in quadruplicate, in the proforma given in Appendix "A" by the Management to the Inspector by July 15 of the year of recruitment and the Inspector shall, after verification from the record of his office, prepare consolidated statement of vacancies of the district subjectwise in respect of the vacancies of lecturer grade, and group wise in respect of vacancies of Trained graduates grade. The consolidated statement so prepared shall, along with the copies of statement received from the Management, be sent by the Inspector to the Board by July 31 with a copy thereof to the Joint Director. Provided that if the State Government is satisfied that it is expedient so to do, it may, by order in writing, fix other dates for notification of vacancies to the Board in respect of any particular year of recruitment.

37. Now, Sub-rule (2)(b) of the Rule 11 of the Rules, 1998 is relevant in this case, which provides that with regard to the post of Principal or Headmaster, the Management shall also forward the names of two senior most teachers, along with copies of their service records (including character rolls) and such other records or particulars as the Board may require, from time to time.

38. Now, on a reading of this Clause (b) of Sub-rule (2) of Rule 11 of the Rules, 1998 what comes out is that while sending the statement of vacancies for the post of teachers including the posts of Principal or Headmaster as is referred in Sub-rule (2)(a), with regard to the post of Principal or Headmaster, the Management shall also forward the names of two senior most teachers. The use of the word "also' makes it abundantly clear that these two names of senior most teachers for consideration for selection to the post of Principal or Headmaster have to be sent along with the statement of vacancies, which is required to be sent under Rule (2)(a) of Rule 11 of the Rules, 1998, by the Management to the District Inspector of School by July 15 and by the District Inspector of School to the Board by July 31. In this context it is relevant to reiterate that the first day of the year of recruitment is 1st of July, therefore, obviously this entire exercise is to be done by the start of the year of recruitment. The contention of learned counsel for petitioners that the names of two senior most persons is to be sent by the Management subsequently as and when requisitioned by the Board for the purposes of interview, is thus, not supported from the scheme of the Rules referred hereinabove.

39. Furthermore, while sending the statement of vacancies and the name of two senior most teachers as referred, copies of their service records including character roll are also required to be sent to the Board, meaning thereby, this has also to be done at the time of sending the statement of vacancies, under Rule (2)(a) of Rule 11 of the Rules, 1998 and while sending the names of two senior most teachers referred in Clause (b) of Sub-rule (2) of Rule 11 of the Rules, 1998 and not as and when required by the Board. The words **''and such other records or particulars as the Board may require, from time to time'** need to be considered by this Court as Shri Sharad Pathak, learned counsel appearing for the petitioner in one of the writ petitions submitted that the use of the words "as the Board may require, from time to time' shows that the names of the two senior most teachers along with their service record is to be sent by the Management to

the Board through the D.I.O.S. as and when the Board requires. This contention with utmost respect is not correct. The words "as the Board may require, from time to time', have to be read with preceding words - "and such other records or particulars', meaning thereby, after the name of two senior most teachers along with copies of their service records including character roll have been sent along with statement of vacancies, thereafter, if the Board requires such other records or particulars pertaining to the said senior most teachers to be sent, from time to time, then, this additional record would also be sent to the Board as required by it. The words "as the Board may require, from time to time' have to be read and understood accordingly. The contention of Shri Sharad Pathak, learned counsel for appearing for petitioner in one of the writ petitions is, thus, rejected. This Court has no doubt in its mind that the name of the two senior most teachers along with copies of their service record including character roll have to be sent while sending the statement of vacancies, as discussed hereinabove, and not subsequently. After having done so if at any subsequent time the Board requires any further records or particulars relating to the senior most teachers then the same would be sent. This is how the said Clause (b) of Sub-rule (2) of Rule 11 of the Rules, 1998 has to be read and understood.

40. Now, from a reading of the aforesaid provisions of law, as it is evident that the names of two senior most teachers is to be sent along with the statement of vacancies (so called requisition), obviously the teachers have to be amongst the two senior most in the said recruitment year at the relevant time when the statement is being sent and not thereafter, for the purpose of Rule 11(2)(a).

41. In this very context it is fruitful to refer to a Division Bench Judgment of this Court reported in ***1990 (1) UPLBEC 539; Nand Kishore Prasad Vs. U.P. Secondary Education Services Commission, Allahabad and Ors***. The facts of the said case were that a vacancy arose on the post of Principal in the institution on 30.06.1986. The petitioner- Nand Kishore Prasad was the third senior most teacher in the college at that time. The first senior most teacher Shri Parashu Ram Upadhyay retired on 30.09.1987. In this context the petitioner's contention was that after 1987, when the selection was made, since Shri Parashu Ram Upadhyay had retired, his i.e. the petitioner- Nand Kishore Prasad's name should have been sent by the Management for consideration for the post of Principal of the College. The Division Bench of this Court considered Rule 4 of the U.P. Secondary Education Services Commission Rules, 1983 and opined that "the said provision clearly intends that on the date when the vacancy arose, on that date, the management is called upon to find out who are the two senior most teachers whose names are to be forwarded to the Commission hence the date when the vacancy arose would be the relevant date for the purposes of Rule Rule 4(ii). Merely because of a subsequent event, if another teacher becomes the senior most teacher in the college, he does not have a right to ask the management to send his name also. If the interpretation is not taken then the result will be the process of selection by the Commission will never be completed as the name of the senior most teachers would go on changing and the process of forwarding names will also continue. This does not take away the right of the said teacher to be considered for the post of Principal of the institution if he has applied for the same." Accordingly, the Division Bench did not

find merit in the submission made before it and dismissed the writ petition.

42. This Division Bench judgment in ***Nand Kishore Prasad's case*** (supra) has been considered by a co-ordinate Bench of this Court in the case of ***Shayam Lal and Anr. Vs. State of U.P. and Ors.; Civil Misc. Writ Petition No. 31736 of 2011*** decided on 29.08.2011 wherein a similar issue came up for consideration and the co-ordinate Bench considered the issue in the light of the Rules, 1983 as also Rules, 1998 which are being considered in this case and after quoting the Division Bench judgment in ***Nand Kishore Prasad's case*** (supra) which was with reference to 1983 Rules opined that the 1998 Rules do not alter the aforesaid position, meaning thereby, the co-ordinate Bench was also of the opinion that the teacher has to be amongst the two senior most teachers at the relevant time of sending requisition during the year of recruitment for being within the zone of consideration under Rule 11(2)(b) of the Rules, 1998 just as was the case under Rule 4(ii) of the Rules, 1983. The co-ordinate Bench in ***Shyam Lal's case*** (supra) held as under:-

"It is the submission of the learned counsel for the petitioner that under Clause 3-A of Appendix "A' of the 1983 Rules the names of the two senior most teachers possessing the requisite qualifications for the post of the Principal in order of seniority and copies of the service records (including character rolls) had to be sent with the requisition but Appendix "A' to the 1998 Rules is silent on this issue. He, therefore, submits that when the said Appendix "A' to the 1998 Rules does not require the names of the two senior most teachers in the Institution to be mentioned and nor does it require the copies of the service records (including character rolls) to be sent with the requisition, as was the position under Appendix "A' to the 1983 Rules, it should be presumed that the Board should call for interview under the 1998 Rules the two senior most teachers working in the Institution at the time of interview. It is, therefore, the submission of learned counsel for the petitioners that the Board committed an illegality in not calling the petitioners for interview."

43. After noticing the aforesaid submission of the learned counsel for the petitioner it examined the issue in the light of the 1983 Rules as also the 1998 Rules and the Division Bench judgment in Nand Kishore Prasad's case (supra) which was based on 1983 Rules and held as under:-

"The 1998 Rules do not alter the aforesaid position. Under Rule 10 (a) of the 1998 Rules, the post of Principal of an Intermediate College is to be filled up by direct recruitment and for the purpose of direct recruitment to the post of teacher, which includes the Principal, the Management has to notify the vacancy through the Inspector to the Board in the proforma given in Appendix "A' by 15th July of the year of recruitment. Such statement is to be sent by the Inspector to the Board by 31st July with a copy to the Joint Director of Education. Rule 11(2)(b) of the 1998 Rules provides that with regard to the post of Principal or the Headmaster, the Management shall also forward the names of two senior most teachers along with the copies of the service records (including character rolls) and such other records or particulars as the Board may require from time to time. Rule 12(6) of the 1998 Rules makes the position more clear. It provides that in respect of the post of

Principal or the Headmaster of an Institution, the Board shall also, in addition, call for interview the two senior most teachers of the Institution whose names are forwarded by the Management through the Inspector under Rule 11(2)(b) of the Rules. It is, therefore, clear that such information required under Rule 11(2)(b) of the 1998 Rules is to be sent with the requisition by 15th July of the year of recruitment.

What needs to be noticed is that the Division Bench of this Court in Nand Kishore Prasad (supra) had examined a similar controversy in the context of Rule 4(1) of the 1983 Rules and the Division Bench decision is not based on what is contained in Appendix "A' of the 1983 Rules but on the provisions of the aforesaid Rule 4(1). Rules 11(2)(b) and Rule 12(6) of the 1998 Rules make it abundantly clear that the names and records of two senior most teachers of the Institution is required to be sent with the requisition and these two teachers whose names have been forwarded by the Board under Rule 11(2)(b) have to be called for interview. Thus, if these two senior most teachers are not to be called for interview, if they have attained the age of superannuation in the meantime, the next two senior most teachers cannot claim that they should be called for interview merely because Appendix "A' to the 1998 Rules, which is merely a proforma, does not contain a Column similar to Column No.3A of the 1983 Rules.

.....

As noticed hereinabove, Appendix "A' to the 1998 Rules does not make any change in the situation as from a reading of Rules 11(2)(a) and (b) and Rule 12(6) of the 1998 Rules, it is clear that the Management has to forward the names of two senior most teachers with the requisition with copies of service record (including character rolls) or such records or particulars as the Board may require from time to time."

44. The co-ordinate Bench also considered the contention as was raised before this Court by Shri Sharad Pathak learned counsel for petitioner, that there is a change in the proforma annexed as Appendix "A" to the Rules, 1992 vis-a-vis the proforma contained in the earlier Rules but rejected it as is evident from the extract quoted above.

45. The substantive provision is contained in Rule 11(2)(a) and (b) with regard to sending of names and merely because the proforma contained in Appendix -'A' of the Rules, 1998 does not mention about sending details of two senior most teachers though it was mentioned in the earlier rules, it would not make any difference as the proforma can not override the rule which clearly stipulates the sending of names and records of two senior most teachers and the time when it is to be sent. This aspect has already been dealt with hereinabove and the contention of Shri Sharad Pathak, learned counsel for petitioner to the contrary is rejected.

46. In ***Shyam Lal's case*** (supra) reference was also made to judgment of a learned Judge of this Court in Writ Petition No.67834 of 2009 (Rajjo Babu Kushwaha Vs. State of U.P. & Ors.) decided on 14th December, 2009 wherein it was held as under:-

"Sri Irshad Ali, learned counsel for the petitioner, contends that the

petitioner as on the date of consideration by the U.P. Secondary Education Service Selection Board is the senior most teacher is available in the institution inasmuch as the other 2 teachers Ram Avtar Tripathi and Sri Shri Krishna Shukla were continuing under the benefit of regulation 21 of Chapter III of the U.P. Intermediate Education Act. In short, the submission is precisely that in the event the process of selection is delayed and the senior most teacher retired then to fall in line like the petitioner should be called for interview.

The aforesaid contention would amount to modifying the terms of the Rules itself which does not make any such provision inasmuch as in the instant case it is undisputed that the date of advertisement is 6.9.2008. On the said date, 2 senior most teachers were admittedly Ram Avtar Tripathi and Sri Shri Krishna Shukla and the petitioner did not fall within that category. The petitioner, therefore, now cannot be permitted to subsequently raise his claim merely because the interviews were delayed and are now be held in the year 2009. The disqualification of Ram Avtar Tripathi and Sri Shri Krishna Shukla does not automatically get converted into the benefit of the petitioner as the rule does not permit to do so.

The writ petition lacks merit and is, accordingly, dismissed."

47. Furthermore, another co-ordinate Bench of this Court in ***Writ - A No. 36881 of 2000; Prem Kishor Sharma Vs. U.P. Secondary Education Services Selection Board and Ors.*** had the occasion to consider this issue and observed that in respect to forwarding of names of two senior most teachers along with requisition by Management, the Court did not find any substantial difference between Rules, 1983 vis-a-vis Rules, 1995 and a subsequent third set of Rules, which came into force in 1998 i.e. U.P. Secondary Education Services Section Board Rules, 1998. It referred to the Division Bench judgment in ***Nand Kshore Prasad's case*** (supra) as also the co-ordinate Bench judgment in ***Shyam Lal's case*** (supra) and expressed its whole hearted agreement with the reasons given in the above judgments and opined that in its view, name of senior most teacher will not change with the subsequent retirements of senior most teachers, whose names are sent or liable to be sent by Management when requisition is forwarded to UPSESSB since qualification and other requirements are in the context of 'year of recruitment' and it is not a situation which would continue to go on changing depending on the date on which Commission advertises the vacancies or hold interview.

48. In the context of eligibility and qualification etc. it also referred to a 5-Judges Bench decision of this Court in ***Smt. Sadhna Vs. State of U.P. and Ors. reported in 2017 (6) ADJ 418*** wherein it has been held, in the context of issues before it, that, for the purpose of eligibility qualification etc., it is the 'year of recruitment' following date of vacancy which is relevant and not an uncertain date which Management decides to sent requisition or any other similar uncertain event.

49. The said Bench also considered the judgment of another Division Bench in ***Bhola Nath Singh Vs. State of U.P.; Special Appeal No. 258 of 2010*** decided on 12.03.2010 wherein the judgment of the Single Judge was set-aside noticing the contention of learned counsel for appellant that date of requisition could not be the cut

off date for the purposes of selection of candidates and the rival contention on behalf of the respondent that the date of advertisement is the appropriate cut off date as also the contention of the appellant that the date of interview is the cut off date, for the reason and with the observation - "one aspect is very clear that both the contesting parties before us are not on the issue that the date of requisition will the appropriate cut off date. Having so, whether the date of advertisement or the date of interview will be the cut off date is required to be considered and decided by the learned Single Judge once again." Accordingly, the matter was remanded back. The co-ordinate Bench in ***Prem Kishor Sharma's case*** (supra) considered this aspect of the matter and held that the Division Bench in ***Bhola Nath Singh's case*** (supra) did not decide any issue, whereas, the co-ordinate Bench in Shyam Lal and Anr.'s case (supra) had decided the issue on merits. Accordingly, it concurred with the view taken in ***Shyam Lal and Anr.'s case*** (supra) as referred hereinabove. Therefore, the contention of Shri Sharad Pathak, learned counsel for petitioner that after remand the learned Single Judge has not yet expressed its opinion finally in ***Bhola Nath Singh's case*** (supra), does not helps his cause nor does it persuade this Court to take any other view of the matter, as, other Single Benches have rendered their opinion and this Court is in agreement with the view expressed in the aforesaid decisions by co-ordinate Benches. The Division Bench in ***Bhola Nath's case*** (supra) did not decide any issue on merits.

50. Furthermore, the same view has been expressed in ***Civil Misc. Writ Petition No. 32406 of 2011; Jagdish Prasad Pandey Vs. State of U.P. and Ors.*** decided on 16.08.2011.

51. Now, Rule 12 of the Rules, 1998 needs to be considered. Rule 12 of the Rules, 1998 reads as under:-

"12. Procedure for direct recruitment.- *(1) The Board shall, in respect of the vacancies to be filled by direct recruitment, advertise the vacancies including those reserved for candidates belonging to Scheduled Castes, Scheduled Tribes and Other Backward Classes of citizens in atleast two daily newspapers, having wide circulation in the State, and call for the applications for being considered for selection in the pro forma published in the advertisement. For the post of Principal of an Intermediate College or the Headmaster of a High School, the name and place of the institution shall also be mentioned in the advertisement and the candidates shall be required to give the choice of not more than three institutions in order of preference and if he wishes to be considered for any particular institution or institutions and for no other institution, he may mention the fact in his application.*

(2) The Board shall scrutinize the applications and in respect of the post of teacher in Lecturers and Trained graduates grade, shall conduct written examination. The written examination shall consist of one paper of general aptitude test of two hours duration based on the subject. The centres for conducting written examination shall be fixed in district headquarters only and the invigilators shall be paid honorarium at such rate as the Board may like to fix.

(3) The Board shall evaluate the answer sheets through examiner to be appointed by the Board or through Computer and the examiner shall be paid

honorarium at the rate to be fixed by the Board.

4. The Board shall prepare list for each category of posts on the basis of marks obtained in the written examination and marks for special merits as follows:-

(a) 85 per cent marks on the basis of written examination;

(b) 10 per cent marks on the basis of interview which shall be divided in the following manner namely:-

(i) 4% marks on the basis of general knowledge;

(ii) 3% marks on the basis of personality test,

(iii) 3% marks on the basis of ability of expression.

(c) 5 per cent marks on the basis of following special merits namely -

(i) 2% marks for having Doctorate Degree;

(ii) 2% marks for having Master of Education (M.Ed.) degree;

(iii) 1% marks for bachelor of education (B.Ed.) degree:

Provided that no marks under this clause shall be awarded to a candidate who has obtained marks under sub-clause (ii),

(iv) 1% marks for the participation in any national level sports competition through state team.

5. The Board shall in respect to the selection for the post of Head Master and Principals, allot the marks in the following manner :-

(i) 60% marks on the basis of quality points specified in Appendix 'D'.

(ii) 16% marks for having experience more than the required experience in the manner that 1% marks shall be awarded for each year of such experience, subject to a maximum of 16% marks.

(iii) 2% marks for research paper published in reputed journals in the manner that 1/2% marks shall be allotted for each research paper subject to maximum 2% marks.

(iv) 7% marks for having Doctorate degree or 3% for Master of Education (M.Ed.) provided that only one degree shall be considered under this clause.

(v) The Board shall hold interview of the candidates and 15% marks shall be allotted for interview. Marks in the interview shall be divided in the following manner :-

(a) 6% marks on the basis of subject/general know ledge;

(b) 4% marks on the basis of personality test;

(c) 5% marks on the basis of ability of expression.

(6) The Board, having regard to the need for securing due representation of the candidates belonging to the Scheduled

Castes/Scheduled Tribes and Other Backward Classes of citizens in respect of the post of teacher in Lecturers and Trained graduates grade, call for interview such candidates who have secured the maximum marks under sub-clause (4) above/and for the post of Principal/Headmaster, call for interview such candidates who have secured maximum marks under sub-clause (5) above in such manner that the number of candidates shall not be less than three and not more than five times of the number of vacancies :

Provided that in respect of the post of the Principal or Headmaster of an Institution, the Board shall also in addition call for interview two seniormost teachers of the Institution whose names are forwarded by the Management through Inspector under clause (b) of sub-rule (2) of Rule 11.

7. The marks obtained in the quality points as referred to in sub-rule (5) by the eligible candidates shall not be disclosed to the members of the interview board.

(8) The Board then, for each category of post, prepare panel of those found most suitable for appointment in order of merit as disclosed by the marks obtained by them after adding the marks obtained under sub-clause (4) or sub-clause (5) above, as the case may be, with the marks obtained in the interview. The panel for the post of Principal or Headmaster shall be prepared institution-wise after giving due regard to the preference given by a candidate, if any, for appointment in a particular institution whereas for the posts in the lecturers and trained graduates de, it shall be prepared subject-wise and group-wise respectively. If two or more candidates obtain equal marks, the name of the candidate who has higher quality points shall be placed higher in the panel and if the marks obtained in the quality points are also equal, then the name of the candidate who is older in age shall be placed higher. In the panel for the post of Principal or Headmaster, the number of names shall be three times of the number of the vacancy and for the post of teachers in the Lecturers and Trained graduate grade, it shall be larger (but not larger than twenty-five per cent) than the number of vacancies.

Explanation.- For the purposes of this sub-rule the word 'group-wise' means in accordance with the groups specified in the Explanation to sub-rule (2) of Rule 11.

(9) At the time of interview of candidates, for the post of teachers in Lecturers and Trained graduates grade the Board shall, after showing the list of the institutions which have notified the vacancy to it, require the candidate to give, if he so desires, the choice of not more than five such institutions in order of preference, where, if selected, he may wish to be appointed.

(10) The Board shall after preparing the panel in accordance with sub- rule (8), allocate the institutions to the selected candidates in respect of the posts of teachers in Lecturers and Trained graduates grade in such manner that the candidate whose name appears at the top of the panel shall be allocated the institution of his first preference given in accordance with sub-rule (9). Where a selected candidate cannot be allocated any of the institutions of his preference on the ground that the candidates placed higher in

the panel have already been allocated such institutions and there remains no vacancy in them, the Board may allocate any institution to him as it may deem fit.

(11) The Board shall forward the panel prepared under sub-rule (8) along with the name of the institution allocated to selected candidates in accordance with sub-rule (10) to the Inspector with a copy thereof to the Joint Director and also notify them on its notice board."

52. Sub-rule (1) of Rule 12 of the Rules, 1998 provides that the Board shall, in respect of the vacancies to be filled by the direct recruitment, advertise the vacancies including the reserved vacancies and call for the applications for being considered for selection in the proforma published in the advertisement. It needs to be reiterated at this stage that so far as the post of Principal or the Headmaster is concerned, the same have to be filled by direct recruitment. Even for the purposes of direct recruitment as already stated that there two sources, one is from the open market for which the eligible persons would apply after the vacancies are advertised under Rule 12(1), however, as stated earlier there is another source which is referred in Rule 11(2)(b), according to which the names of two senior most teachers of the institution where the post of Principal or Headmaster is vacant, is required to be sent to the Board. Even at the cast of repetition it needs to be emphasized that though there are two sources of recruitment but the process of selection and assessment of suitability of the candidates from both sources is the same and there is no distinction in this regard nor any weightage is given to the candidates from either of the sources and there is nothing in the provisions of the Act, 1982 or the Rules, 1998 which could show otherwise.

53. In this context, the provisions to Sub-rule (6) of Rule 12 off the Rules, 1998 refers to the interview. In this context it needs to be reiterated that for the post of Principal or Headmaster there is no written examination and the assessment of suitability of candidates is on the basis of quality points based on educational qualifications, experience and interview as is referred in Rule 12(5) and (6) of the Rules, 1998 read with Rule 6(1)(b) of the U.P. Secondary Education Services Section Board (Procedure and Conduct of Business) (I) Regulations, 1998. The proviso to Sub-rule (6) again says that in respect of the post of the Principal or Headmaster of an Institution, the Board shall also in addition call for interview two senior most teachers of the Institution whose names are forwarded by the Management through Inspector under clause (b) of sub-rule (2) of Rule 11. Thus, the two sources of recruitment as referred earlier are evident and it is also clear that there is no distinction with regard to assessment of their suitability for the post in question. The only distinction appears to be that if the one of the two senior most teachers is selected then he would invariably be allocated the same institution where he is already working unless there are good reasons for not doing so.

54. It has already been noticed earlier that from the scheme of the Act, 1982 and the Rules, 1998 it is evident that even if a teacher is not amongst the two senior most teachers, he can still apply for being considered for direct recruitment to the post of Principal if he otherwise fulfilling the qualification and experience prescribed.

55. Section 16(E) of the Intermediate Education Act, 1921 read with Appendix-'A' to Chapter- II of the Regulations made thereunder prescribe the requisite

qualification and experience for the post in question.

56. Now, as is evident from the facts of individual writ petitions discussed earlier, at the relevant time in the year of recruitment referable to the two advertisements bearing No. 1 of 2011 and 3 of 2013 none of the petitioners were amongst the two senior most teachers either on the date of occurrence of vacancy or sending of requisition so as to fall within the zone of consideration under Rule 11(2)(b) of Rules, 1998, therefore, on this ground itself, their claim falls.

57. Furthermore, from the facts already discussed earlier it is evident that none of the petitioners possessed the requisite experience and/or qualification for the post of Principal/ Headmaster, as the case may be, at the relevant time with reference to the Advertisement No. 1 of 2011 or 3 of 2013 that is why their case is that the eligibility and qualification should be seen on the date of interview and not on the last date of submission of application in pursuance to the advertisements referred above.

58. In this context, they contend that the advertisement was not for the senior most teachers and they were not required to apply in pursuance to the advertisements. This contention has been opposed tooth and nail by both the counsel for Board. This contention is fallacious, firstly, the petitioners were not amongst the two senior most teachers at the relevant time and therefore, they were not entitled to be considered at all in pursuance to the said advertisement. Date of interview has no relevance in this regard. Secondly, even if, this aspect is ignored for a moment for the sake discussion, they had to be eligible and fulfilling the requisite qualification and experience at least on the last date for submission of application as mentioned in the advertisement, if not earlier. There can be no doubt that this qualification and experience could not have been acquired by them subsequent to the year of recruitment or the advertisement nor after the last date for submission of application under the said advertisement. This aspect has already been considered in the decisions cited hereinabove with which this Court concurs.

59. Mileage sought to be drawn by the petitioners based on the Circulars issued in January, 2022, requiring, as alleged, the details of two senior most teachers to be uploaded online is misplaced and based on their misreading. The Circulars dated 01.01.2022, 02.01.2022, 05.01.2022, 08.01.2022 and 10.01.2022 do not invite the names of two senior most teachers afresh and this is evident from a bare reading of the said circulars. The Circular dated 01.01.2022 a copy of which is annexed as Annexure No. 5 to the Writ - A No. 364 of 2022 has been issued in view of the orders passed on 24.11.2021 and 03.12.2021 in Contempt Petition No. 3069 of 2021 with respect to Advertisement No. 3 of 2013 so that the selection process may be completed in a time bound manner considering the delay of 10 years in doing the same. In view of another order dated 07.10.2021 passed in Writ Petition No. 10609 of 2021 the Board has decided that those candidates who had completed 62 years of age and had retired or such senior most teachers who were working after retirement till the end of academic session, would not be called for interview. This is in the context of such senior most teachers whose names had been sent under Rule 11(2)(b) of the Rules, 1998 in the context of Advertisement No. 3 of 2013 and there

is nothing in the circulars to indicate that fresh names of two senior most teachers have been invited. What has been stated in the circulars is that the Board had taken a decision to get the information/details of candidates who had submitted applications offline to be verified online. The Court has carefully perused all the circulars referred hereinabove which are on record. In some of the writ petitions the typed copies are incorrect and the words 'Fresh Abhiyarthiya' has been used, whereas, the term as pointed out by Shri Rishabh Tripathi and Shri R.K. Singh Suryawansi is 'सापेक्ष प्राप्त अभ्यर्थियों' and not 'फ्रेस अभ्यर्थियों'. This error exists in the typed copy of circular dated 10.01.2022 and 12.01.2022 annexed as Annexure No. 8 and 9 of Writ - A No. 364 of 2022, but, the typed copy of Circular dated 08.01.2022 annexed as Annexure No. 6 does not contain this error. Moreover, paragraph 1 of Circular dated 02.01.2022 categorically states that such online verification/application shall not be considered as new applications. This exercise therefore is for verification of details of earlier eligible candidate and not for new candidates who may have become eligible subsequently.

60. The Scheme of the Rules has already been discussed which do not permit persons having acquired requisite eligibility subsequently, to be called for selection.

61. In view of the above discussion, this Court is of the opinion that none of the petitioners were amongst the two senior most teachers of the institution as per Rule 11(2)(b) of the Rules, 1998 at the relevant time of sending requisition hence they were not within the zone of consideration for the post of Principal or Headmaster advertised vide Advertisement No. 1 of 2011 or 3 of 2013. They did not fulfill the requisite qualification or experience at the relevant time. Their eligibility and claim of being within zone of consideration is not to be fixed on the basis of date of Interview in respect of Advertisement No. 01 of 2013 or 03 of 2013. Therefore, they do not have any locus standi to maintain these writ petitions in their present form, especially as, they have not challenged the said advertisements on the ground of inordinate delay of about 10 or more years in holding the selections, except in Writ - A No. 317 of 2022, where, Advertisement No. 3 of 2013 has been challenged but not on this ground and bereft of this ground, the challenge is not maintainable at the behest of said petitioners, for the reasons already given, as already discussed above.

62. All the questions framed are answered accordingly.

63. The petitioners may if otherwise permissible in law and if there is no order or direction of the Courts for completing the selection process pertaining to Advertisement No. 03 of 2013 and if the selection has not been completed as yet in the sense Interview etc. has not been held, raise a challenge on the ground of long delay in completing the same if they are otherwise eligible for the posts in question, subject of course to the rights of opposite parties to raise the plea of delay and laches , if any etc., in this regard. As regards Advertisement No. 01 of 2011 the selection is over with regard to petitioners institution, therefore, it is too late in the day for them.

64. This apart, it is also for the State Government and/or the Board to consider as to how far it is justified and reasonable to keep a recruitment process pending for almost 10 or more years, during which many of the candidates whether they be

from one source or another, for direct recruitment, may have become ineligible for various reasons such as exceeding maximum age or having retired etc. and whether in such a scenario if the recruitment process is not completed within reasonable period of 2 or 3 years, should not the advertisement be cancelled and vacant posts be re-advertised so that others who may have become eligible for consideration from either source of recruitment in the interregnum, may also participate therein ? Appropriate measures should be taken in this regard for the future.

65. Accordingly, subject to the above, all the writ petitions are **dismissed.**

(2022)03ILR A554
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.03.2022

BEFORE

THE HON'BLE RAJAN ROY, J.

Writ A No. 1074 of 2022

Chandra Shekhar Dwivedi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sharad Pathak, Sri Piyush Pathak

Counsel for the Respondents:
C.S.C., Sri Ran Vijay Singh, Sri Shivam Sharma

A. Service Law – Education - Appointment/Selection – If by the discrepancy committed while filling up online application form the candidate concerned puts himself in a disadvantageous position, his candidature shall not be cancelled but will be reckoned with such disadvantage as projected. But if the candidate had projected an advantageous position which was beyond his rightful due or entitlement his candidature will stand cancelled. (Para 16, 17, 18)

Wherever the mistakes committed by the candidates purportedly gave additional marks or weightage greater than what they actually deserve, according to the communication dated 05.03.2021, their candidature would stand rejected. However, wherever mistakes committed by the candidates actually put them at the disadvantage as against their original entitlement or the variation could be one attributable to the University or issuing authority, an exception was made by said communication, the reason for these two categories of candidates differently cannot thus be called irrational.

In the present case, it is apparent that the petitioner herein falls in the category of those candidates who had actually put themselves at a disadvantaged position and therefore, the case of the petitioner is covered for grant of relief. (Para 20)

Writ petition allowed. (E-4)

Precedent followed:

1. Jyoti Yadav & anr. Vs St. of U.P. & ors., Writ Petition (Civil) No. 322 of 2021 (Para 10, 11)

2. Rahul Kumar Vs St. of U.P. & ors., Writ Petition(s) (Civil) No(s). 378 of 2021 (Para 10)

3. Secy. Basic Edu. Board & ors. Vs Jubeda Bano, Special Appeal No. 69 of 2022 (Para 16)

Precedent distinguished:

1. Richa Tripathi Vs St. of U.P. & ors., Special Appeal Defective No. 716 of 2021 (Para 14)

Present petition challenges orders dated 19.06.2021 and 23.11.2021, passed by Secretary, Basic Education Board.

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

1. Heard.

2. The petitioner who was selected and appointed as Assistant Teacher in a basic school has challenged the order dated 19.06.2021 by which his selection was reviewed and the same was cancelled leading to passing of an order of the same date i.e. 19.06.2021, cancelling his appointment, as also the subsequent order dated 23.11.2021 passed by Secretary, Basic Education Board on the representation of the petitioner in pursuance to judgment of this Court dated 27.07.2021 passed in his writ petition filed earlier.

3. The facts of the case in brief are that the petitioner applied for such selection and appointment as Assistant Teacher in a basic school in 2019. He was selected and called for counseling. During counseling, it was found that there was some discrepancy in the marks mentioned by him in his application form pertaining to B.Ed degree and those mentioned in his original marksheet. Accordingly, the appointment letter was not issued. On 04.12.2020, a Government Order was issued as there were several candidates who had incorrectly filled-up the form, some of whom had mentioned lesser marks than what they had secured actually just as in the case of the petitioner. Accordingly, a procedure was prescribed by the said Government Order for dealing with such cases. Based on the said Government Order dated 04.12.2020 which, in fact, has been taken into consideration by Hon'ble the Supreme Court in Writ Petition (Civil) Nos.1308 of 2020 '**Abhinav Kardam vs. State of U.P. & Ors.**' where the Apex Court directed the concerned authorities to place the cases of the petitioners therein for consideration in terms of the Office Memorandum dated 04.12.2020 and 10.12.2020, the District Level Committee scrutinized cases of all such candidates including the petitioner and opined that the petitioner is entitled to be offered appointment. Accordingly, appointment letter was issued to the petitioner on 27.01.2021.

4. At this stage, it is not out of place to mention as to what was the discrepancy in the marks of the petitioner. Page no.82 of the petition is the marksheet of B.Ed pertaining to the petitioner and according to it, he had secured total marks of 757 out of 1100 in the written examination. In addition to it, he had secured 85 out of 100 in practical. However, on a bare perusal of the marksheet, it is apparent that the marks secured by him in practical examination were referred as 'Final Practice of Teaching' and these marks were mentioned below the grand total. According to petitioner's counsel, this confused the petitioner and accordingly, while filling-up the form, he mentioned the marks obtained in written examination as 585 out of 900 and in the practical examination 172 out of 200. This he did by adding up certain marks which had been given out of 100 in the marksheet. The total marks mentioned was 757 out of 1100 obviously as the marksheet mentioned these marks as the grand total. The petitioner did not realize that marks for the practical examination were separate and in fact, he had secured 85 out of 100 and these 85 marks should have been added by him to 757 marks as he had actually secured 842 marks. But he mentioned only 757 marks as the grand total based on the entry in the marksheet.

5. Considering the very format of the marksheet, which was quite confusing, the University issued a notice dated 04.12.2020 (Annexure-11) that the written examination comprised of 1100 marks whereas the

practical examination was of 100 marks and directed the System Manager, Computer Center to upload the same on the website of the University and a direction was also given to the Deputy Registrar, Public Information to dispose of the matters in the light of the aforesaid.

6. So, what comes out is that it is not a case where the petitioner had mentioned more marks than he had actually obtained. In fact, he had mentioned 85 marks less than what he had actually obtained because of the aforesaid confusion. Therefore, evidently no advantage was claimed deliberately or otherwise by the petitioner. In fact, he put himself in a disadvantageous position.

7. This is why in consideration of Government Order dated 04.12.2020, the District Level Committee took a decision to offer appointment to the petitioner.

8. At this stage, it is not out of place to mention that subsequently another Government Order dated 05.03.2021 was issued which is also on record. The case of the petitioner is that the said Government Order permitted ignoring such discrepancies, if documentary basis of the same could be shown by the candidate. He says that there was documentary basis in the form of the format of the marksheet and the clarification issued by the University itself which was proof enough to show that the format of the marksheet was quite confusing and several such issues had arisen leading to a situation where the University had to direct its officials to upload such clarification and dispose of the grievances accordingly.

9. However, after issuance of Government Order dated 05.03.2021, the matter of the petitioner was reconsidered along with others and ultimately, in view of the discrepancies already discussed, the petitioner's appointment/ selection was recommended for cancellation by the District Level Committee. Consequent to which, the Basic Education Officer cancelled the appointment of the petitioner. Both these events happened on 19.06.2021 and are impugned before this Court.

10. The petitioner being aggrieved approached this Court vide Writ Petition No.13814 (S/S) of 2021 'Chandra Shekhar Dwivedi vs. State of U.P. & Ors.' wherein the contentions of rival parties were considered and the Single Judge Bench of this Court also noticed the decision of Hon'ble the Supreme Court dated 08.04.2021 rendered i**n 'Jyoti Yadav and another vs. State of U.P. & others'** Writ Petition (Civil) No.322 of 2021 as also another decision of Hon'ble the Supreme Court dated 26.06.2021 rendered in **'Rahul Kumar vs. State of U.P. & others'** Writ Petition(s) (Civil) No(s).378 of 2021. On a statement being made by learned counsel for the Board that the Secretary of Basic Education Board, Prayagraj would look into the representation of the petitioner, the matter was disposed of on 27.07.2021 with these observations:-

"On the other hand, Sri Ran Vijay Singh, learned Additional Chief Standing Counsel as well as learned counsel for the Secretary, Board of Basic Education, Prayagraj has submitted that this eventuality may very well be looked into by the Secretary, Board of Basic Education, Prayagraj, therefore, the petitioner may prefer a representation to such authority taking all pleas and grounds and the directions may be issued, in the interest of justice, for disposal of such representation.

This is a fair proposition, therefore, I hereby dispose of this writ petition finally permitting the petitioner to prefer a fresh representation to the Secretary, Board of Basic Education, Prayagraj taking all pleas and grounds which are available with him enclosing therewith the copies of all the relevant documents which are necessary for disposal of the representation within a period of fifteen days and if such representation is preferred by the petitioner within the aforesaid stipulated time, the Secretary, Board of Basic Education, Prayagraj shall consider and decide the representation of the petitioner strictly in accordance with law by passing a speaking and reasoned order, with expedition, preferably within a period of three weeks from the date of presentation of a certified / computerized copy of this order along with representation and the decision thereof be intimated to the petitioner forthwith.

It is made clear that this is a case of appointment and the petitioner appears to be a meritorious candidate, therefore, the decision shall be taken by the Competent Authority in view of the directions being issued by the Hon'ble Apex Court in the aforesaid two judgments.

It has been informed by Sri Pathak, learned counsel for the petitioner that consequent to the impugned order dated 19.06.2021, the authority concerned has issued recovery order against the petitioner, which has been received by the petitioner Yesterday i.e. 26.07.2021, therefore, he could not bring that order before the Court. He has requested that the recovery order may be kept in abeyance till appropriate decision is taken by the Secretary, Board of Basic Education, Prayagraj.

Considering the aforesaid request of Sri Pathak, learned counsel for the petitioner and consenting with the learned counsel for the opposite parties on that point, I hereby direct that no coercive action shall be taken against the petitioner till the appropriate decision is taken by the Secretary, Board of Basic Education, Prayagraj in terms of direction being issued by this Court. While taking appropriate decision in terms of order of this Court, the impugned order dated 19.06.2021 shall be ignored.

In view of the above, the writ petition is disposed of finally.

Order Date :- 27.7.2021"

11. However, in pursuance of the aforesaid, on a consideration of the matter, the representation of the petitioner has been rejected on 23.11.2021. The Secretary of the Board has referred to various decisions of this Court and also the decisions of Hon'ble the Supreme Court rendered in the case of **Jyoti Yadav (supra**). However, he has quoted only three lines of the said judgment and has not referred to what has been said by Hon'ble the Supreme Court in the body of the judgment which shall be considered hereinafter. It has been opined in the impugned order that the petitioner had mentioned less marks while mentioning the grand total marks obtained by him in the training examination whereas he had mentioned higher marks in the practical examination. It has also been referred that a declaration was made by the petitioner in the application form itself that he had compared the entries in the application form with original documents and had found it to be correct and that he would not be entitled to modify the entries subsequently.

12. The petitioner worked for about three months and was paid salary before cancellation of his appointment.

13. It is not a case where at the stage of scrutiny of application or counseling itself, the candidature of the petitioner was rejected on account of the discrepancies noticed hereinabove but a case where the discrepancies were noticed, a Government Order dated 04.12.2020 was issued as already referred hereinabove, in the light of which the District Level Committee considered the case of the petitioner along with similarly situated persons as the number of such candidates was very large and after such consideration with due and proper application of mind, the District Level Committee was of the opinion that the petitioner should be offered appointment, obviously because, he had not gained anything by mentioning different marks. It is a case where after having worked for about five months and payment of three months' salary to him, the appointment has been cancelled on the aforesaid ground.

14. Sri Ran Vijay Singh, learned counsel for the Board has invited the attention of the Court to a Division Bench judgment of this Court rendered in Special Appeal Defective No.716 of 2021 [Richa Tripathi vs. State of U.P. and others] arising out of Writ Petition No.7746 of 2021 decided on 27.10.2021. He has also referred to a declaration given by the petitioner in his form as contained at page no.73, according to which, if on inquiry, before or after examination/ selection any detail given by the candidate is found to be false or incorrect then the concerned authority would be entitled to cancel the candidature and also to initiate legal proceedings. If any information is found to be incorrect then the candidate would be entirely responsible for the same. The details as mentioned in the registration form had been compared with the originals and found to be correct and was therefore, agreeable to submitting the same finally. After submission of such form finally he would not have any right to modify the same. Based on this, he contended that the impugned order is not liable to be interfered.

15. At this stage itself, it needs to be mentioned even at the cost of repetition that the petitioner's candidature was not rejected in terms of the aforesaid declaration at the stage of counseling or even at any stage prior to offering him appointment. In fact, to the contrary, in pursuance to the Government Order dated 04.12.2020, which would, in the facts of the case, supersede such declaration, by the conduct of the opposite parties themselves who issued the said Government Order, the petitioner's case was liable to be considered in the light thereof along with others and the same was in fact considered and then a conscious decision was taken to offer him appointment for obvious reasons which have already been mentioned.

16. Learned counsel for the petitioner has relied upon another Division Bench decision rendered recently on 08.03.2022 in Special Appeal No.69 of 2022 '**Secy. Basic Edu. Board & Ors. vs. Jubeda Bano**' wherien the judgment of **Richa Tripathi (supra)** was also cited and the said Division Bench on a consideration of law on the subject including two Supreme Court's decision, one in the case of **Jyoti Yadav (supra)** which was also considered in **Richa Tripathi (supra)** and another

subsequent decision in the case o**f Rahul Kumar (supra),** clarified the law as under:-

"In our opinion, when we examine the Government Orders dated 05.03.2021 and 04.12.2020 what we find is that the said Government Orders have been issued with a purpose. The purpose, in our view, is that no candidate should be permitted to rectify any mistake committed by him/her while filling up online application form so as to avoid have ultimate impact on smooth conduct of the selection process and to avoid any alternation or change in the inter se merit of the candidates which would lead to any alternation/change in the final merit/select list. If a candidate furnishes some information in his/her online application form which, as is a present case, does not put him/her in any advantaged situation, in our considered opinion, such effors are not liable to be treated as the basis for rejecting the candidature of such a candidate.

In a case where a candidate indicates more marks than he/she has actually obtained, he/she puts himself/herself in an advantaged position. Similarly in a case where a candidate indicates less marks then total marks prescribed in an examination conducted by the Examining Body then in this situation as well the candidate puts himself/herself in an advantaged position. In both these situations, if the application form contains such mistake, it will not only impede the smooth selection process but such mistake will have the potential of altering or changing the inter se merit of the candidates as also the entire final merit/select list.

In our opinion, the guidelines issued by means of the Government Order dated 01.12.2018 and the provisions contained in the Government Orders dated 05.03.2021 and 04.12.2020 are meant to check and prevent any such situation where the selection process gets impeded or such mistake has the potential of altering inter-se merit of the candidate as also the final list/select list. The judgment rendered by Hon'ble Supreme Court in the case of Rahul Kumar (supra) is very relevant to be referred to at this juncture itself. Hon'ble Supreme Court in the said case of Rahul Kumar (supra) has clearly considered point no.2 of the Government Order dated 04.12.2020. The reference of the said Government Order has been made in para 3 of the said judgment which is extracted herein below:

" Government Order dated 04.12.2020 (the G.O., for short) dealt with as many as 21 points of discrepancies which could possibly have crept in while filling up online application forms by the candidates. Point No.2 of said G.O. is of some relevance and is being quoted hereunder for facility.

Point No.2: Discrepancy in the Marks obtained and Total marks of High School, Intermediate, Graduation, Training and to the total marks and marks obtained received from the excel sheet of the candidate. In relation to the above type of discrepancies following action to be taken has been decided."

Their Lordships of Hon'ble Supreme Court have clearly interpreted the said provision contained in point no.2 of the Government Order dated 04.12.2020 in para 7 of the said judgment which is also extracted hereunder;

"We need not consider individual fact situation as the reading of the G.O. and the Circular as stated above is quite

clear that wherever a candidate had put himself in a disadvantaged oposition as stated above, his candidature shall not be cancelled but will be reckoned with such disadvantage as projected; but if the candidate had projected an advantaged position which was beyond his rightful due or entitlement, his candidature will stand cancelled. The rigour of the G.O. and the Circular is clear that wherever undue advantage can ensure to the candidate if the discrepancy were to go unnoticed, regardless whether the percentage of advantage was greater or lesser, the candidature of such candidate must stand cancelled. However, wherever the candidate was not claiming any advantage and as a matter of fact, had put himself in a disadvantaged position, his candidature will not stand cancelled but the candidate will have to remain satisfied with what was quoted or projected in the application form."

From the aforequoted portion of the judgment in the case of Rahul Kumar (supra) rendered by Hon'ble Supreme Court, it is abundantly manifest that rigor of the Government Order is clear according to which whenever any undue advantage ensues to the candidate on account of the discrepancy committed by him/her while filling up online application form, then the candidature of such a candidate must be cancelled. However, if by the discrepancy committed while filling up online application form the candidate concerned puts herself in a disadvantaged situation his/her candidature need not be cancelled but such a candidature will be reckoned with such disadvantage as projected in the application form.

In the present case, the facts as discussed above, which are not in dispute, clearly establish that on account of error while indicating the high school marks in her online application form due to inadvertent mistake, the respondent-petitioner neither put herself in disadvantaged position nor in an advantaged position. The percentage of the marks of the respondent-petitioner in her high school examination is 89.3% and it is this percentage which was taken into account by the appellants-State authorities while reckoning the quality point marks. In such a situation it cannot be said by any stretch of imagination that by mistakenly indicating the High School marks in her on-line application form the respondent-petitioner put herself in any advantaged position so as to make her candidature liable for cancellation.

We have already observed that the Government Orders dated 05.03.2021 and 04.12.2020 as also the guidelines contained in the Government Order dated 01.12.2018 are to be given effect to. However, any mindless application of the provisions contained in the said Government Orders has the potential of denying rightful claim of a deserving candidate who not only qualified in the written examination but also was ultimately selected in the final select list. The validity of the Government Order dated 05.03.2021 has already been upheld by this Court in the case of Jyoti Yadav and another (supra) but so far as its application is concerned, Hon'ble Supreme Court in the case of Rahul Kumar (supra) has made it absolute clear that the candidature of a candidate is liable to be cancelled only in case such a candidate puts himself/herself in an advantaged position by committing some mistake while submitting the on-line application form.

In the light of the discussions made and for the reasons given above, this Court finds itself in agreement with the

conclusion drawn by the learned Single Judge and hence any interference in the judgement and order under appeal herein will be unwarranted.

The Special Appeal, thus, lacks merit which is hereby dismissed.

However, there will be no order as to costs. "

17. Learned counsel for the petitioner contended that in **Richa Tripathi's case (supra)**, the observations of Hon'ble the Supreme Court as considered subsequently by another Division Bench judgment in **Jubeda Bano's case (supra)** have not been taken note of wherein it has been categorically held that on a reading of the Government Order and Circulars applicable it is quite clear that wherever a candidate had put himself in a disadvantageous position as stated above his candidature shall not be cancelled but will be reckoned with such disadvantage as projected. But if the candidate had projected an advantageous position which was beyond his rightful due or entitlement his candidature will stands cancelled. Based on this, he says that case of the petitioner is fairly covered by the decision of Hon'ble the Supreme Court in **Jyoti Yadav's case (supra)** as the petitioner had put himself in a disadvantaged position as already mentioned hereinabove by mentioning less marks than what he had actually secured. The fact that more marks had been mentioned in practical examination would be of no consequence as it is the grand total which is considered and that grand total was less than the actual grand total marks obtained.

18. Both the decisions in Jyoti Yadav (supra) and Rahul Kumar (supra) pertain to same selection and the G.Os. applicable are also same. The Court may refer to the relevant portion of the judgment in **Jyoti Yadav's case (supra**) wherein the law on the subject at least so far as the selection at hand is concerned have been dealt with:

"13. The stand of the State is that every candidate was obliged to fill up the relevant entries in the application form correctly and specially those pertaining to the marks obtained by the candidates in various examinations with due care and caution. The information given in the application form would reflect in quality points of the candidates and have a direct bearing on the merit list. That would in turn, not only determine the inter se merit but afford guidance to cater to the choices indicated by the candidates. The declaration which was spelt out in the Guidelines and repeated in the Advertisement, had clearly put every candidate to notice that if there be any mistake in the application form, the candidate could not claim any right to have those mistakes rectified.

14. Wherever the mistakes committed by the candidates purportedly gave additional marks or weightage greater than what they actually deserved, according to the Communication dated 05.03.2021, their candidature would stand rejected. However, wherever mistakes committed by the candidates actually put them at a disadvantage as against their original entitlement or the variation could be one attributable to the University or issuing authority, an exception was made by said Communication. The reason for treating these two categories of candidates differently cannot thus be called irrational.

In the first case, going by the marks or information given in the

application form the candidate would secure undue advantage whereas in the latter category of cases the candidate would actually be at a disadvantage or where the variation could not be attributed to them. The candidates in the latter category have been given a respite from the rigor of the declaration. The classification is clear and precise. Those who could possibly walk away with the undue advantage will continue to be governed by the terms of the declaration, while the other category would be given some relief.

15. Having considered all the rival submissions, in our view, the Communication dated 05.03.2021 made a rational distinction and was designed to achieve a purpose of securing fairness while maintaining the integrity of the entire process. If, at every juncture, any mistakes by the candidates were to be addressed and considered at individual level, the entire process of selection may stand delayed and put to prejudice. In order to have definiteness in the matter, certain norms had to be prescribed and prescription of such stipulations cannot be termed to be arbitrary or irrational. Every candidate was put to notice twice over, by the Guidelines and the Advertisement.

16. Having found the Communication dated 05.03.2021 to be correct, the cases of the petitioners must be held to be governed fully by the rigors of the said Communication.

17. We, therefore, see no reason to interfere in these petitions and no opportunity beyond the confines of the Communication dated 05.03.2021 can be afforded to the petitioners to rectify the mistakes committed by them. We, therefore, reject the submissions and dismiss all these petitions."

19. The Court may also fruitfully refer to the subsequent decision of Hon'ble the Supreme Court in the case of **Rahul Kumar (supra)**:-

"7. We need not consider individual fact situation as the reading of the G.O. and the Circular as stated above is quite clear that wherever a candidate had put himself in a disadvantaged position as stated above, his candidature shall not be cancelled but will be reckoned with such disadvantage as projected; but if the candidate had projected an advantaged position which was beyond his rightful due or entitlement, his candidature will stand cancelled. The rigour of the G.O. and the Circular is clear that wherever undue advantage can enure to the candidate if the discrepancy were to go unnoticed, regardless whether the percentage of advantage was greater or lesser, the candidature of such candidate must stand cancelled. However, wherever the candidate was not claiming any advantage and as a matter of fact, had put himself in a disadvantaged position, his candidature will not stand cancelled but the candidate will have to remain satisfied with what was quoted or projected in the application form.

These petitions are, therefore, disposed of in the light of what is stated above.

8. It must however be stated here that the authorities are not strictly following the intent of the G.0. example, and the Circular. For example, the Office Order dated 28.03.2021 issued by the Basic Teacher Education Officer, District Hardoi, shows cancellation of the candidature of one Raghav Sharan Singh at Serial No.4, though the projection of marks by way of mistake by said candidate was to

his disadvantage. Logically, said candidate would be entitled to have his candidature considered and reckoned at the disadvantaged level. The record shows that even with such disadvantage, the candidate was entitled to be selected.

9. We have given this illustration only by way of an example. The authorities shall do well to consider every such order issued by them and cause appropriate corrections or modifications in the light of conclusions stated above.

10. With these clarifications, the instant petitions are disposed of.

P*ending applications, including miscellaneous application also stand disposed of."*

20. In **Jyoti Yadav's case (supra**), the Government Order dated 05.03.2021 has also been considered and the law in this regard has been categorically clarified as is mentioned in para nos.14 and 15 of the said decision quoted hereinabove. It has been categorically held that wherever the mistakes committed by the candidates purportedly gave additional marks or weightage greater than what they actually deserve, according to the communication dated 05.03.2021, their candidature would stand rejected. However, wherever mistakes committed by the candidates actually put them at the disadvantage as against their original entitlement or the variation could be one attributable to the University or issuing authority, an exception was made by said communication, the reason for these two categories of candidates differently cannot thus be called irrational. From the facts as discussed hereinabove, it is apparent that the petitioner herein falls in the category of those candidates who had actually put themselves at a disadvantaged position and therefore, even as per **Jyoti Yadav's case (supra**), the case of the petitioner is covered for grant of relief as observed therein.

21. The decision rendered in **Rahul Kumar's case (supra**) has not been considered by Division Bench judgment in **Richa Tripathi's case (supra**) whereas the same has been considered by another Division Bench in **Jubeda Bano's case (supra)** as already discussed and quoted hereinabove.

22. Most importantly, an affidavit was sought from the petitioner at the time of offering appointment to him which was submitted on 09.12.2020, a copy of which is annexed at page no.109, according to which, he had given an undertaking that he would abide by the disadvantageous position in which he had put himself and would not claim any advantage of the higher marks which he had actually obtained so that merit of the candidates inter se at the selection is not disturbed. Therefore, by offering appointment to the petitioner and by interfering with the impugned order, *inter se* merits of the candidate does not at all get affected in view of the undertaking already given by the petitioner.

23. In view of the above discussion, the impugned order for the reasons given therein cannot be sustained on facts and in law, therefore, the impugned orders are hereby quashed. The petitioner shall be restored in service in pursuance to the appointment letter dated 27.01.2021 with continuity in service. The petitioner shall be entitled to salary for the period actually worked but the entire period as above shall be treated as in service.

24. Accordingly, the writ petition is **allowed.**

(2022)03ILR A564
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.12.2021

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Writ A No. 4528 of 2019

Yatendra Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Samir Sharma, Sri Ajay Kumar Srivastava

Counsel for the Respondents:
C.S.C., Sri Sunil Kumar Misra

A. Service Law – UP State Road Transport Corporation Employees (other than officers) Service Regulations, 1981 – Reg. 64 – Disciplinary enquiry – Removal from service – Validity – Charges denied – Documents which had a direct bearing on the charge levelled against the petitioner, had not been supplied to him – Effect – Held, the enquiry proceeding has been conducted in violation of Regulation 64(2) and 64(3) of Regulation, 1981 (Para 24 and 25)

B. Constitution of India – Article 226 – Writ – Maintainability – Alternative remedy – When writ power can be exercised, explained – Violation of natural justice – Effect – Apex Court has carved out an exception where despite there being an alternative remedy, this Court under Article 226 of the Constitution of India can exercise its power to entertain the writ petition. The exception carved out are where there is a violation of principles of natural justice, inherent lack of jurisdiction, challenge to an act, and any provision or for enforcement of fundamental rights – Held further, more than nine years have passed since the petitioner is out of employment. Considering the fact that the petitioner would retire in a few years, this Court believes that it would be harsh upon the petitioner if the matter is again remanded to the authorities concerned. (Para 28 and 34)

C. Constitution of India – Article 14 – Principle of natural justice – Orders passed are cryptic and bereft of reasons – Effect – Held, the impugned orders have been passed in violation of principles of natural justice. (Para 31)

D. Constitution of India – Article 14 – Principle of natural justice – Necessary documents demanded by the petitioner to submit his defence have not been supplied to the petitioner – Effect – Held, the impugned orders have been passed in violation of principles of natural justice. (Para 31)

Writ petition allowed. (E-1)

List of Cases cited :-

1. Ravi Yashwant Bhoir Vs Collector; (2012) 4 SCC 407

2. Satwati Deswal Vs St. of Har. & Ors.; (2010) 1 SCC 126

3. Civil Appeal No.5728 of 2021; M/s Magadh Sugar & Energy Ltd. Vs The State of Bihar & Ors.

4. Allahabad Bank & anr. Vs Krishna Narayan Tewari; (2017) 2 SCC 308

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

1. Heard Sri Samir Sharma, Advocate assisted by Sri Ajay Kumar Srivastava, learned counsel for the petitioner, and Sri Sunil Kumar Mishra, learned counsel for the Transport Corporation.

2. The petitioner by means of the present writ petition has assailed the order of punishment dated 05.11.2012, the

appellate order dated 10.12.2014, and the revisional order dated 13.12.2018.

3. The brief facts of the case are that the petitioner was a conductor and was posted at Kaushambi, Ghaziabad region. The petitioner was issued a charge sheet dated 14.06.2010, in which there are two charges against the petitioner which read as under:

"(i) On 21.04.2010 the petitioner was deputed on A.C. Sleeper Bus No. UP 11 T-1120 of Kaushambi Depot of Ghaziabad Region of the Corporation plying on Delhi-Lucknow route. The duty slip no.236385 had been issued to the petitioner at about 20:10 hours for plying aforesaid Bus for 1060 K.Ms. Alongwith the petitioner, Sri Jitendra Kumar (Driver) and Sri Virendra Singh (spare driver) were on duty on the aforesaid bus. On 22.04.2010, at about 14:30 hours the aforesaid bus was taken to Kesarbagh Depot for filling diesel. One Anil Kumar Sharma (conductor) Kaushambi Depot who was issued duty slip on 21.04.2010 on Haridwar route for Bus No. UP 14 AE/9402, submitted an application in petitioner's name to the Station Incharge, Kesarbagh Depot for filling diesel. When the Station Incharge asked Sri Anil Kumar Sharma for his identity card, he could not show the same and instead by making an excuse, slipped away. The Station Incharge, Kesarbagh Depot thereafter, on an application of the driver of the bus, got 120 liters diesel filled up in the bus and provided the conductor and driver of Kesarbagh Depot duty slip no.069611 for plying of the bus on the return journey.

The petitioner in order to conceal the aforesaid misconduct, in collusion with the driver, reported that the bus was defective due to which it could not be plied. Thereafter on 23.04.2010, the petitioner submitted an application at 10:30 hours to the Station Incharge, Kesarbagh Depot giving the details of the defect in the bus.

The charge leveled against the petitioner is that on 22.04.2010, the petitioner in an unauthorised manner and collusion with another conductor, plied A.C. Sleeper Bus No. UP 11 T-1120 and tried to conceal the aforesaid fact by falsely reporting the bus being defective. Due to which bus was not plied for 48 hours, the Corporation suffered loss and the passengers reported inconvenience.

(ii) Further (according to the report of Station Incharge Kaushambi) on 02.03.2010, 07.03.2010, 08.03.2010, 13.03.2010, 21.03.2010, 22.03.2010, 24.03.2010, 25.03.2010, 05.04.2010, 06.04.2010, 10.04.2010, and 17.04.2010, the waybills used by the petitioner were examined and it was found that handwriting on the waybills was of different persons, which indicated that the petitioner had allowed some unauthorized person to perform the duty of conductor on the aforesaid dates, because of which the load factor achieved by the bus was very low.

Thus, the petitioner had allowed an unauthorized person to ply the Corporation bus on the aforesaid dates in a preplanned manner and thereby embezzled Corporation revenue causing loss to the Corporation."

4. The petitioner submitted a reply to the charge sheet on 30.09.2010 denying all the charges. The case of the petitioner in the reply was that on 22.04.2010, at 14:30 hours the bus had developed a technical

snag in AC about 20 Kms. before Lucknow due to which, the passengers of the bus were transferred and sent by another bus. The empty bus was taken, thereafter, to the Kesarbagh workshop where the petitioner had submitted an application for filling up diesel in the bus. The petitioner's identity card was asked for, but as he did not have an identity card with him, he showed his slip no. 236385 with the request to fill up diesel and went to search for the private mechanic to get the defect in the air conditioner of the bus rectified. According to the petitioner, he had written on the back of the duty slip the defect in the air conditioner of the bus. He, thereafter, contacted Kaushambi depot on the telephone and informed him about the defect in the air conditioner of the bus. He was told that the help would come from Kanpur for rectification of the air conditioner and Shyam Service Centre, Kanpur has been contacted for that purpose.

5. The further contention of the petitioner was that on 22.04.2010, he could not find any private mechanic, he came back to Kesarbagh Bus Station at about 23:00 hours and went off to sleep. On 23.04.2010, the petitioner met the Station In-charge at about 10:30 hours, the petitioner was issued another duty slip at about 17:00 hours and he was directed to take the bus to Alambagh Bus Stand where at about 22:00 hours the mechanic had arrived from Kanpur and defect in the bus was rectified by 02:00 hours on 24.04.2010. The next trip was on 24.04.2010 at 21:30 hours for which the bus was booked on the booking counter and was taken to Delhi where it reached on 25.04.2010 wherefrom it was taken to Kaushambi workshop at 11:00 hours and the cash was deposited by the petitioner.

6. The petitioner in his reply has also specifically stated that the entire evidence mentioned in the charge sheet had not been furnished to him. The petitioner on 19.07.2010 submitted an application before the enquiry officer requesting him to supply several documents having a material bearing on the two charges of misconduct leveled against him which the petitioner needs for refuting charges against him. As regards the first charge the following documents were sought by the petitioner:

(i) Copy of letter/application of Sri Anil Kumar Sharma (Conductor) submitted before the Station In-charge, Lucknow on 22.04.2010.

(ii) Copy of the duty slip no. 6961 and the name of the driver/conductor of Kesarbagh Depot who had allegedly taken the bus back.

(iii) Copy of the petitioner's letter dated 23.04.2010 submitted before the Station In-charge, Kesarbagh Depot.

(iv) Copy of the documents as mentioned in the 20th line of first paragraph of the charge sheet.

(v) The statement of the employee who had provided technical help from Kanpur.

(vi) Copy of the defect as noted by driver of A.C. Sleeper Bus No. UP 11 T-1120.

In respect of second charge the following two documents were sought:

(i) The copies waybills as used by the petitioner on various dates (12 dates)

(ii) Details of load factor given by other conductors of the Depot during the period/on the dates, it is alleged that the petitioner had given very low load factor from 08.03.2010 to 18.04.2010.

7. The petitioner on 31.08.2010 informed the enquiry officer that none of the documents sought by him through his letter dated 17.08.2010 had been furnished to him.

8. In the departmental enquiry one Pramod Tripathi, Station In-charge Kesarbagh gave his statement. The petitioner was allowed to cross-examine Pramod Tripathi. In the cross-examination, he admitted that he did not remember that on 22.04.2010 whether the petitioner or somebody else had approached him with the application for getting diesel filled in the bus. One Hakim Singh, Traffic Superintendent, Kaushambi Depot also appeared before the enquiry officer on 29.04.2011 and was cross-examined by the petitioner, he admitted that the load factors given by other conductors were less than the petitioner.

9. The petitioner submitted his statement of defence before enquiry officer on 18.05.2011. The enquiry officer found the charge of misconduct against the petitioner proved and submitted the enquiry report to the disciplinary authority. The petitioner was, thereafter, issued a notice to show cause as to why his unpaid pay for suspension period be not forfeited along with other dues and he may not be removed from service.

10. The petitioner on 22.02.2012 submitted a reply to the show cause notice dated 28.12.2011. The Regional Manager, Ghaziabad-respondent no.6 being dissatisfied with the reply of the petitioner passed on order dated 05.11.2012 punishing removal from service and forfeiture of unpaid pay of suspension period and other dues of the petitioner. The petitioner, thereafter, preferred a departmental appeal which was also dismissed, and the revision preferred against the said order was also dismissed by order dated 13.12.2018.

11. In the counter affidavit filed by the respondent, the main plea which has been taken is that the petitioner has an alternative remedy by raising an industrial dispute before the Labour Court. Besides the above, the respondent has denied the assertions made in the writ petition.

12. Challenging the aforesaid impugned orders, learned counsel for the petitioner contended that the order of disciplinary authority suffers from the manifest error of law and has been passed in violation of principles of natural justice. In elaborating the said argument, he submitted that the petitioner has demanded documents by letter dated 19.07.2010 and 31.08.2010, but those documents which had a direct bearing upon the charges levelled against the petitioner were not supplied to the petitioner and hence, has caused serious prejudice to the petitioner. Thus, the orders impugned are not sustainable.

13. Learned counsel for the petitioner further contended that the petitioner has requested for examining several witnesses in defence which though have been noted by the enquiry officer in the enquiry report but the enquiry officer did not permit the petitioner to examine those witnesses. Accordingly, it is submitted that the departmental enquiry was conducted in

violation of Regulation 64 (2) and 64 (3) of U.P. State Road Transport Corporation Employees (Other than Officers) Services Regulations, 1981.

14. Learned counsel for the petitioner further urged that the reply of the petitioner was not considered either by the disciplinary authority or the appellate authority or the revisional authority and as the impugned orders are bereft of reasons, therefore, it is evident that the impugned orders lack complete application of mind by the authorities. Lastly, he contends that about nine years have passed from the date of removal from service and the petitioner is due to retire shortly, and it would be harsh upon the petitioner if the matter is remitted to the authority concerned to consider afresh.

15. Per-contra, learned counsel for the respondent corporation would contend that the petitioner has the alternative remedy to approach industrial tribunal as the issues which arise for adjudication are disputed question of fact, and as such he submits that the writ petition is liable to be dismissed on the ground of alternative remedy. It is further contended that the enquiry officer has considered every aspect of the matter with precision, and after considering evidence and material on record held that both the charges against the petitioner are proved. It is further contended that the principles of natural justice have been followed, and hence this is not a case that warrants interference by this Court under Article 226 of the Constitution of India.

16. To the aforesaid contention, learned counsel for the petitioner submits that where the order impugned has been passed without adhering to the principles of natural justice, the alternative remedy is not a bar to entertain the writ petition. He further submits that even otherwise if the writ petition is pending for long and pleadings have been exchanged between the parties, the writ petition may be decided on merit, instead of the petitioner being relegated to the alternative remedy.

17. I have heard learned counsel for the petitioner and learned Standing Counsel for State-respondents.

18. The two charges levelled against the petitioner have been extracted above. The petitioner in reply to those charges has denied the charges and has sought necessary documents which had bearing on the charges by letter dated 19.07.2010 and 31.08.2010. The petitioner in this respect has made necessary averment in paragraphs no. 11, 13, 30, and 32 of the writ petition. The respondent has replied to the aforesaid paragraphs in paragraphs no. 13 and 32 of the counter affidavit which is reproduced herein below:

"13. That the contents of paragraph no.11, 12, and 13 of the Writ Petition are matter on record and averment contrary to record are denied and in reply thereto it is stated that the documents demanded by the petitioner were supplied as admitted in paragraph no.12 of the Writ Petition.

32. That the contents of paragraphs no.30, 31, and 32 of the Writ Petition are incorrect and misconceived hence not admitted and denied, and in reply thereto it is stated that the and ample opportunity of hearing and leading evidence including the cross-examination of reporters and explanation was afforded to the petitioner and the enquiry officer has

concluded the enquiry at the satisfaction of the petitioner. Both the reporters (Sri Pramod Tripathi and Sri Hakim Singh) were examined in the presence and hearing of the petitioner and cross-examined by the petitioner also. It is stated that the documents demanded by the petitioner were supplied."

19. The perusal of paragraph no. 13 and 32 of the counter affidavit reveals that the fact that the petitioner has demanded documents by two letters dated 19.07.2010 and 31.08.2010 have not been denied by the petitioner. It is only stated that the documents demanded by the petitioner were supplied. The averments in this regard are vague inasmuch as the respondent has not brought on record any evidence and material to demonstrate that the documents demanded by the petitioner have been supplied to him. The averments in paragraph no. 13 of the counter affidavit that the petitioner has admitted in paragraph 12 of the writ petition that he was supplied the documents are incorrect inasmuch as the petitioner in paragraph 12 in the writ petition has stated that in response to the letter dated 17.08.2010, he was informed that all the documents have already been furnished to him. The assertion made in paragraph 12 of the writ petition is not the admission by the petitioner regarding the furnishing of documents demanded by him by letter dated 17.08.2010.

20. Averments made in paragraph 32 of the counter affidavit are also general in nature. At this juncture, it would be relevant to refer to the letter of the petitioner dated 31.08.2010 wherein he has stated that in absence of the supply of the documents demanded by him by letter dated 19.07.2010, he is not able to furnish a reply to the charge sheet.

21. At this point, it would be apt to have a glance at Regulation 64 of the U.P. State Road Transport Corporation Employees (other than officers) Service Regulations, 1981 which reads as under:

"64. (1) Without prejudice to the right to terminate the services in accordance with regulation 29 no order, (other than order based on facts which had led to his conviction in a criminal court) of dismissal, removal or reduction in a rank, which includes, reduction to a lower post or time scale or to a lower stage in the time scale but excludes the reversion to a lower post of a person who is officiating on a higher post, shall be passed against an employee unless he has been afforded adequate opportunity of defending himself.

64 (2) The ground on which it is proposed to take action shall be reduced in the form of a definite charge or charges which along with the evidence proposed to be relied upon in support of the charge shall be communicated to the person charged and he shall be required, with in a reasonable time, to put in a written statement of his defence and to state whether he desires to examine or cross-examine any witness and whether he desires to be heard in person. He shall also be informed that, in case he does not file a written statement of his defence, it will be presumed that he has none to furnish and orders w

64(3) If the employee desires or the Enquiry Officer considers it necessary, an oral inquiry shall be held in respect of such allegations as are not admitted. At the enquiry such oral evidence shall be heard as the Enquiry Officer considers necessary, the person charged shall be entitled to cross-examine the witnesses, to give

evidence in person and to have such witnesses called as he may wish, provided that the officer conducting the enquiry may for sufficient reasons to be recorded in writing refuse to call or examine any witness."

22. Regulation 64(2) of Regulations, 1981 casts a duty upon the employer that the evidence proposed to be relied upon in support of charge shall be communicated to the person charged and he shall be given reasonable time to submit his defence and to state whether he desires to examine or cross-examine any witness and whether he desires to be heard in person.

23. Regulation 64(3) of Regulation, 1981 also casts a duty upon the enquiry officer to permit the charged employee to cross-examine the witness, to give evidence in person, and to have such witnesses called as he may wish. It further provides that the officer conducting the enquiry may refuse to call for or examine any witness for sufficient reasons to be recorded in writing.

24. In the instant case, from the facts stated above it is evident that the petitioner had demanded several documents which had a direct bearing on the charge levelled against the petitioner, and non-supply of those documents has cast serious prejudice to the petitioner inasmuch as the petitioner had needed those documents to enable him to submit reply and defend his case properly.

25. From the facts as narrated above it is evident that documents demanded by the petitioner had not been supplied to him and hence, the enquiry proceeding has been conducted in violation of Regulation 64(2) and 64(3) of Regulation, 1981.

26. Further order passed by the disciplinary authority dated 05.11.2012 demonstrate that the disciplinary authority has narrated facts in detail but while holding the petitioner guilty on the charges has recorded one line finding "that despite giving ample opportunity of hearing the petitioner could not prove that the charges against him are false." Similarly, the order passed by appellate authority as well as the order passed by revisional authority is also bereft of reasons.

27. The Apex Court in the case of ***Ravi Yashwant Bhoir Vs. Collector, (2012) 4 SCC 407*** has held that the reasons are the bridge between facts and conclusion and are also one of the facets of natural justice. Paragraphs no. 38 and 42 of the judgment are reproduced herein as under:

"38. It is a 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.

42. In S.N. Mukherjee v. Union of India, AIR 1990 SC 1984, it has been held that the object underlying the rules of natural justice is to prevent miscarriage 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."

28. Now coming to the contention of the learned counsel for the respondents that the petitioner has the alternative remedy of

appeal, it is worth noticing the catena of judgments of the Apex Court wherein the Apex Court has carved out an exception where despite there being an alternative remedy, this Court under Article 226 of the Constitution of India can exercise its power to entertain the writ petition. The exception carved out are where there is a violation of principles of natural justice, inherent lack of jurisdiction, challenge to an act, and any provision or for enforcement of fundamental rights.

29. The Apex Court in the case of ***Satwati Deswal Vs. State of Haryana & Ors., (2010) 1 SCC 126*** has repelled the similar objection where the termination order was passed in violation of principles of natural justice. Relevant Paragraph 5 and 7 of the judgment are reproduced herein as under:

"5. In our view, the High Court had fallen in grave error in rejecting the writ petition on the aforesaid ground. First, such an order of termination was passed without issuing any show cause notice to the appellant and without initiating any disciplinary proceedings by the authorities and without affording any opportunity of hearing. It is well settled that a writ petition can be held to be maintainable even if an alternative remedy is available to an aggrieved party where the court or the tribunal lacks inherent jurisdiction or for enforcement of a fundamental right; or if there had been a violation of a principle of natural justice; or where vires of the act were in question.

7. Such being the position and in view of the admitted fact in this case that before termination of the services of the appellant, no disciplinary proceeding was initiated nor any opportunity of hearing given to the appellant. It is clear from the record that the order of termination was passed without initiating any disciplinary proceedings and without affording any opportunity of hearing to the appellant. In that view of the matter, we are of the view that the writ petition was maintainable in law and the High Court was in error in holding that in view of availability of alternative remedy to challenge the order of termination, the writ petition was not maintainable in law."

30. In the case of ***M/s Magadh Sugar & Energy Ltd. Vs. The State of Bihar & Ors. in Civil Appeal No.5728 of 2021,*** a similar view has been taken by the Apex Court. Relevant paragraph no. 19 of the judgment is reproduced herein as under:

19. While a High Court would normally not exercise its writ jurisdiction under Article 226 of the Constitution if an effective and efficacious alternate remedy is available, the existence of an alternate remedy does not by itself bar the High Court from exercising its jurisdiction in certain contingencies. This principle has been crystallized by this Court in Whirpool Corporation v. Registrar of Trademarks, Mumbai and Harbanslal Sahni v. Indian Oil Corporation Ltd. Recently, in Radha Krishan Industries v. State of Himachal Pradesh & Ors. a two judge Bench of this Court of which one of us was a part of (Justice DY Chandrachud) has summarized the principles governing the exercise of writ jurisdiction by the High Court in the presence of an alternate remedy. This Court has observed:

"28. The principles of law which emerge are that:

(i) The power under Article 226 of the Constitution to issue writs can

be exercised not only for the enforcement of fundamental rights, but for any other purpose as well;

(ii) The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person;

(iii) Exceptions to the rule of alternate remedy arise where (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of the principles of natural justice; (c) the order or proceedings are wholly without jurisdiction; or (d) the vires of a legislation is challenged;

(iv) An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law;

(v) When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion; and

(vi) In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with." ***(emphasis supplied)***

The principle of alternate remedies and its exceptions was also reiterated recently in the decision in Assistant Commissioner of State Tax v. M/s Commercial Steel Limited. In State of HP v. Gujarat Ambuja Cement Ltd. this Court has held that a writ petition is maintainable before the High Court if the taxing authorities have acted beyond the scope of their jurisdiction. This Court observed:

"23. Where under a statute there is an allegation of infringement of fundamental rights or when on the undisputed facts the taxing authorities are shown to have assumed jurisdiction which they do not possess can be the grounds on which the writ petitions can be entertained. But normally, the High Court should not entertain writ petitions unless it is shown that there is something more in a case, something going to the root of the jurisdiction of the officer, something which would show that it would be a case of palpable injustice to the writ petitioner to force him to adopt the remedies provided by the statute. It was noted by this Court in L. Hirday Narain v. ITO [(1970) 2 SCC 355: AIR 1971 SC 33] that if the High Court had entertained a petition despite availability of alternative remedy and heard the parties on merits it would be ordinarily unjustifiable for the High Court to dismiss the same on the ground of non-exhaustion of statutory remedies; unless the High Court finds that factual disputes are involved and it would not be desirable to deal with them in a writ petition."

31. As it is held above the impugned orders have been passed in violation of

principles of natural justice for two counts; the necessary documents demanded by the petitioner to submit his defence have not been supplied to the petitioner. Secondly, all the orders are cryptic and bereft of reasons. This Court finds that the objection raised by the respondents that the writ petition should be dismissed on the ground of alternative remedy is not sustainable in law.

32. As this Court has already held the orders impugned are not sustainable, therefore, the order of punishment dated 05.11.2012, the appellate order dated 10.12.2014, and the revisional order dated 13.12.2018 are hereby quashed.

33. Now coming to the question as to whether in the facts of the present case it would be appropriate to remand the matter back. In the present case, the charge sheet was issued to the petitioner in the year 2010 and disciplinary proceedings were concluded in the year 2012 by order dated 05.11.2012 imposing the punishment of dismissal. Thereafter, the appeal preferred by the petitioner was decided in the year 2014 and revision in the year 2018. Thereafter, the petitioner preferred the present writ petition challenging the aforesaid impugned orders.

34. More than nine years have passed since the petitioner is out of employment. Considering the fact that the petitioner would retire in a few years, this Court believes that it would be harsh upon the petitioner if the matter is again remanded to the authorities concerned. In the case of ***Allahabad Bank & Anr. Vs. Krishna Narayan Tewari, (2017) 2 SCC 308*** in an appeal preferred by the Allahabad Bank the Apex Court held that the order passed by the disciplinary authority and appellate authority was in violation of principles of natural justice and modified the order of the High Court to the extent that the respondent-employee shall be entitled to only 50% of salary from the date of his removal from service till the date of superannuation. Relevant paragraphs no. 7, 8, and 10 of the judgment are reproduced herein as under:

"7. We have given our anxious consideration to the submissions at the Bar. It is true that a writ court is very slow in interfering with the findings of facts recorded by a departmental authority on the basis of evidence available on record. But it is equally true that in a case where the disciplinary authority records a finding that is unsupported by any evidence whatsoever or a finding which no reasonable person could have arrived at, the writ court would be justified if not duty-bound to examine the matter and grant relief in appropriate cases. The writ court will certainly interfere with disciplinary enquiry or the resultant orders passed by the competent authority on that basis if the enquiry itself was vitiated on account of violation of principles of natural justice, as is alleged to be the position in the present case. Non-application of mind by the Enquiry Officer or the disciplinary authority, non-recording of reasons in support of the conclusion arrived at by them are also grounds on which the writ courts are justified in interfering with the orders of punishment. The High Court has, in the case at hand, found all these infirmities in the order passed by the disciplinary authority and the appellate authority. The respondent's case that the enquiry was conducted without giving a fair and reasonable opportunity for leading evidence in defence has not been effectively rebutted by the appellant. More importantly the Disciplinary Authority does

not appear to have properly appreciated the evidence nor recorded reasons in support of his conclusion. To add insult to injury the Appellate Authority instead of recording its own reasons and independently appreciating the material on record, simply reproduced the findings of the Disciplinary Authority. All told, the Enquiry Officer, the Disciplinary Authority and the Appellate Authority have faltered in the discharge of their duties resulting in miscarriage of justice. The High Court was in that view right in interfering with the orders passed by the Disciplinary Authority and the Appellate Authority.

8. There is no quarrel with the proposition that in cases where the High Court finds the enquiry to be deficient, either procedurally or otherwise, the proper course always is to remand the matter back to the concerned authority to redo the same afresh. That course could have been followed even in the present case. The matter could be remanded back to the Disciplinary Authority or to the Enquiry Officer for a proper enquiry and a fresh report and order. But that course may not have been the only course open in a given situation. There may be situations where because of a long time-lag or such other supervening circumstances the writ court considers it unfair, harsh or otherwise unnecessary to direct a fresh enquiry or fresh order by the competent authority. That is precisely what the High Court has done in the case at hand.

10. The next question is whether the respondent would be entitled to claim arrears of salary as part of service/retiral benefits in full or part. The High Court has been rather ambivalent in that regard. We say so because while the High Court has directed release of service/retiral benefits, it is not clear whether the same would include salary for the period between the date of removal and the date of superannuation. Taking a liberal view of the matter, we assume that the High Court's direction for release of service benefits would include the release of his salaries also for the period mentioned above. We are, however, of the opinion that while proceedings need not be remanded for a fresh start from the beginning, grant of full salary for the period between the date of dismissal and the date of superannuation would not also be justified."

35. In the facts of the present case, this Court also finds that as the petitioner is out of employment for about nine years and the disciplinary proceedings were not as per law, therefore, it would be in the interest of justice that the petitioner be reinstated in service with 50% back wages and all consequential benefits.

36. The writ petition is ***allowed*** with no order as to cost.

(2022)03ILR A574
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 08.03.2022

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.

Writ A No. 4813 of 2021

Dr. Sonal Sachadev Aurora ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Hari Prasad Gupta

Counsel for the Respondents:

C.S.C.

A. Service Law – Termination – Right of resignation – Grant of Child care leave, extension thereof prayed for – After refusal, the petitioner, being mother resigned from her post of Lecturer – Preliminary inquiry with regard to absence from duty initiated and charge-sheet was issued – Termination order from service was passed without fixing any date, time and place in the inquiry and in fact without conducting any type of inquiry and without taking any decision upon resignation of the petitioner – Validity challenged – Held, the petitioner had a right to resign – She is treated arbitrarily by the respondents. The respondents were bound to accept the resignation of petitioner and, there was no necessity to conduct any inquiry against the petitioner. Even otherwise the inquiry conducted without fixing any date, time, and place and evidence itself is vitiated. (Para 3 and 6)

Writ petition allowed. (E-1)

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

1. Heard learned counsel for petitioner and learned Standing Counsel for the State.

2. Despite the best efforts of all still, how a working woman can be harassed even in this era is reflected in the facts of the present case. Petitioner, a doctor by qualification, after getting selected by U.P. Public Service Commission, in furtherance of appointment letter dated 21.12.2011, joined as lecturer at the Baba Saheb Bheem Rao Ambedkar Medical College and Allied Hospital, Kannauj on 06.01.2012. On being blessed with a child, she took child care leave from 23.01.2016 to 20.07.2016 i.e. for a period of 180 days. The same was sanctioned by the principal of the medical college on 25.02.2016. After the child care leave, petitioner intended to join but due to illness of the child was unable to resume her duties. On 19.07.2016 she again requested for extension of child care leave for another period of six months. The principal of the medical college by communication dated 02.08.2016 informed the petitioner that child care leave cannot be sanctioned for more than 180 days and required the petitioner to join within two days. Petitioner by her communication dated 22.08.2016 again requested for grant of leave. The principal did not agree to the request and by letter dated 05.09.2016 and 22.10.2016 required the petitioner to join her duties. She could not join due to her given circumstances and necessity to look-after the child. On 08.11.2016 she again wrote a letter requesting for grant of any type of leave as the child, due to certain circumstances, was requiring constant care. The principal by his letter dated 12.11.2016, looking into the circumstances of the petitioner, informed the petitioner that only leave without pay can be sanctioned to her. Therefore, petitioner by her letter dated 05.12.2016 requested for grant of leave without pay for the period of absence from duty. Since petitioner was unable to join as the child was still requiring continuous care, she resigned by letter dated 01.05.2018. Till the date of resignation, neither any departmental proceeding against the petitioner were initiated nor she was punished by any order. The resignation was sent both, to the principal of the college as well as to the Director General Medical Education and Training, U.P., Lucknow. On 29.05.2018, the principal of the medical college also recommended the resignation to the Director General. By letter dated 24.05.2018 the government sought details upon the resignation of the petitioner from the Director General. The principal of the

college replied the same and recommended that in the given circumstances resignation of the petitioner should be accepted. He also informed that no dues of the department are pending against petitioner and as per the record of his office no departmental inquiry is pending against her. As no reply to the resignation of petitioner was given, hence, on 25.02.2019, petitioner again wrote a letter to the principal for grant of leave without pay. Surprisingly, in February, 2019, an inquiry officer was nominated to hold a preliminary inquiry with regard to absence from duty of the petitioner. Petitioner submitted her reply to the letter written to her in the said preliminary inquiry. On 14.11.2019, a charge-sheet was issued to the petitioner. Petitioner submitted her reply to the charge-sheet and on 07.02.2020 again requested for acceptance of her resignation letter. Thereafter, without fixing any date, time and place in the inquiry and in fact without conducting any type of inquiry and without taking any decision upon resignation of the petitioner, the State Government passed order dated 06.01.2021 terminating the petitioner from services. Hence, petitioner has approached this Court challenging the same.

3. The facts of the case clearly indicates that petitioner, a mother was facing difficulty in handling both, a child in need of care as well as her job with the State Government. In the given circumstances, initially she applied for leave as may be granted to her under the service rules and finding that the same is not possible she even resigned on 01.05.2018. The resignation was kept pending for as good as two years and a termination order is passed on 06.01.2021 only. Besides the entire inquiry on the face of it is illegal inasmuch as no date, time and place was fixed in the inquiry and no evidence was submitted to prove charge, the very conduct of the respondents is arbitrary and denies a fair play to a working woman. Any working woman, more particularly, a mother is required to be accommodated as far as possible. Presuming the worst, it was not possible for the department to grant any further leave to the petitioner, including leave without pay, suffice would have been in the given circumstances to accept the resignation of the petitioner. This Court fails to understand as to what purpose is achieved by the respondents by keeping the petitioner in service from 01.05.2018 i.e. from the date of resignation till 06.01.2021 i.e. the date on which she was terminated. During the said period, they could not appoint any other person in place of petitioner, therefore, work of the college continued to suffer and the public at large was in no manner benefited. The entire issue could have been best served by accepting her resignation. The petitioner had a right to resign on 01.05.2018 and her resignation had to be accepted as till that date neither any departmental inquiry was initiated against her nor there was any other reason available to the respondents for not accepting the resignation. Even her immediate superior administrative authority, i.e., the principal of the college, had recommended for acceptance of her resignation without any objection.

4. The Supreme Court in case of "State of A.P. Vs. Chitra Venkata Rao", reported in [1975 (2) SCC 557] has detailed the power of court while considering challenge to a departmental proceedings. Relevant portion of paragraph-21 of the said judgment reads:-

"21.....The Court is concerned to 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 are not violated. Second, where there is some evidence which the authority entrusted with the duty to hold the enquiry has accepted and which evidence may reasonably support the conclusion that the delinquent officer is guilty of the charge, it is not the function of the High Court to review the evidence and to arrive at an independent finding on the evidence. ***The High Court may interfere where the departmental authorities have held the proceedings against the delinquent in a manner inconsistent with the rules of natural justice or in violation of the statutory rules prescribing the mode of enquiry or where the authorities have disabled themselves from reaching a fair decision by some considerations extraneous to the evidence and the merits of the case or by allowing themselves to be influenced by irrelevant considerations or where the conclusion on the very face of it is so wholly arbitrary and capricious that no reasonable person could ever have arrived at that conclusion.....***"

(emphasis added)

5. Learned Standing Counsel also could not place any reason for not accepting the resignation of the petitioner.

6. Therefore, the petitioner in the given facts and circumstances is treated arbitrarily by the respondents. The respondents were bound to accept the resignation of petitioner and, there was no necessity to conduct any inquiry against the petitioner. Even otherwise the inquiry conducted without fixing any date, time, and place and evidence itself is vitiated.

7. In view of the aforesaid, the termination order dated 06.01.2021 is quashed. The respondents shall treat the petitioner as having resigned from her post w.e.f. 01.05.2018 and shall grant her benefit which she is entitled to by treating her to be in service till 01.05.2018. Such an exercise shall be conducted expeditiously, say in not more than two months from the date a copy of this order is placed before respondent no.2 Director, Medical Education & Training, 6th Floor, Jawahar Bhawan, Lucknow.

8. With the aforesaid, the writ petition is ***allowed.***

(2022)03ILR A577
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.12.2021

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.

Writ A No. 9673 of 2021
connected with other cases

Kuldeep Kumar Saxena & Ors.
...Petitioners
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Amardeo Singh, Sri Ajay Kumar, Sri Siddharth Khare, Sri Ashok Khare

Counsel for the Respondents:
A.S.G.I., C.S.C., Sri Durga Singh, Sri Piyush Mishra, Sri Shashi Nandan

A. Constitution of India – Article 21-A – Right of Education – Scope – Establishment of Kasturba Gandhi Balika Vidyalaya – Object – Education for a vulnerable class of marginalized children – Held, right to education means right to quality education and it can be provided by qualified teachers only – Establishment of KGBV is thus a forward step taken by the State to secure the high objective of

Article 21A and addresses the cause of education for a vulnerable class of marginalized children. (Para 32)

B. Service Law – NCTE Regulation – Qualification for upper primary teachers – Requirement of special knowledge in particular subject – Validity challenged – Regulations do not require any specific knowledge in a particular stream at the graduation or intermediate level. Anyone who possesses the qualification prescribed for appointment as a teacher in Classes VI to VIII is assumed in law to be competent to teach the subject assigned to him/her – Held, qualification for appointment of teacher in an upper primary school is not with reference to any subject. (Para 42 and 44)

C. Service Law – Right of Children to Free and Compulsory Education Act, 2009 – Sections 19 & 25 – NCTE Regulation – Engagement of teacher on contractual basis – Renewal denied – Categorization of contractual appointed teachers into Sangat and Asangat teachers and denial to renew the Asangat (inconsistent) teacher – Segregation of teachers based on subjects taught by them as full time teacher or part time teacher – Validity of classification challenged – Held, NCTE regulations do not prescribe/specify as to what exactly is meant by a full time teacher or a part time teacher. Even the RTE Act of 2009 is silent about the distinctions between the two. The respondents apparently have engaged teachers as per the curriculum of Basic Shiksha Parishad, wherein there is no distinction between full time teacher and part time teacher. As such aforesaid distinction drawn by respondents is totally alien. (Para 61)

D. Interpretation of statute – Literal rule of interpretation – Once the law requires a thing to be done in a particular manner it has to be done in that manner alone and not in any other manner. (Para 43)

Writ petition allowed. (E-1)

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. This bunch of writ petitions is by the teachers engaged on contractual basis in Kasturba Gandhi Balika Vidyalaya, and have been continuing as such for the last more than ten years. They are aggrieved by a circular dated 14.7.2020, issued by the State Project Director, U.P. Education for All Project Board, insofar as it contemplates categorization of existing contractual teachers into Sangat (consistent) and Asangat (inconsistent) categories and consequential direction not to renew the term of Asangat (inconsistent) contractual teachers from the academic session 2020-2021, on the basis of such categorization. A further prayer has also been made to command the respondents not to interfere in the working of petitioners as warden/whole time teachers/part time teachers and to ensure payment of monthly emoluments to them.

2. After the right to education was recognized as a fundamental right for the children in the age group of 06 to 14 years, vide 86th amendment to the Constitution of India, the Government of India launched a scheme, known as Kasturba Gandhi Balika Vidyalaya (hereinafter in short referred to as the "KGBV') for establishment of residential schools at upper primary level for girls belonging to socially and economically weaker sections and other minorities for backward areas of the country with an specific intent to target drop outs. This scheme later got merged with Sarva Shiksha Abhiyan, which is a scheme of State known as "U.P. Education for all Project'. The need to establish these institutions was felt necessary as the rural female literacy rate was much below the national average as per the 2001 census.

3. The KGBV institutions were established by State Government with financial support from the Central Government under the Sarva Shiksha Abhiyan. The ratio of financial contribution between Central Government and State Government stood at 65:35. A total number of 746 KGBVs are stated to have been established and functional in the State of U.P., as of now. Guidelines laying down financial norms for such institutions as also budgetary allocation for the staff etc. is provided by the State from time to time.

4. The State Project Director, Sarva Shiksha Abhiyan, on 15.4.2005 issued a circular after approval was obtained from the State Government for establishment of KGBV. Pursuant to aforesaid circular a committee at district level was formed in each district of the State of U.P. to appoint one warden-cum-teacher with qualification of "trained graduate' and was to receive honorarium of Rs.7,000/- per month, whereas four posts of full time teachers were sanctioned drawing honorarium of Rs.6,000/- per month with trained graduate qualification in Science, Mathematics, Biology and other teachers. Post of three part time teachers was also created in Hindi, Home Science and Science. The warden-cum-teacher and full time teachers were expected to stay in the institution. Preference was to be given to female candidates. These appointments were to be contractual in nature for a period of almost one year (11 months & 29 days) and could be extended with the approval of the district level committee.

5. A subsequent circular issued on 16.5.2006 specified the committee for appointment of teachers and also the blocks in which these institutions were to be established.

6. The State Project Director of U.P. Education for all under the Sarva Shiksha Abhiyan issued a circular on 8.1.2011 directing commencement of KGBVs w.e.f. 15.2.2011. A committee consisting of various officers with District Magistrate as Chairman, Chief Development Officer as Vice-Chairman and District Basic Education Officer as Member Secretary was constituted in each district for management and supervision of these KGBVs. The object for establishing KGBV institutions were specified as providing education to female students belonging to Scheduled Castes/Scheduled Tribes, OBC, Minority or other female children from below the poverty line. The norms for selecting location as also the targeted admission figures were specified. Admission of 100 girl students was contemplated with representation of SC/ST and minority girls to the extent of 75% and remaining 25% from below the poverty line. The targeted students were girls, who were not a part of any school education programme. Various camps etc. were organized for motivating the family members to encourage them to sent their female child to KGBV.

7. The staff sanctioned in the Government Order dated 8.1.2011 is specified as under:-

"मॉडल-1 के 100 बालिकाओं के कस्तूरबा गांधी बालिका विद्यालय में वार्डेन-1, पूर्णकालिक शिक्षक-4, अंशकालिक शिक्षक-4, लेखाकार-1, रसोइया-1, सहायक रसोइया-2, चौकीदार-1 तथा चपरासी-1 के पदों पर चयन किया जायेगा।"

The subjects to be taught in KGBV were also specified in the said Government Order as under:-

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

The teachers were to be appointed after inviting applications and the merit list was to be drawn in respect of following posts:-

क्र०सं०	पद का नाम	पदों की संख्या
1.	वार्डेन	1
2.	फूल टाइम टीचर	4
3.	पार्ट टाइम टीचर	4
4.	एकाउटेन्ट	1
5.	रसोइया	1
6.	सहायक रसोइया	2
7.	चौकीदार	1
8.	चपरासी	1
	कुल योग	15

The Government Order also provided for a warden-cum-teacher and the subject-wise description has been specified as under:-

"गणित (पी०सी०एम०) 01

विज्ञान (पी०सी०बी०) 01

सामाजिक विषय

(भूगोल, इतिहास एंव नागरिक शास्त्र) 01

हिन्दी, संस्कृत 01

अंग्रेजी 01

उर्दू 01

कम्प्यूटर 01

स्काउट गाइड एंव शारीरिक शिक्षा 01

कला, क्राफ्ट एंव संगीत 01"

8. The procedure for appointment has been specified, as per which advertisements were to be issued in two State level newspapers and the manner for selection was specified for these institutions.

9. A circular then came to be issued on 12.10.2012 providing for renewal of contractual teachers engaged in KGBV. This circular provided that teachers whose services were not found suitable shall not be continued in the next session but before their discontinuance an opportunity would be given to improve their working or else they be discontinued by giving a month's notice. The discontinuance of contractual engagement could, however, be made only with the approval of the District Magistrate.

10. The Principal Secretary, Department of Basic Education, issued yet another circular on 29.7.2013 in which the

district level selection committee was re-constituted and two categories were created in KGBV, namely Model-1 and Model-2. Model-1 was to be in respect of institutions having 100 girls with total staff capacity of 15, whereas Model-2 KGBVs were to have 50 girl students with total staff capacity of 12. A provision was made in this Government Order for appointment of Urdu language teacher only in areas where members of minority community were in substantial numbers. It also provided that subjects taught at higher primary level by the Basic Shiksha Parishad would be taught in these institutions. Relevant portion of the Government Order, in that regard, is reproduced hereinafter:-

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

वार्डेन जिस विषय की होगी उस विषय हेतु अलग से शिक्षिका का चयन नहीं किया जायेगा। चयन समिति अनुमन्य पदों पर चयन के समय विषयों का ध्यान रखेगी। माडल-1 के विद्यालय में गणित एंव विज्ञान हेतु प्रस्तावित 02 शिक्षकों में से यथा संभव 01 पूर्णकालिक शिक्षक तथा 01 अंशकालिक शिक्षक होगा। यदि मॉडल-11 का विद्यालय अल्पसंख्यक बाहुल्य विकासखण्ड/शहरी क्षेत्र में स्थित न हो तो स्काउट-गाइड एंव शारीरिक शिक्षा, कला, क्राफ्ट एंव संगीत के लिए प्रस्तावित 02 शिक्षकों में से यथा संभव 01 पूर्णकालिक शिक्षक तथा 01 अंशकालिक शिक्षक होगा।"

11. The Government of India, Ministry of Human Resource Development, Department of School Education and Literacy revised the norms of institutions in Sarva Shiksha Abhiyan on 24.3.2014, whereby maintenance grant per girl came to be enhanced from Rs.900/- to Rs.1,500/- per month. The warden as per the financial norms were now to receive Rs.25,000/- per month and the full time teachers as per The Right of Children to Free and Compulsory Education Act, 2009 (hereinafter referred to as the "RTE Act, 2009') norms were to receive Rs.20,000/- per month. Urdu teachers were to receive Rs.12,000/- per month, whereas part time teachers were to receive Rs.5,000/- per month. Various other heads were specified for increased financial support to the KGBV institutions.

12. The Secretary, Basic Education Department, thereafter issued a circular on 30.6.2015 modifying the provisions in the light of circular issued by Government of India on 24.3.2014. Posts for different subjects were also sanctioned in the said circular.

13. On 13.3.2019 a circular has been issued by the State Project Director regarding renewal of contractual teachers and the manner of assessment of their work. The circular also provided as under:-

" .... नवीन चयन में यह अनिवार्य रूप से सुनिश्चित किया जाए कि वार्डेन एंव पूर्णकालिक शिक्षिका का चयन मुख्य विषयों के लिए यथा गणित, विज्ञान, सामाजिक विषय,भाषा (हिन्दी एंव संस्कृत हेतु 01 शिक्षिका) एंव अंग्रेजी

हेतु तथा अंशकालिक शिक्षक/शिक्षिका का चयन पाठ्य सहगामी विषयों यथा कम्प्यूटर, स्काउट गाइड एंव शारीरिक शिक्षा तथा कला क्राफ्ट एंव संगीत के लिए किया जाए। ... "

14. On 7.4.2020 a circular was issued by the State Project Director requiring all District Basic Education Officers (excluding Kanpur Nagar and Auraiya) to provide details of working teachers in the format specified on the designated website i.e. the name of the institution, name of the teacher, mobile number, subject, date of appointment and training status. Details in respect of teachers not appointed as per the curriculum prescribed by the Basic Shiksha Parishad i.e. incompatible/inconsistent teachers were required to be separately specified.

15. It is in the light of above circulars issued from time to time that the State Project Director has issued a circular on 14.7.2020 in respect of renewal of contractual appointment of teachers in KGBV. This circular provides that renewal of teachers are required to be made as per the circulars of Central Government dated 29.7.2013 and 24.3.2014 and the provisions of the RTE Act, 2009, particularly the Schedule appended to Sections 19 and 25 of the said Act. After referring to the circular dated 7.4.2020 and the information collected pursuant to it, it has been observed that the details furnished by the KGBV institutions show following infirmities:-

(i) More than one teacher in a subject have been engaged in various KGBV vide Annexure-1.

(ii) Appointments have been made inconsistent with the curriculum published by Basic Shiksha Parishad and details of such teachers are specified in Schedule-2.

(iii) Contractual appointment of teachers found inconsistent with the provisions of RTE Act, 2009, particularly Sections 19 and 25 thereof, as also in teeth of circulars dated 29.7.2013 and 24.3.2014 is contained in Annexure-3.

The circular also contemplates that a committee be constituted at the district level in each district with Chief Development Officer of the subject as its Chairman to examine the renewal of term of contractual employees and to ensure that inconsistent (Asangat) teachers are not retained in KGBV. Relevant portion of the circular dated 14.7.2020 is extracted hereinafter:-

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

<u>वार्डेन/पूर्णकालिक शिक्षिका</u>- कस्तूरबा गांधी आवासीय बालिका विद्यालय में वार्डेन एंव पूर्ण कालिका शिक्षिका का पद महिला अभ्यर्थी हेतु नियत है। इनकी शैक्षिक योग्यता प्रशिक्षित स्नातक थी। उ० प्र० शासन के पत्रांक के०जी०बी०वी०/3-2/1916/2013-14 दिनांक 29.07.2013 द्वारा शैक्षिक योग्यता उच्च प्राथमिक स्तर के टी०ई०टी० एंव प्रशिक्षित स्नातक निर्धारित की गयी है। <u>कस्तूरबा गांधी आवासीय बालिक विद्यालय बेसिक शिक्षा परिषद द्वारा संचालित उच्च प्राथमिक विद्यालयों में निर्धारित पाठ्यक्रम के समरूप है।</u> अतः निःशुल्क और अनिवार्य बाल शिक्षा का अधिकार अधिनियम, 2009 की धारा 19 एंव 25 में वर्णित मान एंव मानकों की अनुसूची के अलोक में वर्णित विषयों में वार्डेनकम शिक्षिका एंव

पूर्णकालिक शिक्षिका की नवीन संविदा की जाये। यदि किसी कस्तूरबा गांधी अावासीय बालिका विद्यालय में एक विषय के एक से अधिक पूर्ण कालिक शिक्षिका या वार्डेन कार्यरत है तो शासन के पत्र दिनांक 29.07.2013 द्वारा निर्धारित अर्हता धारित करने वाली शिक्षिकाओं की के०जी०बी०वी० में सेवा अवधि/अनुभव के आधारपर संकलित सूची तैयार की जाये। उक्त सूची में उच्च अनुभव धारित करने वाली अभ्यर्थी की सम्बन्धित के०जी०बी०वी० में पदस्थापन/नवीन संविदा की जाय, यदि सम्बन्धित विषय का जनपद में संचालित अन्य किसी के०जी०बी०वी० में पद रिक्त हो तो अवरोही क्रम में संकलित सूची के अनुसार सम्बन्धित वार्डेन/शिक्षिका को समायोजित किया जाये। उक्त जनपदीय समिति के प्रस्ताव के क्रम में जिलाधिकारी के अनुमोदनोपरान्त नवीन संविदा/पदस्थापन किया जायेगा।

अंशकालिक शिक्षिक/शिक्षिका- कस्तूरबा गांधी आवासीय बालिका विद्यालय बेसिक शिक्षा परिषद द्वारा संचालित उच्च प्राथमिक विद्यालयों में निर्धारित पाठ्यक्रम के समरूप है। अतः निःशुल्क और अनिवार्य बाल शिक्षा का अधिकार अधिनियम, 2009 की धारा 19 एंव 25 में वर्णित मान एंव मानकों की अनुसूची के आलोक में अंश कालिक विषयों हेतु यदि एक विद्यालय मे एक विषय के एक से अधिक अंश कालिक शिक्षक/शिक्षिका कार्यरत है तो शासन के पत्र दिनांक 29.07.2013 द्वारा निर्धारित अर्हता धारित करने वाली शिक्षिकाओ की के०जी०बी०वी० में सेवा अवधि/अनुभव के आधार पर संकलित सूची तैयार की जाये। उक्त सूची में उच्च अनुभव धारित करने वाली अभ्यर्थी की सम्बन्धित के०जी०बी०वी० में पदस्थापन /नवीन संविदा की जाय। यदि सम्बन्धित विषय का जनपद में संचालित अन्य किसी के०जी०बी०वी० में पद रिक्त हो तो अवरोही क्रम में संकलित सूची के अनुसार सम्बन्धित वार्डेन/शिक्षिका को समायोजित किया जाये। उक्त जनपदीय समिति के प्रस्ताव के क्रम में जिलाधिकारी के अनुमोदनोपरान्त नवीन संविदा/पदस्थापन किया जायेगा।

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

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

उल्लेखनीय हैै कि निःशुल्क और अनिवार्य बाल शिक्षा का अधिकार अधिनियम 2009 की धारा 19 एंव 25 में वर्णित मान एंव मानकों की अनुसूची में निम्नवत् व्यवस्था उल्लिखित है-

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

(i) विज्ञान एंव गणित।
(ii) सामाजिक अध्ययन।
(i) भाषा।

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

3. जहां एक सौ से अधिक बालकों को प्रवेश दिया गया है वहां-
(i) एक पूर्णकालिक प्रधान अध्यापक;
(अ) कला शिक्षा।
(आ) स्वास्थ्य और शारीरिक शिक्षा।
(इ) कार्य शिक्षा। "

16. A counter affidavit has been filed by respondents. The circular dated 14.7.2020 has been sought to be justified on the ground that same has been issued to ensure that quality education is provided to girl students of KGBV by qualified teachers. It is further asserted that engagement of contractual teachers in the scheme for KGBV was reviewed and it was found that more than one teacher/teachers were working in one subject in various KGBVs. Engagement of teachers in KGBV was also found beyond the subjects prescribed by the Board of Basic Education for its curriculum. Part time teachers were engaged for main subjects i.e. Mathematics, Science, Social Science, languages including English in place of full time teachers and full time teachers were appointed for subjects, which required part time teachers in various KGBV. According to respondents the engagement of teachers is being regulated with reference to the Schedule appended to Sections 19 and 25 of the RTE Act, 2009, and that exercise in that regard is valid. Much emphasis has been given to the provisions of the RTE Act, 2009 to submit that the purpose of issuing the circular is to ensure that engagement of teachers remain absolutely in consonance with the provisions of the RTE Act, 2009. A subsequent directive of the State Project Director dated 26.8.2020 has also been relied upon, as per which the eligible teachers are, however, to be adjusted where vacancies exist for the specific posts.

17. A supplementary counter affidavit has been filed by the third respondent pointing out that petitioner no.1 in Writ Petition No.6911 of 2020 was appointed as full time teacher (Physical Education), whereas petitioner no.2 was appointed as part time teacher (Mathematics). Petitioner no.3 was appointed as part time teacher (Biology), petitioner no.4 was appointed as full time teacher (Computer)/Warden, petitioner no.5 was appointed as part time teacher (Commerce), petitioner no.6 was appointed as part time teacher (Home Science), petitioner no.7 was appointed as full time teacher (Arts/Music/Craft), petitioner no.8 was appointed as part time teacher, petitioner no.9 was appointed as part time teacher (Science), petitioner no.10 was appointed as full time teacher (Arts/Music/Craft), petitioner no.11 was appointed as full time teacher (Physical Education)/Warden, petitioner no. 12 was appointed as full time teacher (Physical Education), petitioner no.13 was appointed as part time teacher, petitioner no. 14 was appointed as part time teacher (Social Studies), petitioner no.15 was appointed as

part time teacher (English), petitioner no.16 was appointed as part time teacher (Social Studies), petitioner no.17 was appointed as full time teacher (Physical Education), petitioner no.18 was appointed as full time teacher (Home Science), petitioner no.19 was appointed as full time teacher (Physical Education)/Warden, the petitioner no.20 was appointed as part time teacher (Mathematics) and the petitioner no.21 was appointed as full time teacher (Music/Arts/Craft). With reference to above, it is sough to be urged that engagement of teachers was not in accordance with the statutory scheme, and therefore, the authorities have rightly analyzed the factual scenario so that engagement of teachers remains in consonance with RTE Act, 2009.

18. Second supplementary counter affidavit has been filed by respondents stating therein that teachers engaged contrary to the requirement have been adjusted elsewhere. Details of some of the teachers who have been adjusted has also been brought on record. Similar orders passed in respect of different districts, adjusting teachers in different institutions vide orders passed on 30.9.2021 have also been brought to the notice of the Court to substantiate the respondents' plea that their exercise of adjustment is only to ensure that the engagement of teachers remains as per law.

19. Rejoinder affidavit has been filed by petitioners denying the averments made in the counter affidavit and reiterating the plea taken in the writ petition.

20. It is urged on behalf of petitioners that the subjects and course content for the KGBV is based upon the curriculum published by the Basic Shiksha Parishad in which many subjects over and above those specified in Schedule to Sections 19 and 25 of the RTE Act, 2009 are to be taught including commerce, computer, geography, agriculture, civics and moral science in Classes VI to VIII, whereas the respondents are now restricting the engagement of teachers only to subjects specified in the Schedule appended to Sections 19 and 25 of the RTE Act, 2009. It is urged on behalf of petitioners that RTE Act, 2009 specifies the minimum subjects to be taught in such schools and it is always open for the institutions to teach other subjects also but, as per the curriculum issued by the Basic Shiksha Parishad for Classes VI to VIII. It is argued that subjects taught in addition to those provided under the RTE Act, 2009 cannot be said to be irrelevant or inconsistent, so as to disengage the teachers employed for such subjects and have continued for long of time.

21. Petitioners also urge that qualification of teachers is prescribed by the statutory regulations framed by the National Council for Teacher Education (NCTE), from time to time, which makes no distinction in the qualification of teachers with reference to their subjects. For Classes VI to VIII it is asserted that qualification prescribed is trained graduate with Teacher Eligibility Test (TET). It is thus sought to be urged that in the absence of there being any requirement of qualification in any particular subject for engagement of teachers in the NCTE regulations, the respondents have misdirected themselves in treating the contractual teachers to be qualified to teach only the subject in which they are appointed.

22. On the strength of above, petitioners contend that the exercise

initiated by the department by means of impugned circular is clearly misdirected and is otherwise inconsistent with the scheme of the RTE Act, 2009 and the NCTE regulations.

23. Sri Ashok Khare, learned Senior Counsel for petitioners submits that though the authorities could scrutinize the engagement of contractual teachers with an intent to renew their term but such examination must remain relevant and be based on provisions of law rather than a misdirected approach based on an erroneous understanding of law.

24. Sri Shashi Nandan, learned Senior Counsel appearing for the State Project Director, Sarva Shiksha Abhiyan, U.P., assisted by Sri Durga Singh, Advocate, opposing the writ petition contends that the circular in question merely ascertains relevant information so that the KGBVs function in accordance with the RTE Act, 2009. It is also argued on behalf of respondents that they have complete right to engage teachers for KGBV and the authorities and are otherwise acting as per law. Submission, accordingly, is that no interference with the impugned circular is thus called for. It is also urged that irrespective of above the arguments advanced in this bunch of writ petitions have already been repelled by this Court in a batch of writ petitions with leading Writ Petition No.4845 of 2021, decided on 12.8.2021.

25. I have heard Sri Ashok Khare, learned Senior Counsel assisted by Sri Siddharth Khare in leading writ petition and Sri Vivek Kumar Singh, Sri Amardeo Singh, Sri Ajay Kumar, Sri Agnihotri Kumar Tripathi, Sri Krishna Kumar Singh, Sri Sandeep Kumar, Sri Awadh Bihari Pandey, Sri Vikram Bahadur Singh, Sri Indraj Raj Singh, Sri Krishna Kumar Singh and Sri Vinay Kumar Singh for the petitioners in connected writ petition, learned Standing Counsel for the respondent State, and Sri Shashi Nandan, learned Senior Counsel assisted by Sri Durga Singh has been heard for the respondent State Project Director.

26. At the very outset it is first necessary to meet the objection raised by the counsel for the respondent that the controversy raised in these bunch of writ petitions has already been considered and decided by this Court in a batch of writ petitions with leading Writ Petition No.4845 of 2021 (Suneeta Singh Vs. State of U.P. and Others), vide judgment and order dated 12.8.2021.

27. I have carefully perused and examined the judgment delivered in Writ Petition No.4845 of 2021 (Suneeta Singh Vs. State of U.P. and Others). The petitioners therein were also contractual teachers engaged in KGBV and were aggrieved by non-renewal of their contractual appointment. The Court took notice of various circulars including the impugned circular dated 14.7.2020 but clearly observed that the policy documents contained in the circular dated 14.7.2020 is not under challenge. The qualification to be possessed by the KGBV teacher in light of NCTE regulations has also not been addressed or examined in the aforesaid case. Neither the curriculum published by the Basic Shiksha Parishad nor the question has been considered whether the subjects specified in the Schedule appended to Sections 19 and 25 of the RTE Act, 2009 are exhaustive has also not been dealt with, on which premise the entire exercise has been undertaken by respondents. In such

circumstances, this Court is of the considered opinion that questions raised in this bunch of writ petitions were neither raised nor decided in Writ Petition No.4845 of 2021 (Suneeta Singh Vs. State of U.P. and Others) resultantly the arguments raised in present writ petitions are required to be considered by this Court.

28 . Having heard the respective arguments advanced on behalf of the parties and upon perusal of the materials placed before the Court, the following questions arise for determination:-

(i) Whether qualification for an upper primary teacher is prescribed in law with reference to particular subject and therefore such teacher is required to possess special knowledge in the subject concerned?

(ii) Whether subjects specified in Schedule to Section 19 and 25 of the RTE Act, 2009 lay down the minimum subjects to be taught in the KGBV institution, leaving dispensation of education in other subjects is permissible in KGBV?

(iii) Whether the classification of teacher in KGBV as Sangat (consistent) or Asangat (inconsistent), based on the subject taught by them is a valid classification?

29. Perusal of impugned circular would reveal that it proceeds on the following two grounds:-

(i) that appointment of teacher in an upper primary school is with reference to the qualification held in the subject taught.

(ii) that the Schedule appended to Sections 19 and 25 of the RTE Act, 2009 restricts teaching in the subjects specified therein and engagement of teacher in any other subject is inconsistent with the RTE Act, 2009.

30. According to the writ petitioners the aforesaid grounds are flawed and are in teeth of applicable statutes and hence are liable to be quashed.

31. The scheme for appointment of teachers in KGBV, therefore, needs to be examined with reference to the applicable laws.

32. The Constitution of India was amended vide 86th Amendment Act, 2002 to incorporate Article 21A, which contained a promise by State to provide free and compulsory education to all children in the age group of 06 to 14 years in the manner to be determined by the State. Article 21A has already been interpreted by the Supreme Court of India to hold that right to education means right to quality education and it can be provided by qualified teachers only (see: Environmental & Consumer Protection Foundation Vs. Delhi Administration and Others, 2012 (4) SCALE 243). In State of Tamil Nadu Vs. K. Shyam Sunder, AIR 2011 SC 3470, the Supreme Court also observed that the right of children should not be restricted to free and compulsory education, but must include quality education without any discrimination on the ground of their economic, social and cultural background. Establishment of KGBV is thus a forward step taken by the State to secure the high objective of Article 21A and addresses the cause of education for a vulnerable class of marginalized children.

33. Quality education can thus be guaranteed only when the institution has qualified teachers. With the object to secure guaranteed uniform development of Teacher Education System throughout the county and for maintenance of norms and standards in Teaching Education System, including qualification of school teachers, Parliament enacted the National Council for Teacher Education Act, 1993 (hereinafter referred to as the "Act of 1993'). Section 3 of the Act of 1993 contemplates the establishment of a council to be called "National Council for Teacher Education' (hereinafter referred to as "NCTE'). Section 12(d) of the Act of 1993 provided that one of the functions of the NCTE would be to lay down guidelines in respect of minimum qualifications for a person to be employed as a teacher in school. Section 12(a) was inserted in the Act of 1993 enable the NCTE to determine the minimum standards of education for school children. Section 32 of the Act of 1993 conferred authority on the NCTE to make regulations by issuing notification in the official gazette on various subjects, including the minimum qualification for a person to be employed as a teacher. In furtherance of the aforesaid Act of 1993 statutory regulations have been issued subsequently prescribing the qualification of teachers in school. "School' in the Act of 1993 is defined under Section 2(ka) to mean any recognized school imparting pre-primary, primary, upper primary, secondary or senior secondary education and include a college imparting senior secondary education.

34. Parliament has therefore also enacted The Right of Children to Free and Compulsory Education Act, 2009 with an intent to implement the promise guaranteed in Article 21A of the Constitution of India. Section 23 of the Act, 2009 also provides for qualifications for appointment of teachers and terms and conditions of service of teachers to be such as is laid down by the academic authority, authorized by the Central Government vide notification. The academic authority for the purposes of Section 23 of the RTE Act of 2009 is the NCTE, and therefore prescription of qualification by way of regulations by the NCTE is also the qualification for appointment as a teacher under the Act of 2009. The qualification for a teacher to be appointed in a Junior High School, therefore, can only be such as is prescribed by the NCTE regulations.

35. A notification has in fact been issued by the NCTE exercising its powers under Sub-section (1) of Section 23 of the RTE Act, 2009 on 23rd August, 2010, which has been amended on 29th July, 2011 prescribing following qualifications for a teacher to be appointed for Classes VI to VIII:-

"(ii) Classes VI-VIII

(a) Graduation and 2-year Diploma in Elementary Education (by whatever name known)

OR

Graduation with at least 50% marks and 1-year Bachelor in Education (B.Ed.)

OR

Graduation with at least 45% marks and 1-year Bachelor in Education (B.Ed.), in accordance with the NCTE recognition Norms and Procedure) Regulations issued from time to time in this regard.

OR

Senior Secondary (or its equivalent) with at least 50% marks and 4-year Bachelor in Elementary Education (B.Ei.Ed.)

OR

Senior Secondary (or its equivalent) with at least 50% marks and 4-year B.A./B.Sc.Ed. or B.A. Ed./B.Sc.Ed.

OR

Graduation with at least 50% marks and 1-year B.Ed. (Special Education)

AND

(b) Pass in Teacher Eligibility Test (TET), to be conducted by the appropriate Government in accordance with the guidelines framed by the NCTE for the purpose."

36. It may be observed that NCTE regulations while prescribing the minimum qualifications for appointment of teacher for Classes VI to VIII merely requires a trained graduate, who has passed Teacher Eligibility Test. The qualification is not prescribed with reference to any particular subject to be taught in such classes. The circular issued by the State Government on 29.7.2013 has also prescribed the qualification for appointment in KGBV as trained graduate with TET for higher primary level (Classes VI to VIII). The statutory scheme, therefore, makes it explicit that appointment of teacher at upper primary level is trained graduate with TET without any further qualification specific to a particular subject.

37. No circular or notification by any competent authority has been placed before the Court, which may show that any other qualification has been prescribed for appointment of teachers in KGBV, except trained graduate with TET.

38. The qualification for appointment of a teacher in an upper primary school is therefore, not with reference to any particular subject.

39. Sri Shashi Nandan, learned Senior Counsel for the respondents State Project Director contends that a teacher must possess requisite knowledge in a particular subject before he can be allowed to teach such subject in the upper primary institution.

40. Per contra, Sri Ashok Khare submits that subject specific qualification for teacher starts from IXth standard and for classes below it the qualification uniformly is trained graduate with TET. It is further argued that TET has been introduced by NCTE as an essential eligibility qualification for Junior Primary level and upper primary level, differently, and teachers who qualify TET are expected to be sufficiently equipped to teach different subjects to students of such lower classes. They are otherwise trained. An attempt has also been made to suggest that the course content for TET includes all subjects that are taught to students upto VIIIth standard, and therefore subject specific qualification is not separately provided for teachers upto Class VIIIth.

41. Submissions urged in this regard are not required to be dealt with any further, inasmuch as the law requires qualification for an upper primary teacher to be prescribed by NCTE and that having been done, it is not left to our general understanding to determine as to what

ought to be the qualification for upper primary teacher.

42. The NCTE regulations are actually the law prescribing the qualification to be possessed by a teacher of Junior High School. The regulations do not require any specific knowledge in a particular stream at the graduation or intermediate level. Anyone who possesses the qualification prescribed for appointment as a teacher in Classes VI to VIII is assumed in law to be competent to teach the subject assigned to him/her. The KGBV management, therefore, cannot add or subtract the qualification prescribed by the NCTE, so as to read the requirement of graduation in a particular subject to teach the students of Classes VI to VIII in a given subject.

43. It is otherwise settled that once law requires a thing to be done in a particular manner it has to be done in that manner alone and not in any other manner (see:-Taylor vs. Taylor: (1875) LR (1) CH-D-426, and Nazir Ahmad vs. King Emperor: AIR 1936 PC 253).

44. In view of the above discussions this Court is of the considered view that qualification for appointment of teacher in an upper primary school is not with reference to any subject but is trained graduate with TET as per notification of NCTE dated 29th July, 2011 inasmuch as the notification issued by NCTE is not only binding upon State Governments but also has and over riding effect. The first question is answered accordingly.

45. A question had earlier arisen before this Court regarding prescription of qualification for teachers in basic institutions, governed by the provisions of the Uttar Pradesh Basic Education (Teachers) Service Rules, 1981 (hereinafter referred to as the "Rules of 1981'), which then were at variance with the qualification prescribed in the NCTE regulations. The NCTE regulations had prescribed passing of Teacher Eligibility Test (hereinafter referred to as "TET') as eligibility for appointment, which was not the qualification specified in the Rules of 1981. The question whether TET is an essential qualification in basic institution governed by 1981 rules was referred to the Full Bench. The Full Bench in Writ Petition No.12908 of 2013 (Shiv Kumar Sharma Vs. State of U.P. through Secretary and others), alongwith connected matters, decided on 31.5.2013, categorically held that Teacher Eligibility Test is an essential qualification, thereby holding that the NCTE regulations would prevail in respect of appointment of teachers to be governed by the Rules of 1981.

46. Sections 19 and 25 of the RTE Act, 2009 lay down the norms and standards for upper primary schools as also the teacher-student ratio, which are relevant for the issue in hand and are accordingly reproduced hereinafter:-

"19. Norms and standards for school.--(1) No school shall be established, or recognised, under Section 18, unless it fulfils the norms and standards specified in the Schedule.

(2) Where a school established before the commencement of this Act does not fulfil the norms and standards specified in the Schedule, it shall take steps to fulfil such norms and standards at its own expenses, within a period of three years from the date of such commencement.

(3) Where a school fails to fulfil the norms and standards within the period specified under subsection (2), the authority prescribed under sub-section (1) of section 18 shall withdraw recognition granted to such school in the manner specified under sub-section (3) thereof.

(4) With effect from the date of withdrawal of recognition under sub-section (3), no school shall continue to function.

(5) Any person who continues to run a school after the recognition is withdrawn, shall be liable to fine which may extend to one lakh rupees and in case of continuing contraventions, to a fine of ten thousand rupees for each day during which such contravention continues.

25. Pupil-Teacher Ratio.--(1) Within six months from the date of commencement of this Act, the appropriate Government and the local authority shall ensure that the Pupil-Teacher Ratio, as specified in the Schedule, is maintained in each school.

(2) For the purpose of maintaining the Pupil-Teacher Ratio under sub-section (1), no teacher posted in a school shall be made to serve in any other school or office or deployed for any non-educational purpose, other than those specified in section 27."

47. Schedule appended to Sections 19 and 25 of the RTE Act, 2009 prescribes standards for students of Classes VI to VIII at serial 1(b), which is extracted hereinunder:-

"(ख) छठी कक्षा से आठवी कक्षा के लिए
(1) कम से कम प्रति कक्षा एक शिक्षक, इस प्रकार होगा कि निम्नलिखित प्रत्येक के लिए कम से कम एक शिक्षक हो-

(i) विज्ञान और गणित;
(ii) सामाजिक अध्ययन;
(iii) भाषा।

(2) प्रत्येक पैंतीस बालकों के लिए कम से कम एक शिक्षक।

(3) जहां एक सौ से अधिक बालकों को प्रवेश दिया गया है वहां-

(i) एक पूर्णकालिक प्रधान अध्यापक;
(ii) निम्नलिखित के लिए अंशकालिक शिक्षक-
(अ) कला शिक्षा;
(आ) स्वास्थ्य और शारीरिक शिक्षा;
(इ) कार्य शिक्षा। "

48. For Classes VI to VIII the RTE Act, 2009 requires one teacher for each class in such a manner that one teacher is available for each of three subjects, namely (i) Science and Mathematics, (ii) Social Science & (iii) Language. The student-teacher ratio as per RTE Act, 2009 is 35:1 i.e. one teacher for 35 students. Where students admitted are in excess of 100, the RTE Act, 2009 requires a Head Teacher and also part time teachers in other streams, namely (i) Art Education, (ii) Health and Physical Education & (iii) Home Science. The RTE Act, 2009 apparently prescribes the norms, which are the minimum required to be fulfilled as per the Act of 2009. These norms by their very nature do not appear to be exhaustive but at best prescribe the minimum standards, which are to be fulfilled by schools imparting education to students in upper primary classes.

49. So far as the subjects and course contents to be taught in KGBV is concerned, the applicable circular of the

department provides that the curriculum followed by the Basic Shiksha Parishad in such classes would also be the curriculum for KGBV. The circular issued by Secretary, Basic Shiksha Parishad, dated 30.6.2015 prescribes the subjects to be taught in KGBV as per the curriculum of the Basic Shiksha Parishad and is extracted hereinafter:-

"मॉडल - 1 में उर्दू विषय के शिक्षण हेतु 01 उर्दू टीचर का चयन केवल 20 प्रतिशत से अधिक मुस्लिम बाहुल्य विकास खण्डों तथा चयनित शहरी क्षेत्रों में किया जायेगा।

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

वार्डन जिस विषय की होंगी उस विषय हेतु अलग से शिक्षिका का चयन नहीं किया जायेगा। चयन समिति अनुमन्य पदों पर चयन के समय विषयों का ध्यान रखेगी। मॉडल - 1 के विद्यालय में गणित एवं विज्ञान हेतु प्रस्तावित 02 पदों में से यथा संभव 01 पूर्णकालिक शिक्षिका अवश्य हो। "

50. As against the subjects to be taught as per Schedule to Sections 19 and 25 of the RTE Act, 2009, the decision by State earlier was to impart education in other subjects also i.e. over and above than the minimum prescribed in the RTE Act, 2009. These subjects include Commerce, Moral Science, Environmental Education, Computer etc., otherwise not specified in the RTE Act, 2009.

51. The decision of the State has consistently been to impart quality education to girl students in KGBV in different subjects, as per the course contents specified in the Basic Shiksha Parishad. An affidavit has been filed by the Secretary, Basic Shiksha Parishad on 14.9.2021, annexing the curriculum prescribed for upper primary school (Classes VI to VIII) by the Basic Education Board, in which the number of permissible subjects to be taught alongwith the course content for each of such subjects is far in excess of what is recommended in the RTE Act, 2009. As a matter of fact the list of permissible subjects to be taught in upper primary schools extends upto to 42 subjects.

52. The second ground of challenge to the impugned circular is that it wrongly assumes that subjects specified in Schedule to Sections 19 and 25 of the RTE Act, 2009 alone are permissible to be taught in upper primary institutions and the engagement of teachers for other subjects is contrary to the RTE Act, 2009. This stand of the respondents proceeds on the ground that the list of subjects to be taught in upper primary schools, as specified in the RTE Act, 2009, is exhaustive and that no other subject except what is specified therein is required to be taught.

53. No decision of the competent authority has been placed before the Court, which may go to show that the respondents have taken a policy decision to restrict the

subjects to be taught in KGBV shall be as those which are specified in Schedule to the RTE Act, 2009. The stated policy of the State in view of the Government Order dated 30.6.2015 clearly is to provide education in other subjects also as per the curriculum of Basic Shiksha Parishad and not to limit the subjects to be taught in KGBV only as per Schedule to the RTE Act, 2009.

54. The respondents although would be entitled to regulate course content for students in KGBV but such regulation will have to be consistent with the policy decision taken by the respondents themselves. Since the professed policy is to adopt the curriculum specified by the Basic Shiksha Vibhag, as such the respondents would not be justified in limiting the subjects to be taught only to the Schedule to the RTE Act, 2009.

55. Many of the teachers previously engaged for teaching subjects other than those specified in the schedule to the RTE Act, 2009 would become redundant and may have to be discontinued, only because the respondents have confined the permissible subjects to be taught as those specified in Schedule to the RTE Act, 2009.

56. It transpires that large number of teachers were engaged to teach various subjects in the KGBVs as were available from the curriculum prescribed for the schools run by the Basic Shiksha Parishad. These teachers have continued for almost 10 years or more, by now.

57. The Schedule to the RTE Act, 2009 otherwise specifies the minimum norms and standards to be fulfilled by a primary and upper primary institution. The language employed in Section 19(1) of the RTE Act of 2009 is amply suggestive of the fact that the norms and standards specified in the Schedule are the bare minimum for the institution and is not exhaustive. It clearly admits of additional subjects being taught in such institutions. The second question stands answered accordingly.

58. The concept of Sangat (consistent) and Asangat (inconsistent) contained in the impugned circular needs to be understood in the above perspective.

59. The respondents have proceeded on the premise that only such subjects can be taught in KGBV which are specified in the Schedule to the RTE Act, 2009 and therefore teachers engaged in other subjects are treated as Asangat (inconsistent). Similarly, teachers engaged in subjects requiring full time teacher, as per the Schedule to the RTE Act, 2009 alone are to be retained as full time teachers while teachers engaged in part time subjects, as per schedule, can be retained as part time teachers. All other teachers, even though their engagement may be permissible under the curriculum published by the Basic Shiksha Parishad are no longer required to be retained and are treated as inconsistent (Asangat) by virtue of the classification drawn in the impugned circular.

60. The grounds for not accepting the rationale behind the impugned circular by this Court are apparent on the face of the record. First and foremost, the qualification of teacher in upper primary school is not subject specific and the respondents have erred in taking a contrary view. A teacher possessing qualification as per NCTE regulation and appointed to teach Hindi can very well teach Social Science or Arts also

at upper primary level. It would, therefore, not be proper to presume that qualification and appointment of teacher is with reference to any subject and if it is not in consonance with the Schedule to RTE Act, 2009 then it becomes inconsistent or Asangat.

61. The segregation of teachers based on subjects taught by them as full time teacher or part time teacher is also an aspect, which requires due considerations. The NCTE regulations do not prescribe/specify as to what exactly is meant by a full time teacher or a part time teacher. Even the RTE Act of 2009 is silent about the distinctions between the two. The respondents apparently have engaged teachers as per the curriculum of Basic Shiksha Parishad, wherein there is no distinction between full time teacher and part time teacher. As such aforesaid distinction drawn by respondents is totally alien. Having continued the previous engagement as per the circulation provided by Basic Shiksha Parishad curriculum the respondents are revising the engagement of teachers on a flawed interpretation and understanding of the RTE Act, 2009. Their understanding in doing so is otherwise inconsistent with the NCTE regulations which are otherwise binding upon them.

62. Attention of the Court has been invited to appointment letters issued to many of the part time teachers, wherein their working hours are throughout the day. There is no clarity even otherwise about the working hours of part time teachers vis-a-vis full time teachers.

63. Engagement of some of the teachers in KGBVs was on full time basis as well as on part time basis. There is, however, no specific policy about this segregation, inasmuch as teachers engaged in part time subjects are also required to attend schools from 9.00 a.m. to 4.00 p.m. In this regard attention of the Court was invited to the appointment letter of some of the part time teachers whose timings are shown as 9.00 a.m. to 4.00 p.m. No attempt was made to explain the aforesaid decision during the course of hearing.

64. It is thus apparent that there is lack of clarity on the distinction between full time and part time teachers. The Second National Report on evaluation of KGBVs has also noticed this anomaly while observing as under in paragraph 34:-

"34. Some states deploy regular teachers on deputation to the KGBV - which is indeed a good practice as these teachers are both qualified and trained. Compared to them, teachers appointed on contract may not have the requisite qualification or training. In some states the KGBVs visited reported a high attrition as more and more teachers were qualifying the TET and moving on to join regular positions.

34.1. There needs to be clarity on who is part-time (comes for a few hours) and full-time (comes for the duration of the school hours). Some states interpret full time as being residential and part time as those who come and go.

34.2. Equally, RTE compliance needs to be made a non-negotiable guideline of KGBV. The qualifications of teachers need to be stipulated and adhered to."

65. According to the petitioners part time teachers are those who do not stay in the KGBVs while full time teachers stay in

the school but they both remain in school throughout the school timings. It is therefore urged on behalf of petitioners that distinction between full time and part time teacher needs to be properly defined and all part time teachers attending the KGBV throughout the day cannot be denied salary at par with full time teachers since both remain in school throughout the school hours. According to petitioners discrimination is being practiced in the garb of classification.

66. On behalf of the respondents it is sought to be urged that part time teachers work only for a few hours, but no specific provision in any applicable circular or policy is placed before the Court, which may demonstrate that lesser working hours are prescribed for part time teachers engaged in KGBV. This aspect therefore does require necessary classification by the respondents or else the purpose of undertaking the impugned exercise would be futile.

67. The impugned circular has not taken note of the NCTE regulations which prescribe the qualifications for appointment of teachers for upper primary classes and has also not examined the issue of engagement of teachers with reference to curriculum formulated by the Basic Shiksha Parishad. Respondents have proceeded on an erroneous assumption that subjects specified in Schedule appended to Sections 19 and 25 of the RTE Act, 2009 are exhaustive and therefore do not additional subjects cannot being taught, is wholly fallacious. The distinction drawn between Sangat (consistent) and Asangat (inconsistent) teachers coupled with the direction for renewal of contract to be made as per aforesaid classification clearly unsustainable. Resultantly the impugned circular dated 14.7.2020, issued by the State Project Director, cannot be sustained and stands quashed. Respondents are directed to re-visit the issue, in the light of qualifications prescribed vide NCTE regulations as also the curriculum prescribed by the Basic Shiksha Parishad for Classes VI to VIII and to proceed for the reasons mentioned herein above thereafter. It goes without saying that petitioners shall be paid their honorarium regularly and continuously. This bunch of writ petitions, accordingly, stands allowed. Cost made easy.

(2022)03ILR A595
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.11.2021

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE VIKAS BUDHWAR, J.

Writ A No. 14563 of 2021

Pandit Prithi Nath Memorial Society,Kanpur Nagar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Dhiraj Srivastava, Sri T.P. Singh (Sr. Advocate)

Counsel for the Respondents:
C.S.C., Sri Gagan Mehta, Sri Gaurva Mahajan

A. Service Law – UP Higher Education Services Commission Act, 1980 –Selection and appointment of Teachers in private aided institution – Power of State Government to regulate it – Legislative competence – Held, the State Legislature has ample power to legislate on the subject, dealt with by the Act, 1980. Thus,

there is no lack of legislative competence to enact Act, 1980 – Further held, the State Government, in case of such an aided institution, has ample power to regulate method of selection and appointment of the teachers. (Para 11 and 12)

B. Constitution of India – Article 19(1)(g) – Breach of Fundamental Rights – Field of legislation, when interference called for – Held, the constitutional validity of an Act can be challenged only on two grounds, viz. (i) lack of legislative competence; and (ii) violation of any of the Fundamental Rights guaranteed in Part III of the Constitution or of any other constitutional provision. Except the above two grounds, there is no third ground on the basis of which the law made by a competent legislature can be invalidated – Once petitioners are not disputing the legislative competence of the State Legislature to enact the Act, 1980 and the field of legislation to regulate method of appointment of teacher in private aided institution, the question of breach of any fundamental right of the petitioner's institution including Article 19 (1) (g) of the Constitution of India, do not arise at all – T.M.A. Pai Foundation's case relied upon. (Para 17 and 19)

Writ petition dismissed. (E-1)

List of Cases cited :-

1. T.M.A. Pai Foundation Vs St.of Karn. ; (2002) 8 SCC 481

2. Committee of Management, D.N. (P.G.) College, Meerut Vs St. of U.P. & ors.; 2007 (5) ADJ 398

3. Anant Mills Vs St.of Guj.; AIR 1975 SC 1234

4. Charanjit Lal Choudhary Vs U.O.I. & ors.; AIR 1951 SC 41

5. U.O.I. Vs Elphinstone Spinning and weaving Co. Ltd.& ors.; AIR 2001 SC 724

6. St. of Bihar & ors. Vs Smt. Charusila Dasi; AIR 1959 SC 1002

7. Kedar Nath Singh Vs St. of Bihar; AIR 1962 SC 955

8. Corporation of Calcutta Vs Libery Cinema; AIR 1965 SC 1107

9. Anandji Haridas & Co. (P) Ltd. Vs S.P. Kasture & ors.; AIR 1968 SC 565

10. Sunil Batra Vs Delhi Administration & ors.; AIR 1978 SC 1675

11. St. of Bihar Vs Bihar Distilleries; AIR 1997 SC 1511

12. Zameer Ahmad Latifur Rehman Sheikh Vs St. of Mah. & ors.; J.T. 2010 (4) SC 256

13. Greater Bombay Co-operative Bank Ltd Vs United Yarn Tex (P) Ltd. & ors.; (2007) 6 SCC 236

14. Promoters & Builders Assoc. Vs Pune Municipal Corporation; (2007) 6 SCC 143

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

1. Supplementary affidavit filed today, is taken on record.

2. Heard Sri T.P. Singh, learned Senior Advocate, assisted by Sri Dhiraj Srivastava, learned counsel for the petitioners, Sri Gagan Mehta, learned counsel for the respondent no.3 and Ms. Subhas Rathi, learned Chief Standing counsel for the State-respondents.

3. This writ petition has been filed praying for the following relief:-

(I) Issue a writ, order or direction in the nature of mandamus, declaring that the U.P. Higher Education Services Commission Act, 1980 and rules framed thereunder are unconstitutional, being violative of fundamental rights of the petitioners' as guaranteed under the Constitution of India.

(ii) Issue writ, order or direction in the nature of mandamus, commanding and directing the respondents to permit the petitioners' to manage, run, and control the P.P.N. P.G. College, particularly in the matters of selection, appointment and disciplinary action of teachers and principal in accordance with the U.P. State University Act, 1973 and statues framed thereunder by the Chhatrapati Sahu Ji Maharaj University, Kanpur as earlier.

Submissions

4. Learned counsel for the petitioners submits as under:-

(I) The U.P. Higher Education Services Commission Act, 1980 takes away the autonomy of the Committee of Management of the aided non-minority institutions like the petitioners, and thus, it is violative of Articles 14, 19 and 19 (1) (G) of the Constitution of India.

(II) In the case of ***T.M.A. Pai Foundation Versus State of Karnataka (2002) 8 SCC 481,*** it is clearly held that the autonomy of the aided private institutions shall not be interfered with in the matter of administering the institution by the Committee of Management which include the regulation for appointment of teachers in such government aided private institution like the petitioners.

5. Sri T.P. Singh, learned Senior Advocate, learned counsel for the petitioners states that no other submission is being made except the aforequoted two submissions.

6. Learned Standing Counsel and learned Chief Standing Counsel for the State-respondents support the impugned Act, 1980.

Facts of the case

7. Briefly stated facts of the present case are that the petitioner's institution is presently affiliated to Kanpur University (now known as Chhatrapati Sahu Ji Maharaj University, Kanpur). It is an aided institution. The salaries and other benefits to entire teachers and staff/employee of the petitioner's institution are paid from the State Exchequer. The validity of the U.P. Higher Education Services Commission Act, 1980 (hereinafter referred to as the "Act,1980") has been upheld by the Division Bench of this Court in the case of ***Committee of Management, D.N. (P.G.) College, Meerut Versus State of U.P. and others) 2007(5) ADJ 398 (DB***). Now, despite the validity of the Act, 1980 has been upheld, the petitioners have filed the present writ petition challenging the constitutional validity of the Act, 1980.

Discussions and Findings

8. The Act, 1980 has been enacted by the State Legislature to establish the Service Commission in the selection and appointment of the teacher to the colleges affiliated or recognised by the University and for matters connected therewith or incidental thereto. **Section-4** provides composition of the Commission. **Section-11** provides powers and duties/function of the Commission, which may include the power to make recommendation to the Management relating the appointment of selected candidates. **Section-12** provides procedure for appointment of teacher including responsibility of Management to intimate the existing vacancy and the vacancy likely to be caused during the course of ensuing academic year to the Director at such time and in such manner as may be prescribed. The Director requiring to notify the vacancy to the Commission.

The detail procedure has been prescribed under Section 13 of the Act, 1980 for recommendation by the Commission. **Section-24** exempts minority institution in the matter of appointment. **Section-25** provides punishment in contravention of the provision of the Act. **Section-32** empowers the State Government to make rules by notification, for carrying out the purposes of the Act.

9. In the case of ***T.M.A. Pai Foundation (supra),*** a Constitution Bench (11 Judges) of Hon'ble Supreme Court clearly held that the autonomy of a private aided institutions would be less than that an un-aided institution and the State Government, in case of such an aided institution, has ample power to regulate the method of selection and appointment of teachers after prescribing requisite qualifications for the same. Relevant para nos. ***71,72 and 73*** are reproduced below:-

"71. While giving aid to professional institutions, it would be permissible for the authority giving aid to prescribe by rules or regulations, the conditions on the basis of which admission will be granted to different aided colleges by virtue of merit, coupled with the reservation policy of the state. The merit may be determined either through a common entrance test conducted by the University or the Government followed by counseling, or on the basis of an entrance test conducted by individual institutions - the method to be followed is for the university or the government to decide. The authority may also device other means to ensure that admission is granted to an aided professional institution on the basis of merit. In the case of such institutions, it will be permissible for the government or the university to provide that consideration should be shown to the weaker sections of the society.

72. Once aid is granted to a private professional educational institution, the government or the state agency, as a condition of the grant of aid, can put fetters on the freedom in the matter of administration and management of the institution. The state, which gives aid to an educational institution, can impose such conditions as are necessary for the proper maintenance of the high standards of education as the financial burden is shared by the state. The state would also be under an obligation to protect the interest of the teaching and non-teaching staff. In many states, there are various statutory provisions to regulate the functioning of such educational institutions where the States give, as a grant or aid, a substantial proportion of the revenue expenditure including salary, pay and allowances of teaching and non-teaching staff. It would be its responsibility to ensure that the teachers working in those institutions are governed by proper service conditions. The state, in the case of such aided institutions, has ample power to regulate the method of selection and appointment of teachers after prescribing requisite qualifications for the same. Ever since In Re The Kerala Education Bill, 1957 [(1959) SCR 995], this Court has upheld, in the case of aided institutions, those regulations that served the interests of students and teachers. Checks on the administration may be necessary in order to ensure that the administration is efficient and sound and will serve the academic needs of the institutions. In other words, rules and regulations that promote good administration and prevent mal-administration can be formulated so as to promote the efficiency of teachers,

discipline and fairness in administration and to preserve harmony among affiliated institutions. At the same time it has to be ensured that even an aided institution does not become a government-owned and controlled institution. Normally, the aid that is granted is relatable to the pay and allowances of the teaching staff. In addition, the Management of the private aided institutions has to incur revenue and capital expenses. Such aided institutions cannot obtain that extent of autonomy in relation to management and administration as would be available to a private unaided institution, but at the same time, it cannot also be treated as an educational institution departmentally run by government or as a wholly owned and controlled government institution and interfere with Constitution of the governing bodies or thrusting the staff without reference to Management.

Other Aided Institutions

73. There are a large number of educational institutions, like schools and non-professional colleges, which cannot operate without the support of aid from the state. Although these institutions may have been established by philanthropists or other public-spirited persons, it becomes necessary, in order to provide inexpensive education to the students, to seek aid from the state. In such cases, as those of the professional aided institutions referred to hereinabove, the Government would be entitled to make regulations relating to the terms and conditions of employment of the teaching and non-teaching staff whenever the aid for the posts is given by the State as well as admission procedures. Such rules and regulations can also provide for the reasons and the manner in which a teacher or any other member of the staff can be removed. in other words, the autonomy of a private aided institution would be less than that of an unaided institution.

10. In the case of ***Committee of Management, D.N. (P.G.) College, Meerut Versus State of U.P. and others) (supra),*** Division Bench of this Court considered the challenge to the validity of the Act, 1980 and held as under:-

8. The West Bengal Higher Education Commission Act (the WB Commission Act) is similar to the Commission Act and the appointments there are also made on the recommendations of the West Bengal Higher Education Commission. Brahmo Samaj Educational Society was claiming itself to be a minority in West Bengal and challenged the vires of the WB Commission Act. This matter was dealt in Brahmo Samaj Educational Society and others versus State of West Bengal and others: (2004) 6 SCC 224 (the Brahmo Samaj case). In this case, the Supreme Court neither decided the issue of minority/denominational status of Brahmo Samaj, nor declared the WB Commission Act as ultravires. The court disposed it off with the direction to the State to reconsider the matter in the light of paragraphs no. 71 to 73 of the TMA Pai case. The counsel for the petitioners, relying upon the Brahmo Samaj case and paragraph 71 to 73 of the TMA Pai case submit that the Commission Act is ultravires the Constitution. Does the Commission Act as it stands today imposes unreasonable restrictions?.

9. The objects and reasons of the Commission Act (Appendix-1) show that this Act was enacted on the recommendation of the Vice Chancellors and was to apply to the affiliated and

associated colleges only. This has been done on the ground that

- The selection committees of the individual colleges were expensive;

- Often selection meetings were postponed because a common date did not normally suit the members of the selection committee.

- There were complaints of favourtism.

10. The Commission Act as originally enacted was very comprehensive. The word appointment is defined under section 2(a) of the Commission Act. (see Appendix-2). It provided an inclusive definition and included all appointments except the appointment under section 31(3) of the State Universities Act. Section 2(c) of the Commission Act (see Appendix-2) defines the word college and it included all colleges to whom affiliation or recognition has been granted by the University. Section 24 of the Act provided some exemption to the minority institution but even here the minority institution was required to take approval before making appointments. Thus, the Commission Act as originally enacted had very wide application but now it has been curtailed.

11. The Commission Act has been amended by the UP Act No. 30 of 2004. It has amended the definition of word appointment and college as well as section 24 of the Commission Act (see Appendix-2). The appointment is no longer as wide as it used to be. The appointment is now confined only to the posts described under section 60-E of the State Universities Act. Section 60-E of the State Universities Act (Appendix-3) is titled as Liability in respect of salary. Under this section, the State Government is liable for payment of salary against certain posts mentioned therein. Amended section 2(a) read alongwith section 60-E of the State Universities Act clarify that now the Commission can only make appointments in respect of the posts for which the State Government has undertaken liability to pay the salary.

12. Section 2(c) which defines the word college has also been amended. Section 24 has also been suitably amended. The net result of the amendment of these two in the definition is that the Commission neither makes any appointment in any minority institution, nor any approval of the commission is required by the minority institution before making any appointment.

13. The Commission Act as it stands has been altered. Earlier the Commission was not making any appointment in the minority institution but its approval was required. Now the approval of the Commission is no longer required in the minority institutions. Earlier the word appointment provided inclusive definition. Now it has been confined to the word appointment for which the State Government is liable to pay the salary. The Commission Act was enacted in order to reduce expenses, wastage of time and eradicate complaints of favouritism in the selection of the candidate and now the Commission is only required to make appointment in respect to those posts for which it is liable to pay salary. These appointments can only be made by the Commission if the candidate fulfils the minimum qualification prescribed by the statutes of the different universities. It would have been better if the State had left the appointments to the Committee of management but in case it does not do so then it can not be said that the State has

imposed unreasonable restriction by entrusting right to make the appointment to the Commission. In our opinion it is reasonable restriction within the meaning of Article 19(6) as well as article 26(a) of the Constitution.

CONCLUSION

14. Our conclusion is that the UP Higher Education Commission Act, 1980 as it stands today is intra-vires the constitution. The writ petitions have no merit and are dismissed.

11. From the facts and legal position as well as looking into the provision of the Act, 1980, we are of the considered view that the Act, 1980 regulates the method of selection and appointment of teachers in private aided institution covered by it, including the petitioner's institution. It has neither been argued nor disputed before us that the State Legislature has ample power to legislate on the subject, dealt with by the Act, 1980. Thus, there is no lack of legislative competence to enact Act, 1980.

12. Once it has been settled by a Constitutional Bench (11 Judges) in the case of ***T.M.A. Pai Foundation (supra)*** that the autonomy for a private aided institutions would be less than that an un-aided institution and the State Government, in case of such an aided institution, has ample power to regulate method of selection and appointment of the teachers. There is no question of infringing any fundamental right of the petitioner's institution by the impugned Act, 1980, particularly when the learned counsel for the petitioners has neither disputed nor argued before us that the impugned Act, 1980 regulates the method of selection and appointment of the teacher. The Act, 1980 does not infringe the fundamental right of the petitioners referable to Article 19 (I)(g) of the Constitution of India.

13. **We requested the learned counsel for the petitioners to point out any specific provision of the Act, 1980, which according to him is unconstitutional, but he could not point out any specific provision of the Act, 1980 which according to him is ultra-vires to the Constitution of India.**

14. In the case of ***Anant Mills Vs. State of Gujarat reported in AIR 1975 SC 1234 para 20,*** the Hon'ble Supreme Court has held that :

"20. There is a presumption of the constitutional validity of a statutory provision. *In case any party assails the validity of any provision on the ground that it is violative of Article 14 of the Constitution, it is for that party to make the necessary averments and adduce material to show discrimination violative of Article 14. No averments were made in the petitions before the High Court by the petitioners that the assessments before the coming into force of Ordinance 6 of 1969 bad been made by taking into account the rent restriction provisions of the Bombay Rent Act. Paragraph 2B and some other paragraphs of petition No. 233 of 1970 before the High Court, to which our attention was invited by Mr. Tarkunde, also do not contain that averment. No material on this factual aspect was in the circumstances produced either on behalf of the petitioners or the Corporation. The High Court, as already observed, decided the matter merely on the basis of a presumption. It is, in our opinion, extremely hazardous to decide the question of the constitutional validity of a provision*

on the basis of the supposed existence of certain facts by raising a presumption. The facts about the supposed existence of which presumption was raised by the High Court were of such a nature that a definite averment could have been made in respect of them and concrete material could have been produced in support of their existence or non-existence. Presumptions are resorted to when the matter does not admit of direct proof or when there is some practical difficulty to produce evidence to prove a particular fact. When, however, the fact to be established is of such a nature that direct evidence about its existence or non- existence would be available, the proper course is to have the direct evidence rather than to decide the matter by resort to presumption. A pronouncement about the constitutional validity of a statutory provision affects not only the parties before the Court, but all other parties who may be affected by the impugned provision. There would, therefore, be inherent risk in striking down an impugned provision without having the complete factual data and full material before the court. It was therefore, in our opinion, essential for the High Court to ascertain and field out the correct factual position before recording a finding that the impugned provision is violative of article 14. The fact that the High Court acted on an incorrect assumption is also borne out by the material which has been adduced before us in the writ petitions filed under article 32 of the Constitution."

15 . In the case of ***Charanjit Lal Choudhary Vs. Union of India and others reported in AIR 1951 SC 41 para 10,*** the Hon'ble Supreme Court has held that there is presumption that the legislature understands and correctly appreciates the need of its people. In the case of ***Union of India Vs. Elphinstone Spinning and weaving Co. Ltd. and Ors. reported in AIR 2001 SC 724 para 9,*** the Hon'ble Supreme Court has laid down the law that the legislature does not exceed its jurisdiction. In the case of ***State of Bihar and others Vs. Smt. Charusila Dasi reported in AIR 1959 SC 1002*** para 14, the Hon'ble Supreme Court has laid down the law that there is presumption that the legislature does not intend to exceed its jurisdiction. In the case of ***Kedar Nath Singh Vs. State of Bihar reported in AIR 1962 SC 955 para 26*** the Hon'ble Supreme Court held that provision should be construed in the manner as will uphold its constitutionality. In the case of ***Corporation of Calcutta Vs. Libery Cinema reported in AIR 1965 SC 1107*** the Hon'ble Supreme Court has laid down the law that the provision should be read in the manner as will make it valid. Similar view has been expressed by the Constitution Bench of Supreme Court in the case of ***Anandji Haridas and Co. (P) Ltd. Vs. S.P. Kasture and ors. reported in AIR 1968 SC 565, para 32***. In the case of ***Sunil Batra Vs. Delhi Administration and ors. reported in AIR 1978 SC 1675*** the Hon'ble Supreme Court observed that the legislature expresses wisdom of community. In the case of ***State of Bihar VS. Bihar Distilleries reported in AIR 1997 SC 1511, para 18,*** the Hon'ble Supreme Court observed that an Act made by legislature represents the will of people and cannot be lightly interfered with. In the case of ***Zameer Ahmad Latifur Rehman Sheikh Vs. State of Maharashtra and ors. Reported in J.T. 2010 (4) SC 256 para 34***, the Hon'ble Supreme Court observed that every legally possible effort should be made to uphold the validity. In the case of ***Greater Bombay Co-operative Bank Ltd Vs. United Yarn Tex (P) Ltd. and others reported in (2007) 6 SCC 236 para 82 to***

85 the Hon'ble Supreme Court observed as under :

*" **82 The constitutional validity of an Act can be challenged only on two grounds,** viz. (i) lack of legislative competence; and (ii) violation of any of the Fundamental Rights guaranteed in Part III of the Constitution or of any other constitutional provision. In State of A. P. & Ors. v. McDowell & Co. & Ors. [(1996) 3 SCC 709], this Court has opined that except the above two grounds, there is no third ground on the basis of which the law made by the competent legislature can be invalidated and that the ground of invalidation must necessarily fall within the four corners of the afore-mentioned two grounds.*

83. Power to enact a law is derived by the State Assembly from List II of the Seventh Schedule of the Constitution. Entry 32 confers upon a State Legislature the power to constitute cooperative societies. The State of Maharashtra and the State of Andhra Pradesh both had enacted the MCS Act 1960 and the APCS Act, 1964 in exercise of the power vested in them by Entry 32 of List II of the Seventh Schedule of the Constitution. Power to the enact would include the power to re-enact or validate any provision of law in the State Legislature, provided the same falls in an entry of List II of Seventh Schedule of the Constitution with the restriction that such enactment should not nullify a judgment of a competent court of law. In the appeals / SLPs/petitions filed against the judgment of the Andhra Pradesh High Court, the legislative competence of the State is involved for consideration. Judicial system has an important role to play in our body politic and has a solemn obligation to fulfil. In such circumstances, it is imperative upon the courts while examining the scope of legislative action to be conscious to start with the presumption regarding the constitutional validity of the legislation. The burden of proof is upon the shoulders of the the incumbent who challenges it. It is true that it is the duty of the constitutional courts under our Constitution to declare a law enacted by Parliament or the State Legislature as unconstitutional when Parliament or the State Legislaturehad assumed to enact a law which is void, either for want of constitutional power to enact it or because the constitutional forms or conditions have not been observed or where the law infringes the fundamental rights enshrined and guaranteed in Part III of the Constitution.

84. As observed by this Court in CST v. Radhakrishnan in considering the validity of a Statute the presumption is always in favour of constitutionality and the burden is upon the person who attacks it to show that there has been transgression of constitutional principles. For sustaining the constitutionality of an Act, a Court may take into consideration matters of common knowledge, reports, preamble, history of the times, objection of the legislation and all other facts which are relevant. It must always be presumed that the legislature understands and correctly appreciates the need of its own people and that discrimination, if any, is based on adequate grounds and considerations. It is also well-settled that the courts will be justified in giving a liberal interpretation in order to avoid constitutional invalidity. A provision conferring very wide and expansive powers on authority can be construed in conformity with legislative intent of exercise of power within constitutional limitations. Where a Statute is silent or is inarticulate, the Court would attempt to

transmutate the inarticulate and adopt a construction which would lean towards constitutionality albeit without departing from the material of which the law is woven. These principles have given rise to rule of "reading down" the provisions if it becomes necessary to uphold the validity of the law.

85. In State of Bihar & Ors. v. Bihar Distillery Ltd. & Ors. [(1997) 2 SCC 453], this Court indicated the approach which the Court should adopt while examining the validity/constitutionality of a legislation. It would be useful to remind ourselves of the principles laid down, which read: (SCC p.466, para 17):

"The approach of the court, while examining the challenge to the constitutionality of an enactment, is to start with the presumption of constitutionality. The court should try to sustain its validity to the extent possible. It should strike down the enactment only when it is not possible to sustain it. The court should not approach the enactment with a view to pick holes or to search for defects of drafting, much less inexactitude of language employed. Indeed, any such defects of drafting should be ignored out as part of the attempt to sustain the validity/constitutionality of the enactment. After all, an Act made by the legislature represents the will of the people and that cannot be lightly interfered with. The unconstitutionality must be plainly and clearly established before an enactment is declared as void. The same approach holds good while ascertaining the intent and purpose of an enactment or its scope and application."

In the same para, this Court further observed as follows:

"The Court must recognize the fundamental nature and importance of legislative process and accord due regard and deference to it, just as the legislature and the executive are expected to show due regard and deference to the judiciary. It cannot also be forgotten that our Constitution recognizes and gives effect to the concept of equality between the three wings of the State and the concept of "checks and balances" inherent in such scheme."

16. In the case of ***Promoters and Builders Association Vs. Pune Municipal Corporation (2007) 6 SCC. 143 para 9***, the Hon'ble Supreme Court has laid down the law that while exercising legislative function, unless unreasonableness and arbitrariness is pointed out it is not open for the Court to interfere.

17. The constitutional validity of an Act can be challenged only on two grounds, viz. (i) lack of legislative competence; and (ii) violation of any of the Fundamental Rights guaranteed in Part III of the Constitution or of any other constitutional provision. Except the above two grounds, there is no third ground on the basis of which the law made by a competent legislature can be invalidated. The ground of invalidation must necessarily fall within the four corners of the aforementioned two grounds. In considering the validity of a Statute the presumption is always in favour of constitutionality and the burden is upon the person who attacks it to show that there has been transgression of constitutional principles. For sustaining the constitutionality of an Act, a Court may take into consideration matters of common knowledge, reports, preamble, history of the times, object of the legislation and all the other facts which are relevant. It must always be presumed that the legislature

understands and correctly appreciates the need of its own people and that discrimination, if any, is based on adequate grounds and considerations. The courts will be justified in giving a liberal interpretation in order to avoid constitutional invalidity. Where a Statute is silent or is inarticulate, the Court would attempt to transmutate the inarticulate and adopt a construction which would lean towards constitutionality albeit without departing from the material of which the law is woven. These principles give rise to rule of "reading down" the provisions if it becomes necessary to uphold the validity of the law. While examining the challenge to the constitutionality of an enactment, the court is to start with the presumption of constitutionality and try to sustain its validity to the extent possible. The court cannot approach the enactment with a view to pick holes or to search for defects of drafting, much less inexactitude of language employed. An act made by the legislature represents the will of the people and that cannot be lightly interfered with. It is presumed that the legislature expresses wisdom of the community, does not intend to exceed its jurisdiction and correctly appreciates the need of its own people.

18. When these settled principles are applied on the facts of the present case and the submissions made by the parties, we find that the petitioners have completely failed to rebut the presumption of constitutional validity of the impugned Act, 1980.

19. Once petitioners are not disputing the legislative competence of the State Legislature to enact the Act, 1980 and the field of legislation to regulate method of appointment of teacher in private aided institution, the question of breach of any fundamental right of the petitioner's institution including Article 19 (1) (g) of the Constitution of India, do not arise at all, particularly in view of law laid down by Hon'ble Suprme Court in the case of ***T.M.A. Pai Foundation (supra***).

20. For all the reasons aforequoted, we do not find any unconstitutionality in the impugned Act, 1980. The writ petition is wholly devoid of merit and is frivolous, which deserves to be dismissed. Consequently, the writ petition is ***dismissed.***

(2022)03ILR A605
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.01.2022

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ A No. 17530 of 2021

Arvind Kumar & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ankur Sharma, Nidhi Agarwal

Counsel for the Respondents:
C.S.C., A.S.G.I., Sri Siddharth Singhal

A. Service Law – UP Industrial Training Institutes (Instructors) Service Rules, 2014 – Selection – Advertisement issued and selection process started – In respect of two posts selection was already concluded and recommendations were made for appointment – Meantime, UP Direct Recruitment to Junior Level Posts (Discontinuation of Interview) Rules, 2017 came to be framed which provide that interview prescribed in the selection procedure in the relevant service rules would be discontinued – Validity

challenged – Besides the saving clause 4(d) of the Recruitment Rules, 2017, the Selecting Body has to abide by the procedure prescribed for under the advertisement and the relevant rules then in existence – Selecting body does not have its right to alter the procedure for selection than what is prescribed under the relevant Service Rules, 2014 and Recruitment Rules, 2017. (Para 25 and 32)

Writ petition allowed. (E-1)

List of Cases cited :-

1. N.T. Devin Kutti & ors. Vs Karnataka Public Service Commission & ors.; (1990) 3 SCC 157

2. Dheeraj Mor Vs Hon'ble High Court of Delhi; (2020) 7 SCC 401

3. Prashant Kumar Katiyar Vs St. of U.P. & ors.; 2013 (1) ESC 221

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

1. Heard Sri Ankur Sharma, learned counsel for the petitioners, Sri Siddharth Singhal, learned counsel for the respondent No.- 4 and learned Standing Counsel for the respondent Nos. 1 & 2 through video conferencing. Nobody is present on behalf of the respondent No.3.

2. The petitioners who are four in number, are before this Court seeking a writ of certiorari to quash the notification issued by the respondent No.4, namely, U.P. Subordinate Service Selection Commission, impleaded through its Secretary, dated 11th November, 2021 whereby the applicants under the Advertisement No.- 20(07)/2015 and 16(04)/2016 have been directed to apply for appearing in the written examination for selection and appointment to the post of Instructors that are 559 and 293 respectively under the advertisements, to be filled in.

3. The petitioners who have applied against two advertisements respectively, have questioned the notification on the ground that at the time of advertisements in the year 2015 and 2016 prescribing last date for submission of applications as 24th November, 2015 and 21st December, 2016 respectively, the rules in existence were The Uttar Pradesh Industrial Training Institutes (Instructors) Service Rules, 2014 (hereinafter referred as 'Service Rules, 2014') and according to these rules, selection had to be made on the basis of credentials, academic records of the candidates and walk-in-interview.

4. In this regard, he has placed reliance upon sub-rule (3) and (4) of Rule 16 of the Service Rules, 2014. He submits that the selection process had already begun way back in the year 2015 and selection and appointment against two vacancies of Instrument Mechanic and Embroidery in needle work had already been made and the selection process in respect of the remaining 850 (557+293) had remained to be completed. However, in the meantime, Uttar Pradesh Direct Recruitment to Junior Level Posts (Discontinuation of Interview) Rules, 2017 (hereinafter referred to as 'Recruitment Rules, 2017') came to be framed by the Governor in exercise of power under the proviso to Article 309 of the Constitution of India and which provided that interview prescribed in the selection procedure in the relevant service rules of the State would be discontinued and wherever the recruitment process prescribed for interview only, such selection would now be made on the basis of the written examination only.

5. Learned counsel for the petitioner has submitted that these rules saved the selection process in respect of the

advertisement already issued prior to coming into force of these rules vide Clause (d) of Rule 4 of Recruitment Rules, 2017. However, the respondent No.- 4 created confusion and that too for no justifiable reasons by seeking guidance from the Director, Training and Employment Government of U.P. Lucknow that approval be sought from the State Government for holding written examination in respect of the vacancies already advertised and in respect of which selection was yet to be accomplished.

6. This letter was written on 5th June, 2020 by the Secretary of respondent No.4, however, the Director in his wisdom correctly appreciated the matter and made recommendation to the Chief Secretary (Vocational Education and Craft Development Department), Government of U.P, Lucknow that any change in the method of selection qua posts already advertised out of which selection and recommendation in respect of two such advertised posts have already been made, would complicate things and would lead to disputes. The Secretary on 30th July, 2021 wrote to the Selection Board that recruitment had to be made strictly in accordance with Recruitment Rules, 2017.

7. Learned counsel for the petitioner has further submitted that there was nothing in the order of the Secretary to direct for written examination in respect of the vacancies already advertised and for which the selection process was still on and yet the respondent No.- 4 proceeded to issue notification for holding written examination in respect of the advertisement of the year 2015 and 2016 and, therefore, the notification dated 28th November, 2016 is absolutely unsustainable in law.

8. He submits that once the Government has decided that the recruitment has to be made in accordance with Recruitment Rules, 2017 and Recruitment Rules, 2017 saved already advertised vacancies in respect of which selection process was underway, the respondent No.-4 transgressed its authority in directing for written examination for the selection process. He submits that this notification is de hors the Recruitment Rules, 2017. Additionally, he submits that every rule unless it postulates its retrospective application by express means, no Government order or notification by the selecting body, can make the rules effective retrospectively.

9. `*Per contra*, Sri Siddharth Singhal, learned counsel appearing for the respondent No.4 tried to defend the notification on the ground that the Government intended the ongoing selection process to abide by the Recruitment Rules, 2017 which prescribed for written examination and that is why in its letter dated 3rd November, 2021 the Special Secretary, Government of U.P. prescribed for 100 marks for the written examination. He submits that the Commission was left with no other option but to issue notification impugned here in this petition inviting applications from the candidates for written examination. However, he could not dispute the factum of selection and appointment against two posts of Instrument Mechanic and Embroidery in needle work respectively which were part of the same advertisement. He could also not dispute that the selection process had started with the invitation of the applications and for which last date was prescribed as 20th November, 2015 and 21st December, 2016 respectively under the two advertisements.

10. On a pointed query being made refering to the relevant clause (d) of Rule 4 of the Recruitment Rules, 2017, he could not dispute the same and merely argued that it will all depend upon the interpretation of the said provision. However, he would admit at the same time that Recruitment Rules, 2017 have not been made retrospective in its effect.

11. Learned Standing Counsel submitted that the letter issued by the Special Secretary dated 3rd November, 2021 cannot be construed in any manner to be directing to the respondent No.- 4 to hold the on going selection process pursuant to the advertisement of the year 2015 and 2016 by applying the method of the written examination. He would submit that clause (b) of Rule 4 provides similar number of marks for the written examination as prescribed for interview under the Recruitment Rules, 2017 in the event of selection being done doing away with the procedure of interview and replacing the same by written examination. However, he could not demonstrate that Recruitment Rules, 2017 in any manner can be said to have any retrospective operation inasmuch as he could not dispute the provision as contained in clause (d) of Rule 4 to be a saving clause in respect of the advertisements where the selection process in pursuance thereof if already underway at the time when the Recruitment Rules, 2017 came into force.

12. Having heard learned counsel for the respective parties and having gone through the records of the case, I find that sustainability of the notification impugned, depends only upon the interpretation of Recruitment Rules, 2017. It is admitted to the parties that the posts in question were advertised in the year 2015 and 2016 respectively inviting applications fixing last date as 24th November, 2015 and 21st December, 2016 and thus the process of selection started. It is also admitted to the parties that out of various posts advertised, in respect of two posts of Instrument Mechanic and Embroidery in needle work selection had already been done in the past and recommendations had been made to the department concerned for appointment in the past and the final selection process in respect of the remaining vacancies were underway.

13. It is in this above background of the facts of the case, I proceed to examine the relevant recruitment rules so as to form a final view qua sustainability of the notification issued by the respondent No.4, impugned in this petition.

14. Prior to the coming into force of the Recruitment Rules, 2017, there was a procedure only for walk-in-interview under the Service Rules, 2014. Part V of the Service Rules, 2014 prescribes for procedure for recruitment and the relevant rules are sub-rule (3), (4) and (5) of Rule 16 which are reproduced hereunder:-

"(3) In making selection for direct recruitment, the merit list of the eligible candidates shall be prepared in the following manner:-

(a) For academic qualifications prescribed for the post, the marks shall be awarded to each candidate in the following manner:

(i) Fifty percent of the percentage of marks secured in the High School Examination shall be given to each candidate.

(ii) Twenty percent of the percentage of marks secured in the

National Trade Certificate Test/ National Apprenticeship Certificate Test shall be given to each candidate,

or

Twenty percent of the percentage of marks secured in Diploma or Degree Examination shall be given to each candidate.

(iii) Fifteen percent of the percentage of the marks secured in CITS/ POT test shall be given to each candidate.

(b) (i) After the results of the evaluations under clause (a) have been received and tabulated, the Section Committee shall hold an interview. If the applications received are large in numbers, then in such situation the number of candidates to be called for interview shall be four times the number of vacancies. For this purpose the merit list of candidates shall be prepared separately on the basis of aggregate of marks obtained by them under clause (a).

(ii) The interview shall carry one hundred marks. Fifteen percent of the marks obtained at the interview shall be given to each candidate."

(4). ***The marks obtained by each candidate under clause (a) of sub-rule (3) shall be added to the marks obtained by him under clause (b) of sub-rule (3). The final select list shall be prepared on the basis of aggregate of marks so arrived.*** *If two or ore candidates obtain equal marks in the aggregate, the candidate obtaining higher marks under clause (a) of sub-rule (3) shall be placed higher in the select list. In case two or more candidates obtain equal marks under clause (a) of sub-rule (3) also, the candidate senior in age shall be placed higher in the select list.*

(5) The select list referred to in sub-rule (4) shall be forwarded to the appointing authority." (emphasis added)

15. Rule 17 of Service Rules, 2014 provides for appointment, probation, confirmation and seniority under part VI of the Service Rules, 2014. Rule 17(1) that deals with appointment is important for the purpose of this case and is reproduced hereunder:-

"17.(1) Subject to the provisions of sub-rule (3) of this rule, the appointing authority shall make appointment by taking the names of candidates in the order in which they stand in the list prepared under rule 16."

16. Upon bare reading of these rules quoted above, it is clear that a select list has to be prepared under sub-rule 4 in order of merit of the candidates on the basis of marks secured by them under various heads of sub-rule 3 and marks obtained in the interview, shall be forwarded to the appointing authority. The appointing authority shall act upon the select list in the order of merit prepared and forwarded under Rule 16. Thus, there was no procedure prescribed under the Service Rules, 2014 for holding any written examination for making recruitment to the post of instructors.

17. Exercising power under the proviso to Article 309 of the Constitution of India, the Governor has been pleased to frame another rule, namely, Uttar Pradesh Direct Recruitment to Junior Level Posts (Discontinuation of Interview) Rules, 2017 giving it an overriding effect upon all the

existing rules of recruitment to the posts in the departments of State Government by virtue of Rule 2 of the Recruitment Rules, 2017. Rule 4 of Recruitment Rules, 2017 deals with discontinuation of the procedure of interview in making direct recruitment to the junior level posts in the Government. Admittedly, the posts in question do fall in the category of junior level posts. For proper appreciation Rule 4 of the Recruitment Rules, 2017 is reproduced hereunder in its entirety:-

*"**4. Discontinuation of Interview in making direct recruitment to junior level posts** - The provisions of interview prescribed in the selection procedure in the relevant service rules in making direct recruitment to junior level posts shall stand discontinued, and upon such discontinuation-*

(a) Where the procedure for direct recruitment to a junior level posts is prescribed on the basis of interview only, such selection shall be made on the basis of written examination only.

(b) Where separate marks are prescribed for written test and interview in the selection procedure, the marks for interview shall be included in the marks prescribed for written examination. In case there is no provision for written examination, the marks prescribed for interview shall be presumed as the marks prescribed for written examination.

(c) For selection to the posts where skill test or technical examination is required, the marks prescribed for such test/ examination shall be only qualifying in nature and such marks shall not be counted in the over all selection procedure.

(d) If prior to commencement of these rules, the advertisement for selection to any junior level post has been made and the selection process is on going, such selection shall remain unaffected and shall be made in accordance with the advertisement issued in this behalf.

(e) If in special circumstances, the Administrative Department of the Government finds a justification to prescribe the interview for selection to a particular junior level post, the Administrative Department will submit the appropriate proposal to the Personnel Department of the Government, which will take a well considered decision on such proposal." (emphasis added)

18. From a bare reading of the aforesaid rules, it becomes quite explicit that in the event advertisement has already been made prior to the commencement of these Rules for selection to any junior level posts and the selection process is going on, such selection shall remain unaffected and shall be governed by the advertisement issued in that behalf.

19. Thus, clause (d) of Rule 4 of Recruitment Rules, 2017 saves the advertisement and selection process pursuant thereto, if already issued and makes the rule 4 of Recruitment Rules, 2017 prospective in nature.

20. The golden rule of interpretation is that words have to be interpreted in the manner they have been framed in the phrase and in my considered view there cannot be any other view in interpreting clause (d) of Rule 4 so as to hold it applicable to even ongoing selection process.

21. Now, the question would be as to when the selection process begins with the issuance of advertisement, or with the issuance of call letter for interview.

22. The legal position as it stands today, the selection process starts with the invitation of applications under an advertisement in which the last date is prescribed for. It is not the case of the respondents that the dates prescribed for as a last date for submission of application forms under the advertisements, were further extended and the case is instead that in respect of two posts selection was already concluded and recommendations were made for appointment. That being the situation, the respondents cannot take the plea that the process of selection had not already begun.

23. It would be worth referring here certain authorities of Supreme Court of India in the above regard. In the case of A.P. Public Service Commission, Hyderabad and others v. B. Sarat Chandra and others reported in (1990) 2 SCC 669, the Andhra Pradesh Services Tribunal though held the process of Selection to have started with the advertisement as applications were invited but there being various steps in the selection process, the essence of process would lie in the preparation of select list and thus held that the eligibility would be taken to be on the date of preparation of select list. The Supreme Court reversed the judgment of the Tribunal by holding that selection cannot be understood in a sense of final act of preparation of selecting candidates with preparation of the list for appointment. The Court though was dealing with the date of eligibility in that case but held that selection consisted of various steps like inviting applications, scrutiny of applications, rejection of defective applications, conducting examinations, calling for interview and preparation of list of selected candidates for appointment and it was observed that Rule 3 of procedure of the Public Service Commission, Andhra Pradesh was also indicative of that. In the case in hand I also find Rule 16 of the Service Rules, 2014, laying down such procedure and thus it is right to hold that selection process in this case also began with the invitation of applications by issuing advertisements in the year 2015 and 2016 in respect of posts advertised thereunder. In the case of **N.T. Devin Kutti and others v. Karnataka Public Service Commission and others; (1990) 3 SCC 157**, the Supreme Court has clearly held that selection process starts with the advertisement and the selection of candidates is to be made in accordance with the existing Rules and Government order applicable on that date. The rights of the candidates crystallize on the date of publication of the advertisement. The process of selection ends with the appointment. Again in a very recent decision in the case **Dheeraj Mor v. Hon'ble High Court of Delhi reported in (2020) 7 SCC 401**, it was clearly held that selection process begins with advertisement, inviting applications form the eligible candidates.

24. Yet another argument advanced by learned counsel for the petitioner is that once the rules of game are finally set and game is on, rules of the game cannot be changed.

25. I find merit in the above submission. Besides the saving clause 4(d) of the Recruitment Rules, 2017, the Selecting Body has to abide by the procedure prescribed for under the

advertisement and the relevant rules then in existence.

26. In my above view, I find support in the Full Bench judgment of this Court in the case of **Prashant Kumar Katiyar v. State of U.P. and others reported in 2013 (1) ESC 221.** In that case vacancies had been intimated to the Selection Board for the purposes of notification under the relevant Act and the Rules and the Board had issued advertisement inviting applications. By calling/ approving applications of transfer of a teacher at the instance of management, it sought to alter vacancy position of institutions. The issue was whether the selection Board could have altered the vacancies to upset the procedure already set forth. Vide paragraph 39 of the judgment the Full Bench has held thus:-

"39. To our mind, the function of the management and the District Inspector of Schools, therefore, has to follow this procedure and it is trite law that if a statute requires a thing to be done in a particular manner then it should be done in that manner alone and not otherwise. The procedure under the Act and Rules is mandatory and it has to be done in that manner alone. Reference be had to Para 20 and 23 of the division bench judgment in the case of Km. Poonam v. State of U.P. 2008 (3) AWC Pg. 2852 and to Para 24 of the decision in the case of U.P. Secondary Education Service Selection Board Vs. State of U.P. 2011 (3) ADJ Pg. 340. The rules have been framed consciously by making a provision of limited alteration in the determination by adding to the vacancies on account of any fresh occurrence during the year of recruitment itself. Thus impliedly no power has been conferred for altering the vacancies already determined and intimated to the Board for the purpose of notification under the Act and Rules. The requisition to fill up the vacancies after having sent to the Board therefore becomes unalterable as the Board proceeds with the advertisement under Rule 12 by publishing the vacancy in accordance with reservation rules and in accordance with the subject-wise and group-wise vacancies against which appointments are to be made inviting applications from candidates giving their preference of the institution which choice has to be indicated by the candidate. At this stage, to upset the procedure after advertisement by giving any further leverage would be to disturb the entire process of selection and if such a concession is given, the management can indulge into motivated manipulations which are not uncommon and give rise to uncalled for controversies ending up in litigation."

27. Although in view of the above the impugned notification is liable to be quashed but still further I would examine the right of a Selecting Body, respondent No.-4 in this case, as something has been argued in defence of the notification issued in its behalf changing the procedure of selection.

28. The argument of the learned counsel for the respondent No.- 4 is that the letter dated 3rd November, 2021 issued by Secretary would be taken to be a direction to the respondent No.- 4 to hold written examination and so the consequential notification and unless and until the said order is questioned, the consequential order cannot be questioned. I find no merit in this submission. Firstly, I would observe that when the recruitment Rules, 2017 clearly saved the on going selection process

pursuant to an advertisement already made, it was not open for the respondent No.- 4 to have passed resolution requesting the Director, Training and Employment U.P., Lucknow for his opinion. The respondent No. 4 is merely a selecting body and not the appointing authority. The respondent No.- 4 being selecting body has to hold selection as the recruitment rules prescribe for. It is an admitted fact to the respondent No.- 4 that when advertisements were made in the year 2015 and 2016 respectively the Service Rules, 2014 provided only for walk-in-interview as procedure for selection and preparation of select list on the basis of marks obtained under different heads of credentials and academic records of the candidates and finally in the interview. The recruitment Rules, 2017 that came to be framed and enforced to do away with the requirement of interview and replace the same by written examination/ test, did save the selection process already underway and, therefore, it was a complete misadventure on the part of the respondent No.- 4 to have written a letter to the Director, Training and Employment, U.P. Lucknow on 5th June, 2020. The Director, Training and Employment , U.P. Lucknow rightly wrote a letter to the Chief Secretary that any deviation in the procedure of selection pursuant to which selection in respect of two vacancies had already been done and recommendations had been made, would lead to disputes and so the Director also wrote to the respondent No.- 4 on 30th July, 2020 to proceed as per the Recruitment Rules, 2017 as admittedly these rules saved the ongoing selection process.

29. It appears that some further letter was written by the respondent No.- 4 to the Government on 22nd October, 2021, however, copy thereof has not been placed on record but in reply to that letter, an order has come to be passed by the Special Secretary, Government of U.P., Lucknow on 3rd November, 2021 directing the respondent No.- 4 to hold the selection by prescribing curriculum for written examination and allocation of marks in respect thereof. Why the respondent No.- 4 has not brought its letter dated 22nd October, 2021 on record is best known to it, but the argument advanced by learned counsel for the petitioner is correct that the letter dated 3rd November, 2021 does not refer to any advertisement number or date in respect of which curriculum for written examination has been prescribed for and, therefore, this cannot be read to mean that Government decided to hold written examination replacing the interview procedure in respect of the selection pursuant to the advertisements in question made prior to coming into force of Recruitment Rules, 2017. Thus, exercising power as a selecting body, the respondent No.- 4 had no authority to change the rule of procedure in the mid of selection process.

30. Thus for what has been discussed and observed above in this judgment, I am not able to sustain the notification dated 11th November, 2021 whereby written examination has been prescribed to replace the procedure of interview in respect of the selection and appointment to the vacancies advertised in the year 2015 and 2016 vide advertisement Nos.- 20(4)/ 2015 and 16(4)/ 2016 respectively.

31 . I further find that the notification is based more upon the resolution of the Selection Commission dated 28th January, 2020 than the letter dated 3rd November, 2021 issued by the Chief Secretary.

32. In my considered view the selecting body does not have its right to

alter the procedure for selection than what is prescribed under the relevant Service Rules, 2014 and Recruitment Rules, 2017. Since I have already interpreted both the rules, I am not able to sustain resolution passed by U.P. Subordinate Selection Commission dated 28th January, 2020 and same is hereby quashed as quashing of the notification dated 11th November, 2021 would result in revival of another illegal resolution of the Commission dated 28th January, 2020.

33. Insofar as 3rd November, 2021 order of the State Government is concerned since it only refers to some letter of Selection Commission which has not been brought on record and so it is hereby provided that in the event it relates to the selection pursuant to the advertisements in question, the same shall also stand quashed to that extent.

34. The writ petition thus succeeds and stands allowed as indicated above. However, further directions is issued to the Selection Commission to conclude the selection process strictly in accordance with law and as per the Service Rules, 2014 as expeditiously as possible.

(2022)03ILR A614
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.03.2022

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.

Writ A No. 24963 of 2021
with
Writ A No. 5390 of 2021

Ram Vilas ...Petitioner
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:
Sri Dinesh Kumar Verma, Sri Karunakar Srivastava

Counsel for the Respondent:
C.S.C., Sri Nirankar Singh

A. Service Law – Payment of benefits - Service conditions of the employees of the Nigam would be same as are applicable to the employees of the State Government under the Rules, Regulations and Orders applicable to the State Government servants so long as the same are not altered by the respondents in accordance with the provisions of the Act. (Para 5)

In the present case, only administrative orders are issued by the respondents and there is no alteration made with regard to the service conditions of the petitioners viz-a-viz. the employees of the State Government. **Merely by office orders change in the service conditions cannot be made.** It is not disputed that benefits of the 6th Pay Commission are covered under the term 'service conditions' and, therefore, the said benefits are to be made applicable to the petitioners also from the date the same are made applicable to the State Government employees. (Para 6)

Writ petitions allowed. (E-4)

Precedent followed:

1. Harwindra Kumar Vs Chief Engineer, Karmik & ors., (2005) 13 SCC 300 (Para 4)

Present petition challenges orders dated 10.08.2021 and 19.01.2021.

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

1. Heard Sri DineshKumar Verma, learned counsel for petitioners, Sri Nirankar Singh, learned counsel for respondent No.2 and 3 and Standing Counsel for the State respondents.

2. Petitioners have approached this Court for quashing of the orders dated 10.8.2021 and 19.1.2021 and further for a mandamus commanding the opposite parties to implement the recommendations of the 6th Pay Commission on the petitioners w.e.f. from 20.7.2015, i.e., the date when the similarly situated persons have been granted the said benefits (Annexure No.3). Further an interest is also sought on the delayed payment of the 6th and 7th Pay Commission and also prayer is made for payment of dearness allowance to the petitioners in accordance with the Government Order dated 16.10.2009 (Annexure-7 to the writ petition).

3. After the coming into force of 6th Pay Commission, different orders were passed recommending the benefits of payments of 6th Pay Commission to the petitioners w.e.f. 20.7.2015 while the State Government employees were paid the said benefits from 01.01.2006. Petitioners are praying parity with the State Government employees.

4. Counsel for the petitioners submits petitioners were appointed with the U.P. Pichhra Varg Vitt Evam Vikas Nigam Limited, Lucknow. He further submits that the entire controversy with regard to the status of the employees of the Jal Nigam was considered at length by Supreme Court in case of Harwindra Kumar Vs. Chief Engineer, Karmik and Others reported in (2005) 13 SCC 300 and after referring to the provisions of the said Act, Rules and Regulations applicable, in paragraph-7, 9 and 10, the Supreme Court held-:

"7.....From the aforesaid provisions, it would be clear that the appointed date for the purposes of the Act was 18th June, 1975 when the Nigam was established and under Section 37 of the Act, conditions of service of the appellants/petitioners who were employed in the Local Self Engineering Department of the Government of Uttar Pradesh before the appointed date, were continued to remain the same as they were before the appointed date unless and until the same are altered by the Nigam under the provisions of the Act. Section 97 confers power upon the Nigam with the previous approval of the State Government to frame Regulations in relation to service conditions of employees of the Nigam and acting thereunder, Regulations were framed by the Nigam in the year 1978, Regulation 31 whereof provides that service conditions of the employees of the Nigam shall be governed by such rules, regulations and orders which are applicable to other serving government servants functioning in the State of Uttar Pradesh. Thus, from a bare reading of Section 37 and Regulation 31, it would be clear that the service conditions of the employees of the Nigam would be the same as are applicable to the employees of the State Government under the Rules, Regulations and Orders applicable to such government servants so long the same are not altered by the Nigam in accordance with the provisions of the Act. If Regulations would not have been framed, the Nigam had residuary power under Section 15(1) of the Act whereby under general power it could change the service conditions and the same could remain operative so long regulations were not framed but in the present case, regulations were already framed in the year 1978 specifically providing in Regulation 31 that the conditions of service of the employees of the Nigam shall be governed by the Rules, Regulations and Orders governing the conditions of service of government servants which would not only mean then

in existence but any amendment made therein as neither in Section 37 nor in Regulation 31, it has been mentioned that the Rules then in existence shall only apply. After the amendment made in Rule 56(a) of the Rules by the State Government and thereby enhancing the age of superannuation of government servants from 58 years to 60 years, the same would equally apply to the employees of the Nigam and in case the State Government as well as the Nigam intended that the same would not be applicable, the only option with it was to make suitable amendment in Regulation 31 of the Regulations after taking previous approval of the State Government and by simply issuing direction by the State Government purporting to act under Section 89 of the Act and thereupon taking administrative decision by the Nigam under Section 15 of the Act in relation to age of the employees would not tantamount to amending Regulation 31 of the Regulations.

9. In the present case, as Regulations have been framed by the Nigam specifically enumerating in Regulation 31 thereof that the Rules governing the service conditions of government servants shall equally apply to the employees of the Nigam, it was not possible for the Nigam to take an administrative decision acting under Section 15(1) of the Act pursuant to direction of the State Government in the matter of policy issued under Section 89 of the Act and directing that the enhanced age of superannuation of 60 years applicable to the government servants shall not apply to the employees of the Nigam. In our view, the only option for the Nigam was to make suitable amendment in Regulation 31 with the previous approval of the State Government providing thereunder age of superannuation of its employees to be 58 years, in case, it intended that 60 years which was the enhanced age of superannuation of the State Government employees should not be made applicable to employees of the Nigam. It was also not possible for the State Government to give a direction purporting to Act under Section 89 of the Act to the effect that the enhanced age of 60 years would not be applicable to the employees of the Nigam treating the same to be a matter of policy nor it was permissible for the Nigam on the basis of such a direction of the State Government in policy matter of the Nigam to take an administrative decision acting under Section 15(1) of the Act as the same would be inconsistent with Regulation 31 which was framed by the Nigam in the exercise of powers conferred upon it under Section 97(2) of the Act.

10. For the foregoing reasons, we are of the view that so long Regulation 31 of the Regulations is not amended, 60 years which is the age of superannuation of government servants employed under the State of Uttar Pradesh shall be applicable to the employees of the Nigam. However, it would be open to the Nigam with the previous approval of the State Government to make suitable amendment in Regulation 31 and alter service conditions of employees of the Nigam, including their age of superannuation. It is needless to say that if it is so done, the same shall be prospective. "

5. On the basis of the aforesaid judgment, submission made by counsel for petitioners is that service conditions of the employees of the Nigam would be same as are applicable to the employees of the State Government under the Rules, Regulations and Orders applicable to the State

Government servants so long as the same are not altered by the respondents in accordance with the provisions of the said Act. Applicability of the aforesaid judgment could not be disputed by the learned Standing Counsel and counsels for the respondent-Corporation.

6. In the present case, only administrative orders are issued by the respondents and there is no alteration made with regard to the service conditions of the petitioners viz-a-viz the employees of the State Government. Merely by office orders change in the service conditions cannot be made. It is not disputed that benefits of the 6th Pay Commission are covered under the term 'service conditions' and, therefore, the said benefits are to be made applicable to the petitioners also from the date the same are made applicable to the State Government employees.

7. In view of the aforesaid, the impugned orders dated 10.8.2021 and 19.1.2021 are set aside and respondents are directed to pay the benefits of the 6th Pay Commission to the petitioners w.e.f. 20.7.2015 as was provided to the similarly situated persons by the respondents by the order dated 24.6.2020 (Annexure No.3) and further to pay the dearness allowance as is being provided to the State Government employees within a period of four months from the date of receipt of a certified copy of this order.

8. With the aforesaid directions, all the writ petitions are allowed.

(2022)03ILR A617
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.11.2021

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Writ A No. 26110 of 2018

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

Counsel for the Petitioner:
Sri Ashok Kumar Rai, Sri Santosh Kumar Dwivedi

Counsel for the Respondents:
C.S.C.

A. Service Law – Compulsory retirement from the post of Deputy District Election Officer – Subjective satisfaction – Charge of not performing the duty properly – After enquiry, the petitioner was awarded the punishment by placing him on the minimum pay scale – Order of compulsory retirement was challenged on the ground of its being issued as camouflage to cut short the disciplinary proceeding – Held, the screening committee has formed the opinion on the subjective satisfaction on appreciation of entire record of the petitioner – Pendency of disciplinary proceeding was not at all in consideration of the screening committee in forming an opinion that the petitioner should be compulsorily retired in the public interest. (Para 20 and 23)

Writ petition dismissed. (E-1)

List of Cases cited :-

1. Writ A No. 45254 of 2017; Ghanshyam Misra Vs St. of U.P. & ors.

2. Special Appeal Defective No. 24 of 2018; Rizwan Ahmad Vs St. of U.P. & ors.

3. Special Appeal No. 496 of 2018; Brijesh Kumar Vs St. of U.P. & ors.

4. St. of U.P. Vs Abhai Kishore Masta; 1995(1) SCC 336

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

1. I have heard learned counsel for the petitioner and learned counsel for the respondents.

2. The petitioner has assailed the order dated 29.10.2018 passed by respondent no.2-Chief Election Officer, U.P., Lucknow by which he has been compulsory retired and the consequential order dated 30.10.2018 passed by respondent no.3-Additional District Magistrate (Administration)/Deputy District Election Officer, Bulandshahar intimating the order dated 29.10.2018.

3. Brief facts giving rise to the present case are that the petitioner was appointed as Junior Assistant on 19.06.1990 in the office of District Election Officer. The petitioner was promoted to the post of Senior Assistant. The petitioner was suspended by order dated 01.07.2011 on the charge that he had not been performing his duties properly and had not abide by the orders of his superiors. Thereafter, an enquiry was instituted against the petitioner. The petitioner was awarded punishment by placing him on the minimum pay scale by order dated 16.02.2016.

4. It appears that the Chief Secretary, Government of U.P., Lucknow issued an order on 06.07.2017 to all Additional Chief Secretary/Principal Secretary/Secretary, U.P. Government to forward the details of all employees working in their department who have completed fifty years on 31.07.2017 for screening them for compulsory retirement. The cut-off date of fifty years was 31.03.2017.

5. Pursuant to the aforesaid letter, the Chief Election Officer, UP, Lucknow wrote a letter dated 12.07.2017, addressed to all District Election Officers, the State of U.P. Whereby he asked them to supply details of employees who have completed fifty years on 31.03.2017 to screen them for compulsory retirement.

6. The Additional District Magistrate (Finance/Revenue)/Deputy District Election Officer, Hathras by letter dated 28.07.2017 sent the details of all the employees including the petitioner to the Chief Election Officer, U.P., Lucknow. According to the said report, the services of the petitioner are satisfactory.

7. The District Election Officer, Hathras by letter dated 22.09.2017 submitted a report to the Chief Election Officer, UP, Lucknow stating therein that the petitioner has given full cooperation in successfully conducting the election of General Assembly-2017. However, the Chief Election Officer in the exercise of power under Rule 56(c) of Fundamental Rules passed an order on 29.10.2018 retiring the petitioner compulsorily. According to the said order/notice, the petitioner will retire after three months of the said order/notice. The order dated 29.10.2018 was communicated by respondent no.3-Additional District Magistrate, Bulandshahar to the petitioner on 30.10.2018.

8. The further, case of the petitioner is that the Chief Election Officer, UP, Lucknow by order dated 17.07.2018 initiated a disciplinary proceeding against the petitioner, and the District Election Officer, Bulandshahar was appointed as Enquiry Officer to conduct an enquiry against the petitioner. The Chief Election Officer, UP, Lucknow by order dated 20.08.2018 changed the Enquiry Officer for conducting enquiry against the petitioner.

9. In the counter affidavit, the respondent has stated that the petitioner was promoted as Senior Assistant in the year 1996 and not in the year 2018. In the disciplinary proceeding, the petitioner was awarded the punishment of reversion of the minimum pay scale on the post of Senior Assistant by order dated 16.02.2016. The respondents have further stated in the counter affidavit that the petitioner was compulsorily retired in the public interest to enhance efficiency in the department and to make the atmosphere corruption-free. It is further stated in the counter affidavit that the conduct and reputation of the petitioner were such that his continuance in service would have been a menace and injurious to the public interest. To support the aforesaid contention, the respondents have enclosed various letters dated 24.01.2017, 04.03.2017, 21.03.2017, 16.11.2017 & 30.05.2018. It is further stated that the letter of the Election Officer, Hathras dated 22.09.2017 was in the context of fixation of pay in consonance with the 7th Pay Commission.

10. Further, the case of the respondents is that the District Election Officer, Bulandshahar by letter dated 31.08.2018 directed the petitioner to appear before the screening committee at 11:00 A.M. on 14.09.2018. The petitioner had appeared on 14.09.2018 at 11:00 A.M. before the screening committee and the petitioner was also given a personal hearing. The respondents have also enclosed with the counter affidavit, the report of the screening committee which was the basis of forming the opinion that the petitioner should be compulsorily retired in the public interest and for the better administration of the department.

11. hat compulsory retirement should not be used as a tool to cut short disciplinary proceedings. He submits that it is on record that the disciplinary proceeding was instituted against the petitioner by order dated 20.08.2018 for certain allegations and once, the disciplinary proceeding had been instituted against the petitioner that ought to have been brought to a logical end by the respondents by conducting proper and fair enquiry in which the petitioner should also be allowed to defend himself and prove his innocence. He submits that the report of the screening committee enclosed with the counter affidavit also discloses that there was no material except certain allegations of irregularities committed by the petitioner which influenced the screening committee to conclude that the petitioner should be compulsorily retired. He submits that the object of compulsory retirement is to weed out the deadwood, and in the instant case, there is no material on record based on which a prudent man would form an opinion that the petitioner has outlived his utility in the department and is deadwood, therefore, he should be compulsorily retired. In support of his case, learned counsel for the petitioner has relied upon the judgments of this Court in **Writ-A No.45254 of 2017 (Ghanshyam Misra Vs. State of U.P. and 7 others), Special Appeal Defective No.24 of 2018 (Rizwan Ahmad Vs. State of U.P. and 3 others) and Special Appeal No.496 of 2018 (Brijesh Kumar Vs. State of U.P. and 2 others).**

12. Per contra, learned Standing Counsel contends that the screening committee after considering the entire service record of the petitioner formed an opinion that the petitioner has outlived his utility in the department and is deadwood, and accordingly, the screening committee recommended for compulsory retirement of

the petitioner. He submits that various communications/letters enclosed as Annexure CA-2 to the counter affidavit and the fact that the petitioner had been awarded punishment by order dated 16.02.2016 and the report of the screening committee demonstrates that the retention of the petitioner in the department was not in the public interest. He submits that opinion of the screening committee is based upon subjective satisfaction after screening the entire record of the petitioner, and particularly the record of the recent past. Accordingly, it is submitted that the decision of the committee to recommend the petitioner for compulsory retirement is correct. He submits that the opinion of the screening committee is not solely based upon pendency of disciplinary proceeding but is based upon the appreciation of the entire service record of the petitioner and therefore, it is not a fit case, where this Court should interfere with the order of compulsory retirement.

13. I have heard learned counsel for the parties and perused the record.

14. The facts as emerge out from the record are that the petitioner has been appointed as Junior Assistant on 19.06.1990 and has been promoted as Senior Assistant in the year 1996. The petitioner was suspended by order dated 01.07.2011, and upon conclusion of the disciplinary proceeding, he was awarded the punishment of reversion to the minimum pay scale of Senior Assistant by order dated 16.02.2016. It is contended that the order of compulsory retirement has been issued as camouflage to cut short the disciplinary proceeding instituted by order dated 20.08.2018 passed by the Chief Election Officer, U.P., Lucknow and, therefore, the order of compulsory retirement is liable to be set aside.

15. On perusal of record, this Court finds that the facts are otherwise. The respondents have enclosed various letters of authorities dated 24.01.2017, 04.03.2017, 21.03.2017, 16.11.2017 & 30.05.2018 stating therein that the petitioner is not discharging his duties properly and is not abiding by the instructions of his superior officers. The issuance of said letters has not been denied by the petitioner which is evident from Para 5 of the rejoinder affidavit which replies the averment of Paragraph 6 of the counter affidavit. Further, the fact that the petitioner was awarded punishment by order dated 16.02.2016 which the petitioner had undergone is also not disputed on record.

16. At this stage, it would be apt to refer to the report of the screening committee in respect of the petitioner, enclosed as Annexure-3 to the counter affidavit:-

4.	श्री आदित्येन्द्र शर्मा, वरिष्ठ सहायक, जिला निर्वाचन कार्यालय, बुलन्दशहर (तत्कालीन वरिष्ठ सहायक, जिला निर्वाचन कार्यालय, हाथरस)	सुनवाई के दौरान अपने समर्थन में प्रस्तुत किये गये पक्ष, निर्वाचन विभाग में उनके द्वारा की गयी सेवाओं, उनकी वार्षिक चरित्र प्रविष्टियों, विभाग द्वारा उनके विरुद्ध प्रचलित की गयी अनुशासनिक कार्यवाहियों तथा दिये गये दण्डों एवं उनके सम्बन्ध में संबंधित

		जिला निर्वाचन अधिकारी द्वारा उपलब्ध करायी गयी संस्तुति सहित आख्या का अवलोकन किया गया। अवलोकन से यह संज्ञान में आया कि- अ- श्री आदित्येन्द्र शर्मा के विगत 10 वर्षों की चरित्र प्रविष्टियों में संबंधित अधिकारियों द्वारा या उन्हें सामान्य कार्मिक के रूप में आंकलित किया गया है अथवा प्रविष्टियां प्रदान ही नहीं की गयी है। ब- श्री आदित्येन्द्र शर्मा के विरूद्ध गम्भीर अभिलेखीय/वित्तीय अनियमितता बरते जाने तथा उच्चाधिकारियों के आदेशों का उल्लंघन करने, मनमाने ढंग से कार्यालय आने, अपने पदीय दायित्वों में घोर लापरवाही एवं उदासीनता बरते जाने तथा कर्मचारी आचरण नियमावली के सुसंगत नियमों का उल्लंघन करने जैसे
		गम्भीर आरोप लगे। उक्त आरोपों के दृष्टिगत श्री आदित्येन्द्र शर्मा को कार्यालय ज्ञाप संख्या-786/सी०ई०ओ०-1 दिनांक 01.07.2011 के द्वारा उनके विरूद्ध अनुशासनिक कार्यवाही संस्थित करते हुए उन्हें निलम्बित कर दिया गया था। जांच अधिकारी द्वारा उपलब्ध कराये गये जांच आख्या में उनके विरूद्ध लगे कुल 11 आरोपों में 07आरोप पूर्णतया सिद्ध पाये गये, 01 आरोप आंशिक रूप से सिद्ध पाया गया तथा 03 आरोप सिद्ध नही पाये गये। जांच अधिकारी की आख्या एवं अन्य सुसंगत अभिलेखों से यह भी संज्ञान में आया कि वे अभिलेख समय से तैयार नहीं करते हैं, अग्रिम का समायोजन उनके द्वारा 1.5 वर्ष में किया गया, उनके कैशियर के रूप में कार्य करने की अवधि में कैशबुकों में भिन्नता/अपूर्णता पायी

		गयी। उनके द्वारा ट्रेजरी चेक काफी समय तक अपने पास रखा गया। प्रकरण में कार्यालय ज्ञाप संख्या-465/सी०ई०ओ०-1 दिनांक 16.02.2016 के द्वारा श्री आदित्येन्द्र शर्मा को दोषी पाते हुए हुए उन्हें वरिष्ठ सहायक के मूलवेतन के न्यूनतम प्रक्रम पर प्रत्यावर्तित करने के दण्ड के साथ उनका निलम्बन एवं उनके विरूद्ध प्रचलित अनुशासनिक कार्यवाही को समाप्त किया गया। स- श्री आदित्येन्द्र शर्मा, वरिष्ठ सहायक, जिला निर्वाचन कार्यालय, ज्योतिबाफूलेनगर माह जनवरी, 2002 में स्थानान्तरित होकर जनपद हाथरस गये। श्री शर्मा द्वारा जनपद ज्योतिबाफूलेनगर में कैशियर का कार्य निस्तारित किया जाता था। जनपद ज्योतिबाफूलेनगर में धनराशि रू०-8,36,300.00 के गबन से संबंधित			प्रकरण संज्ञान में आने के उपरान्त जब कैशचेस्ट को खोला गया तो उसमें से रू०-2,53,090.00 लगभग की धनराशि कैशचेस्ट से बरामद हुई। शेष धनराशि रू०-5,83,210.00 के आधार पर उच्चाधिकारी द्वारा एफ०आई०आर० दर्ज करायी गयी थी, जिसका मुकदमा जनपद न्यायालय में चल रहा है। चूंकि वर्ष 1999-2000 से 2001-2002 की अवधि की विशेष सम्परीक्षा होनी है और इसके लिए सम्परीक्षा दल द्वारा मांगे जाने वाले अभिलेखों को संकलित कराकर उपलब्ध कराये जाने के निर्देश दिये गये हैं। ऐसी स्थिति में अभिलेखों का संकलन मात्र इस कारण नहीं हो पा रहा है कि श्री आदित्येन्द्र शर्मा द्वारा अपना सम्पूर्ण चार्ज जनपद अमरोहा (तत्कालीन ज्योतिबाफूलेनगर) में उपस्थित होकर आज

		तक नहीं उपलब्ध कराया गया है, जबकि इसके लिए उन्हें अनेकों बार निर्देशित किया गया। चार्ज हस्तगत ने कराये जाने, आदेशों की अवहेलना करने तथा अनुशासनहीनता आदि आरोपों के दृष्टिगत कार्यालय ज्ञाप संख्या-1378/सी०ई०ओ०-01 दिनांक 17.07.2018 के द्वारा उनके विरुद्ध अनुशासनिक कार्यवाही पुनः संस्थित कर दी गयी हैं। द- श्री आदित्येन्द्र शर्मा के संबंध में जिला निर्वाचन अधिकारी, हाथरस (जहां वे जनपद बुलन्दशहर होने के पूर्व तैनात थे) द्वारा उनके संबंध में यह उल्लिखित किया गया है कि श्री आदित्येन्द्र शर्मा कार्यालय में अधिकांशतः विलम्ब के आने तथा मनमर्जी के बिना सूचना दिये एवं अवकाश बिना स्वीकृत कराये कार्यालय से अनुपस्थित रहने के आदी हैं, जिसके संबंध में श्री शर्मा से अपनी कार्य प्रणाली में अपेक्षित सुधार लाने हेतु सचेत किया गया तथा इनके वेतन रोके जाने की भी प्रक्रिया अपनाई गयी जिस कारण इनकी छवि अच्छी नहीं है। उक्त के दृष्टिगत स्क्रीनिंग कमेटी द्वारा श्री आदित्येन्द्र शर्मा, वरिष्ठ सहायक को अनिवार्य सेवानिवृत्ति प्रदान करने की संस्तुति करती है।

17. A joint reading of various letters enclosed as Annexure-2 to the counter affidavit with the report of the screening committee, it is evident that the screening committee has considered the entire record and was not at all influenced only by the order dated 20.08.2018 passed by the Chief Election Officer, UP, Lucknow instituting disciplinary proceeding against the petitioner in forming the opinion that petitioner should be compulsorily retired as his continuance in the department is not in the public interest. A perusal of the report of the screening committee discloses that the order dated 20.08.2018 of the Chief Election Officer, UP, Lucknow instituting the disciplinary proceeding was not before it, hence, in such view of the fact, it cannot be said that the decision of screening committee was influenced by the order dated 20.08.2018 or the order of compulsory retirement has been passed to cut short the disciplinary proceeding.

18. At this stage, it would apt to refer to the judgment of the Apex Court in the case of **State of U.P. Vs. Abhai Kishore Masta 1995(1) SCC 336**. Relevant paragraphs 7, 8, 9 & 12 of the said judgment are reproduced herein-below:-

"7. So far as the order of compulsory retirement under Fundamental Rule 56-J is concerned, we are of the opinion that the principle enunciated by the High Court in J.N. Bajpai and followed in the Judgment under appeal is unsustainable in law. It cannot be said as a matter of law nor can it be stated as invariable rule, that any and every order of compulsory retirement made under Fundamental Rule 56-J (or other provision corresponding thereto) during the pendency of disciplinary proceedings is necessarily penal. It may be or it may not be. It is a matter to be decided on a verification of the relevant record or the material on which the order is based.

8. In the State of Uttar Pradesh v. Madan Mohan Nagar (1967)IILLJ63SC it has been held by a Constitution Bench that the test to be applied in such matters is "does the order of compulsory retirement cast an aspersion or attach a stigma to the officer when it purports to retire him compulsory?" It was observed that if the charge or imputation against the officer is made the condition of the exercise of the power it must be held to be by way of punishment-otherwise not. In other words if it is found that the authority has adopted an easier course of retiring the employee under Rule 56-J instead of proceeding with and concluding the enquiry or where it is found that the main reason for compulsorily retiring the employee is the pendency of the disciplinary proceeding or the levelling of the charges, as the case may be, it would be a case for holding it to be penal. But there may also be a case where the order of compulsory retirement is not really or mainly based upon the charges or the pendency of disciplinary enquiry. As a matter of fact, in many cases, it may happen that the authority competent to retire compulsorily under Rule 56-J and authority competent to impose the punishment in the disciplinary enquiry are different. It may also be that the charges communicated or the pendency of the disciplinary enquiry is only one of the several circumstances taken into consideration. In such cases it cannot be said that merely because the order of compulsory retirement is made after the charges are communicated or during the pendency of disciplinary enquiry, it is penal in nature.

9. It is true that merely because the order of compulsory retirement is couched in innocuous language without making imputations against the government servant, the Court need not conclude that it is not penal in nature. In appropriate cases the Court can lift the veil to find out whether, in truth, the order is penal in nature vide Ram Ekbal Sharma v. State of Bihar."

It ultimately held:-

12. We are, therefore, of the opinion that the High Court was in error in holding that merely because the order of compulsory retirement was passed during the pendency of a disciplinary enquiry, it must be necessarily deemed to be penal in nature, is unsustainable in law. The Judgment of the High Court is accordingly set aside and the matter is remitted to the High Court to determine, in the light of the observations made herein, whether the

order of compulsory retirement is, in truth, penal in nature? There shall be no order as to costs."

19. The Apex Court in the case of **Abhai Kishore Masta (supra)** has held that the order of compulsory retirement during the pendency of disciplinary proceedings is penal and is unsustainable in law. The Apex Court held that where it could be demonstrated that the authority has used the tool of compulsory retirement as an easier course to retire the employee instead of proceeding with enquiry and concluding the same or where the main reason for compulsorily retiring the employee is the pendency of the disciplinary proceeding or the levelling of the charges, as the case may be, it would be a case for holding it to be penal. But if the authorities on the subjective satisfaction of the record form an opinion that the employee is deadwood and has outlived in the department and while forming the said opinion the pendency of disciplinary proceeding is one of the several circumstances which has been taken into consideration. In such a case, it cannot be said that the order of compulsory retirement during the disciplinary proceeding is penal. The Apex Court has further held that in appropriate cases the court can lift the veil to find out whether, in truth, the order is penal.

20. Now applying the law elucidated by the Apex Court in the case of Abhai **Kishore Masta (supra),** this Court finds that the order of compulsory retirement against the petitioner is based upon subjective satisfaction of the entire record of the petitioner more particularly the recent record of the petitioner and the pendency of disciplinary proceeding was not at all in consideration of the screening committee in forming an opinion that the petitioner should be compulsorily retired in the public interest.

21. If the various letters of authorities enclosed as Annexure-CA-2 to the counter affidavit and the report of the screening committee are read, this Court finds that the screening committee after proper appreciation of material on record formed the opinion that the petitioner is deadwood and is not fit to remain in the department for better administration and, therefore, this Court is not inclined to agree with the contention of learned counsel for the petitioner that the order of compulsory retirement has been passed as camouflage to cut short the disciplinary proceeding against the petitioner.

22. So far as the judgments of this Court relied upon by learned counsel for the petitioner are concerned, in the case of **Ghanshyam Misra (supra)**, this court after noticing the various precedents of the Apex Court on the subject of compulsory retirement held that the decision of the screening committee was not based upon subjective satisfaction of the record as the screening committee failed to consider entries awarded to the petitioner in recent past where the petitioner was awarded good entries. Therefore, the facts and circumstances in which this Court allowed the writ petition are not akin to the facts of the present case and, therefore, the judgment of this Court is no help to the petitioner.

23. So far as the judgment of this Court in the case of **Brijesh Kumar (supra)** is concerned, this Court recorded a finding that while screening the records of the petitioner, the competent authority has not examined the records in its entirety

correctly and in proper perspective, whereas in the case in hand, the screening committee has formed the opinion on the subjective satisfaction on appreciation of entire record of the petitioner. It is worth notice that learned counsel for the petitioner could not demonstrate that the report of the screening committee is per-se illegal or based upon no material on record. Accordingly, the judgment of **Brijesh Kumar (supra)** also does not come to the aid of the petitioner.

24. So far the judgment of this Court in the case of **Rizwan Ahmad Vs. State of U.P. ad others (Special Appeal Defective No.24 of 2018)** is concerned, the same has also been rendered in the different factual backdrop since in the said case, the Court found that the entire service record was not placed before the screening committee who formed an opinion on the basis of the incomplete service record of the petitioner to compulsory retire the petitioner. Accordingly, this Court held that the order of compulsory retirement is not sustainable. The judgment in the said case has been rendered by this Court in different factual backdrop and therefore, reliance placed by the learned counsel for the petitioner on the said judgment is also misconceived.

25. For the reasons given above, this Court finds that there is no infirmity in the order of compulsory retirement. Accordingly, the writ petition lacks merit and is **dismissed** without there being any order as to cost.

(2022)03ILR A626
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 16.03.2022

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Writ A No. 30241 of 2016

Hori Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sameer Kalia

Counsel for the Respondents:
Sudeep Seth, Jitendra Narain Mishra

A. Service Law – Removal from service – Disciplinary enquiry – Charge of committing gross irregularities in sourcing, disbursement etc. against the bank's employee – Right of cross examination, when accrues – Held, right of cross-examination accrues in disciplinary proceedings if the statement of a person, who has testified, is in dispute. If there is no dispute regarding the documents and the facts, in such a case there is no requirement for cross-examination. (Para 29)

B. Service Law – Departmental enquiry – Standard of proof – Evidence Act, application thereof – Basic difference between departmental enquiry and criminal trial, discussed – Held, charges in a disciplinary proceedings are not required to be proved like a criminal trial i.e. beyond all reasonable doubt. Though the inquiry officer performs a quasi-judicial function, but he is not required to observe the strict adherence of the Indian Evidence Act – In the departmental inquiry standard of proof is not that of a criminal case i.e. beyond reasonable doubt. In departmental proceedings, the proof is merely the preponderance of probabilities. (Para 31 and 33)

C. Service Law – Departmental proceeding – Judicial review – Scope – Held, the scope of judicial review in departmental proceedings is very limited. This Court can interfere only if the inquiry was deficient either procedurally or otherwise – Court

must be slow in interfering with the finding of fact recorded by a departmental authority on the basis of evidence. If the findings are supported by evidence and are reasonable, the Courts are not to interfere with the disciplinary inquiry. (Para 35 and 36)

Writ petition dismissed. (E-1)

List of Cases cited :-

1. Roop Singh Negi Vs P.N.B. & ors.; (2009) 2 SCC 570

2. St. of U.P. & ors. Vs Saroj Kumar Sinha; (2010) 2 SCC 772: AIR 2010 SC 3131

3. St. of Har. & anr. Vs Rattan Singh; (1977) 2 SCC 491

4. K.L. Tripathi Vs S.B.I. & ors.; (1984) 1 SCC 43

5. M.V. Bijlani Vs U.O.I. & ors.; (2006) 5 SCC 88

6. General Manager (Operations), S.B.I. & anr. Vs R. Periyasamy; (2015) 3 SCC

7. Allahabad Bank & ors. Vs Krishna Narayan Tewari; (2017) 2 SCC 308

8. St. of Bihar & ors. Vs Phulpari Kumari; (2020) 2 SCC 130

(Delivered by Hon'ble Dinesh Kumar Siingh, J.)

1. The present writ petition has been filed seeking quashing of the orders dated 5.6.2015, 16.12.2015 and 29.7.2016 (Annexure Nos.1, 2 and 3 to the writ petition) passed by the disciplinary authority, appellate authority and the reviewing authority.

2. The disciplinary authority on conclusion of the disciplinary proceedings against the petitioner, imposed penalty of removal from service and the said order of removal from service was affirmed in appeal as well as in review.

3. The disciplinary proceedings were instituted against the petitioner for alleged acts of omission and commissions of serous irregularities committed by him during his tenure as Branch Manager, Derapur Branch between 2.1.2012 to 27.4.2013. Sum and substance of the charge against the petitioner was gross irregularities in sourcing, disbursement and follow up of credit facilities sanctioned to 8 borrowing units and 20 Prime Minister Rojgar Yojna and the Chief Minister Rojgar Yojna Loans and thus, exposing bank to substantial loss of Rs.2,95,45,786/- plus interest.

4. The disciplinary inquiry was held under the provisions of the State Bank of India Officers Service Rules, 1992 (for short "Rules, 1992'). Charge sheet contains 26 allegations against the petitioner. The inquiry officer found 22 allegations proved, 3 were not proved and 1 was partly proved. After submissions of the charge sheet, the petitioner was afforded opportunity to submit his response to the charge sheet. The disciplinary authority afforded opportunity of personal hearing to the petitioner and, thereafter, passed the impugned punishment order dated 5.6.2015 of removal from serviced.

5. Thereafter, petitioner filed a departmental appeal on 1.8.2015. The appellate authority gave a detailed consideration to the submissions made by the petitioner and affirmed the punishment order of removal from service vide order dated 16.12.2015. Petitioner, thereafter, filed a review petition on 1.2.2016 against the appellate order. The reviewing committee consisting of three officers, dismissed the review petition vide impugned order dated 29.7.2016. The reviewing committee also held that the penalty imposed on the petitioner was

commensurate with the gravity of the lapses committed by the petitioner and there was no scope to modify the punishment order.

6. Sri Sameer Kalia, learned counsel for the petitioner has submitted that as per Rule 68(2) of Rules, 1992, the presenting officer was reacquired to prove the charges against the petitioner. The presenting officer did not prove the charges during the course of inquiry. The documents relied upon in the departmental inquiry, were not proved by examining the witnesses in support of them. He has, therefore, submitted that when the documents were not proved, which were relied upon in support of the charges, whole inquiry got vitiated.

7. It has been further submitted that besides the petitioner, other employees were also charge-sheeted in respect of the same allegations. However, other employees of the bank were let off with minor penalty. It has also been submitted that one Sri S.L. Nathan was the sanctioning authority of the loans, but he was let off with minor penalty. He has relied upon Rule 68(6) of Rules, 1992 to submit that when there were allegations against the two officers, joint inquiry should have been conducted, but in this case separate inquiries were held for the petitioner as well as for S.L. Nathan.

8. Learned counsel for the petitioner has also submitted that there was no financial loss caused to the bank with respect to the defaulter borrowers and, therefore, the charge of causing financial losses to the tune of Rs.2,95,45,786/- is wholly untenable and the punishment of removal from service awarded to the petitioner is highly disproportionate to the alleged misconduct against the petitioner.

9. Learned counsel for the petitioner has further submitted that nature of departmental inquiry is a quasi judicial proceeding. Mere production of documents is not enough, but the contents of the documentary evidence has to be proved by examining the witnesses. It is further submitted that even if the petitioner did not deny the documents produced during the course of the departmental inquiry, it was the duty of the bank/presenting officer to prove the documents by examining the witnesses. In the present case, the documents were not proved independently by examining the witnesses and, therefore, admission of the petitioner would not amount that documents were proved as required and, therefore, the punishment order passed by the disciplinary authority considering the charges proved against the petitioner, is wholly untenable and the impugned orders are liable to be set aside.

10. In support of his contention, learned counsel for the petitioner has relied upon the judgment of the Supreme Court rendered in the cases of ***Roop Singh Negi Vs. Punjab National Bank and others, (2009) 2 SCC 570*** and ***State of U.P. and others Vs. Saroj Kumar Sinha,*** (2010) 2 SCC 772: AIR 2010 SC 3131.

11. On the other hand, Sri Jitendra Narain Mishra, learned counsel for the bank has submitted that petitioner was the Branch Manager of Derapur Branch and during his tenure, loans were disbursed in gross violation of the banking practices and procedure. Due diligence was not observed. The bank interest was compromised and

that resulted into the losses of Rs.2,95,45,786/-.

12. He has further submitted that under Rule 50(4) of Rules, 1992, every officer is required to take at all times all possible steps to ensure and protect the interests of the bank and he should discharge his duties with utmost integrity, honesty, devotion and diligence. He should not do anything, which is unbecoming of an officer. He has also submitted that Rule 67 of Rules, 1992 prescribes the major penalties, which include, inter alia, removal from service besides dismissal and compulsory retirement.

13. The manner in which the departmental inquiry is to be conducted, is provided under Rule 68(2) of Rules, 1992, which reads as under :-

"68. (2) .....

(xiii) On the date fixed for the inquiry, the oral and documentary evidence by which the articles of charge are proposed to be proved shall be produced by or on behalf of the Bank. The witnesses produced by the Presenting Officer shall be examined by the Presenting Officer and may be cross-examined by or on behalf of the officer. The Presenting Officer shall be entitled to re-examine his witnesses on any points on which they have been cross-examined, but not on a new matter without the leave of the Inquiring Authority. The Inquiring Authority may also put such questions to the witnesses as it thinks fit.

(xiv) Before the close of the case in support of the charges, the Inquiring Authority may, in its discretion, allow the Presenting Officer to produce evidence not included in the charge-sheetor may itself call for new evidence or recall or re-examine any witness. In such case, the officer shall be given opportunity to inspect the documentary evidence before it is taken on record,or to cross-examine a witness who has been so summoned. The Inquiring Authority may also allow the officer to produce new evidence, if it is of the opinion that the production of such evidence is necessary in the interest of justice.

(xv) W hen the case in support of the charges is closed, the officer may be required to state his defence, orally or in writing, as he may prefer. If the defence is made orally, it shall be recorded and the officer shall be required to sign the record. In either case, a copy of the statement of defence shall be given to the Presenting Officer.

(xvi) The evidence on behalf of the officer may then be produced. The officer may examine himself as a witness in his own behalf, if he so prefers. The witnesses, if any, produced by the officer shall then be examined by the officer and may be cross-examined by the Presenting Officer. The officer shall be entitled to re-examine any of his witnesses on any points on which they have been cross-examined, but not on any new matter without the leave of the Inquiring Authority.

(xvii) The Inquiring Authority may, after the officer closes his evidence, and shall if the officer has not got himself examined, generally question him on the circumstances appearing against him in the evidence for the purpose of enabling the officer to explain any circumstances appearing in the evidence against him.

....."

14. Learned counsel for the Bank has further submitted that the departmental inquiry was conducted strictly in accordance with the procedure prescribed under the Rules, 1992 with complete compliance of the principles of natural justice. It is further submitted that petitioner never disputed the documentary evidence produced by the presenting officer in support of the charges. The petitioner accepted the genuineness and authenticity of the documents at the commencement of the inquiry. The petitioner did not lead any evidence to controvert the contents of the documents and neither he disputed the contents of the documents relied on by the presenting officer in support of the charges. He has also submitted that once the documents were not denied, there was no requirement for examining the witnesses to prove the contents of the documents inasmuch as admitted facts need not be proved by examining the witnesses. It is, therefore, submitted that the inquiry officer had not committed any illegality as alleged or otherwise.

15. It has further been submitted that there is no weight in the argument of learned counsel for the petitioner that listed prosecution documents were required to be proved by oral evidence though their authenticity and genuineness had not been disputed or denied by the petitioner. It is the discretion of the presenting officer to produce oral and documentary evidence to prove the charges, but if the documents filed in support of the charges remain un-rebutted and in fact accepted, then submission of learned counsel for the petitioner that even admitted documents were required to be proved by leading oral evidence, is belied of any legal basis. It is also submitted that whole charges were based on the documentary evidence and those documents were not denied and rather admitted by the petitioner and, therefore, there was no requirement for the presenting officer to lead oral evidence in support of the charges/allegations.

16. It is also important to note here that if the presenting officer in support of the charges, is relying on the documentary evidence, then authenticity/genuineness or their denial/rebuttal is to be done by the delinquent officer at the commencement of the inquiry. It is again reiterated that petitioner had not disputed the documents or the contents thereof. The petitioner was given full opportunity to examining the witnesses, who brought the documents, however, It was denied by him. Therefore, challenge of the admitted documents later on by the petitioner, can not be sustained in the eyes of law.

17. Learned counsel for the bank has further submitted that each of the allegations/charges against the petitioner got proved on the basis of the un-rebuttal/admitted documents. The inquiry officer prepared the inquiry report after carefully examining the listed documents, prosecution and defence exhibits, written brief/arguments of the presenting officer, reply as well as the defence documents produced by the petitioner during the course of the inquiry. The defence representative was given full opportunity to cross-examine the witnesses produced during the course of the inquiry as per the Rules, 1992, which was denied by him. Therefore, contention of the learned counsel for the petitioner that the documents relied upon by the inquiry officer, were not proved, has no basis and is liable to be rejected.

18. The disciplinary authority after considering the inquiry report, response of the petitioner and after giving him opportunity of hearing, had recorded his

independent finding against each of the allegations in his order dated 5.6.2015. The disciplinary authority has carefully examined the entire record of the case and applied his independent mind. The disciplinary authority under Rule 68(3)(ii) of Rules, 1992 is required to give reason for his finding, only if he disagrees with the finding of the inquiry officer. In the present case, the disciplinary authority had agreed with the finding recorded by the inquiry officer and, therefore, there was no requirement to give reasons. Rule 68(3)(ii) of Rules, 1992 reads as under :-

"68. (3) (i) x x x x

(ii) The Disciplinary Authority shall, if it disagrees with the findings of the Inquiring Authority on any article of charge, record its reasons for such disagreement and record its own findings on such charge; if the evidence on record is sufficient for the purpose."

19. Learned counsel for the bank has further submitted that there was complete compliance of the principles of natural justice during the course of departmental inquiry and before passing the punishment order dated 5.6.2015. The petitioner's departmental appeal was duly considered and after detail consideration, the appellate authority found no merits in the appeal. The appellate authority applied his independent mind on passing the appellate order dated 16.12.2015. It is also submitted that there is no substance in the submission of learned counsel for the petitioner that the bank did not suffer any loss because of the misdeeds and acts of omission and commission of the petitioner during his tenure as Branch Manager, Derapur Branch.

20. Learned counsel for the bank has further submitted that after settlement of claims from the Credit Guarantee Fund Trust for Micro and Small Enterprises (CGTMSE) to the tune of Rs.109.04 Lakhs, the bank was still exposed to a substantial loss of 186.42 Lakhs. The decree issued by the Debt Recovery Tribunal in favour of the bank was not a guarantee for full recovery of the loss to which the bank was exposed. The petitioner did not conduct any pre-sanction survey as it was required before sanctioning the loan and this fact got proved before the inquiry officer by inspection register relating to various accounts, which finds mention at serial no.29 of the minutes of the inquiry proceedings dated 19.9.2014. The petitioner had completed the pre-sanction survey reports without visiting the work places/residence of the borrowers and he prepared bogus survey reports. It is further submitted that the quantum of punishment of removal from service awarded to the petitioner, is just and proper and no interference is called for from this Court with the quantum of punishment.

21. It has also been submitted that the reviewing committee in detail order, had upheld the order of the appellate authority. The reviewing committee had also examined all the records and did not find any error committed by the disciplinary authority and the appellate authority and thus, upheld the order of punishment of removal from service.

22. Learned counsel for the bank has also submitted that there is no substance in the submission of learned counsel for the petitioner that petitioner was subjected to any discrimination inasmuch as the charges levelled against S.L. Nathan were different from the charges levelled against the petitioner. Nature of duties of the petitioner and S.L. Nathan were also different. The

petitioner can not draw similarity with the case of S.L. Nathan as S.L. Nathan was charged with different charges. The petitioner was charge-sheeted for committing serous irregularities of sourcing, disbursement and follow up of credit facilities sanctioned to 8 borrowing units and 20 Prime Minister Rojgar Yojna and the Chief Minister Rojgar Yojna Loans and causing financial loss to the bank, while S.L. Nathan was charged with separate charges. He has, therefore, submitted that writ petition is without any merit and substance and is liable to be dismissed.

23. I have considered the submissions advanced on behalf of the learned counsel for the petitioner as well as by the learned counsel for the bank and perused the record of the writ petition.

24. The only argument which has been advanced by the learned counsel for the petitioner, is that even if the petitioner did not deny the documents submitted in support of the charges by the presenting officer, it was the duty of the presenting officer to prove the contents of the documents by examining the witnesses and since the witnesses have not been examined to prove the contents of the documents, the charges against the petitioner did not get proved and, therefore, the punishment order, appellate order and the order passed in review are liable to be quashed.

25. In support of his contention, learned counsel for the petitioner has relied upon the judgment of the Supreme Court rendered in the case of Roop Singh Negi (supra). In paragraph 14 of the aforesaid judgment, the Supreme Court held as under:-

"14. Indisputably, a departmental proceeding is a quasi judicial proceeding. The Enquiry Officer performs a quasi judicial function. The charges leveled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the Investigating Officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the Enquiry Officer on the FIR which could not have been treated as evidence."

26. In the present case, it is not a confession of the petitioner made before the police officer, which was relied on by the inquiry officer or the evidence collected during the course of investigation by the police officer against him. Here in the present case, the presenting officer brought documentary evidence in support of the charges, which were admitted by the petitioner and, therefore, the judgment relied upon by the learned counsel for the petitioner in the case of Roop Singh Negi (supra) has no relevance to the facts of the case.

27. It is well settled that in a domestic inquiry strict and sophisticated rules of evidence under the Indian Evidence Act are not applicable. The evidence which has probative value of reasonable nexus and credibility, can be placed reliance in support of the allegations. Section 56 of the Indian Evidence Act provides that admitted facts need not be proved.

28. Supreme Court in the case of ***State of Haryana and another Vs. Rattan Singh, (1977) 2 SCC 491*** in paragraph 4 of the judgement while dealing with standard of proof and evidence applicable in the domestic inquiry, held as under :-

"4. It is well settled that in a domestic enquiry the strict and sophisticated rules of evidence under the Indian Evidence Act may not apply. Ail materials which are logically probative for a prudent mind are permissible. There is no allergy to hearsay evidence provided it has reasonable nexus and credibility. It is true that departmental authorities and administrative tribunals must be careful in evaluating such material and should not glibly swallow what is strictly speaking not relevant under the Indian Evidence Act. For this proposition it is not necessary to cite decisions nor text books, although we have been taken through case law and other authorities by counsel on both sides. The essence of a judicial approach is objectivity, exclusion of extraneous materials or considerations and observance of rules of natural justice. Of course, fair play is the basis and if perversity or arbitrariness, bias or surrender of independence of judgment vitiate the conclusions reached, such finding,even though of a domestic tribunal, cannot be held good. However, the courts below mis-directed themselves, perhaps, in insisting that passengers who had come in and gone out should be chased and brought before the tribunal before a valid finding could be recorded. The 'residuum' rule to which counsel for the respondent referred, based upon certain passengers from American jurisprudence does not go to that extent nor does the passage from Halsbury insist on such rigid requirement. The simple point is, was there some evidence or was there no evidence not in the sense of the technical rules governing regular court proceedings but in a fair common-sense way as men of understanding and wordly wisdom will accept. Viewed in this way, sufficiency of evidence in proof of the finding by a domestic tribunal is beyond scrutiny. Absence of any evidence in support of a ending is certainty available for the court to look into because it amounts to an error of law apparent on the record. We find, in this case, that the evidence of Chamanlal, Inspector of the flying squad, is some evidence which has relevance to the charge leveled against the respondent. Therefore, we are unable to hold that the order is invalid on that ground."

29. The right of cross-examination accrues in disciplinary proceedings if the statement of a person, who has testified, is in dispute. If there is no dispute regarding the documents and the facts, in such a case there is no requirement for cross-examination. When on the question of facts there was no dispute, no real prejudice would be 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.

30. Supreme Court in the case of ***K.L. Tripathi Vs. State Bank of India and others,*** (1984) 1 SCC 43 in paragraph 32 held as under:-

"32. The basic concept is fair play in action administrative, judicial or quasi-judicial. The concept 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."

31. It is also not in dispute that charges in a disciplinary proceedings are not required to be proved like a criminal trial i.e. beyond all reasonable doubt. Though the inquiry officer performs a quasi-judicial function, but he is not required to observe the strict adherence of the Indian Evidence Act. The inquiry officer requires to arrive at a conclusion upon analysing the documents/evidence before him regarding preponderance of probability to prove the charges on the basis of materials on record.

32. Supreme Court in the case of ***M.V. Bijlani Vs. Union of India and others,*** (2006) 5 SCC 88 in paragraph 25 of the judgment held as under :-

"25. It is true that the jurisdiction of the court in judicial review is limited. Disciplinary proceedings, however, being quasi-criminal in nature, there should be some evidences to prove the charge. Although the charges in a departmental proceedings are not required to be proved like a criminal trial, i.e., beyond all reasonable doubts, we cannot lose sight of the fact that the Enquiry Officer performs a quasi-judicial function, who upon analysing the documents must arrive at a conclusion that there had been a preponderance of probability to prove the charges on the basis of materials on record. While doing so, he cannot take into consideration any irrelevant fact. He cannot refuse to consider the relevant facts. He cannot shift the burden of proof. He cannot reject the relevant testimony of the witnesses only on the basis of surmises and conjectures. He cannot enquire into the allegations with which the delinquent officer had not been charged with."

33. The bank employee/bank officer must perform his duty with absolute devotion, diligence, integrity and honesty, so that the confidence of the public/depositors is not impaired in the bank. The banking system is backbone of the Indian economy and financial establishment of the country. An officer who is found to have been involved in financial irregularities while preforming his function as bank officer, can not be let off even if there is minor infarction in the inquiry report. In the departmental inquiry standard of proof is not that of a criminal case i.e. beyond reasonable doubt. In departmental proceedings, the proof is merely the preponderance of probabilities. It is well settled that departmental proceeding can proceed even though a person is acquitted when the acquittal is other than honourable.

34. Supreme Court in the case of ***General Manager (Operations), State Bank of India and another Vs. R. Periyasamy*** (2015) 3 SCC 101 in

paragraphs 11, 12, 13 and 17 held as under:-

"11. It is interesting to note that the learned Single Judge went to the extent of observing that the concept of preponderance of probabilities is alien to domestic enquiries. On the contrary, it is well known that the standard of proof that must be employed in domestic enquiries is in fact that of the preponderance of probabilities. In Union of India Vs. Sardar Bahadur, (1972) 4 SCC 618 this Court held that a disciplinary proceeding is not a criminal trial and thus, the standard of proof required is that of preponderance of probabilities and not proof beyond reasonable doubt. This view was upheld by this Court in State Bank of India & ors. Vs. Ramesh Dinkar Punde, (2006) 7 SCC 212. More recently, in State Bank of India Vs. Narendra Kumar Pandey, (2013) 2 SCC 740, this Court observed that a disciplinary authority is expected to prove the charges leveled against a bank-officer on the preponderance of probabilities and not on proof beyond reasonable doubt.

12. Further, in Union Bank of India Vs. Vishwa Mohan, (1998) 4 SCC 310, this Court was confronted with a case which was similar to the present one. The respondent therein was also a bank employee, who was unable to demonstrate to the Court as to how prejudice had been caused to him due to non-supply of the inquiry authorities report/findings in his case. This Court held that in the banking business absolute devotion, diligence, integrity and honesty needs to be preserved by every bank employee and in particular the bank officer. If this were not to be observed, the Court held that the confidence of the public/depositors would be impaired. Thus in that case the Court set-aside the order of the High Court and upheld the dismissal of the bank employee, rejecting the ground that any prejudice had been caused to him on account of non-furnishing of the inquiry report/findings to him.

13. While dealing with the question as to whether a person with doubtful integrity ought to be allowed to work in a Government Department, this Court in Commissioner of Police New Delhi & Anr. Vs. Mehar Singh, (2013) 7 SCC 685, held that while the standard of proof in a criminal case is proof beyond all reasonable doubt, the proof in a departmental proceeding is merely the preponderance of probabilities. The Court observed that quite often criminal cases end in acquittal because witnesses turn hostile and therefore, such acquittals are not acquittals on merit. An acquittal based on benefit of doubt would not stand on par with a clean acquittal on merit after a full-fledged trial, where there is no indication of the witnesses being won over. The long standing view on this subject was settled by this Court in R.P. Kapur Vs. Union of India, AIR 1964 SC 787, whereby it was held that a departmental proceeding can proceed even though a person is acquitted when the acquittal is other than honourable. We are in agreement with this view.

17. We also find it difficult to understand the justification offered by the Division Bench that there was no failure on the part of the respondent to observe utmost devotion to duty because the case was not one of misappropriation but only of a shortage of money. The Division Bench has itself stated the main reason why its order cannot be upheld in the following words, "on reappreciation of the entire material

placed on record, we do not find any reason to interfere with the well considered and merited order passed by the learned Single Judge."

35. The scope of judicial review in departmental proceedings is very limited. This Court can interfere only if the inquiry was deficient either procedurally or otherwise.

36. It is also well settled that the Court must be slow in interfering with the finding of fact recorded by a departmental authority on the basis of evidence. If the findings are supported by evidence and are reasonable, the Courts are not to interfere with the disciplinary inquiry.

37. Supreme Court in the case of ***Allahabad Bank and others Vs. Krishna Narayan Tewari,*** (2017) 2 SCC 308 in paragraph seven of the judgment held as under:-

"7. We have given our anxious consideration to the submissions at the bar. It is true that a writ court is very slow in interfering with the findings of facts recorded by a Departmental Authority on the basis of evidence available on record. But it is equally true that in a case where the Disciplinary Authority records a finding that is unsupported by any evidence whatsoever or a finding which no reasonable person could have arrived at, the writ court would be justified if not duty bound to examine the matter and grant relief in appropriate cases. The writ court will certainly interfere with disciplinary enquiry or the resultant orders passed by the competent authority on that basis if the enquiry itself was vitiated on account of violation of principles of natural justice, as is alleged to be the position in the present case. Non-application of mind by the Enquiry Officer or the Disciplinary Authority, non-recording of reasons in support of the conclusion arrived at by them are also grounds on which the writ courts are justified in interfering with the orders of punishment. The High Court has, in the case at hand, found all these infirmities in the order passed by the Disciplinary Authority and the Appellate Authority. The respondent's case that the enquiry was conducted without giving a fair and reasonable opportunity for leading evidence in defense has not been effectively rebutted by the appellant. More importantly the Disciplinary Authority does not appear to have properly appreciated the evidence nor recorded reasons in support of his conclusion. To add insult to injury the Appellate Authority instead of recording its own reasons and independently appreciating the material on record, simply reproduced the findings of the Disciplinary Authority. All told the Enquiry Officer, the Disciplinary Authority and the Appellate Authority have faltered in the discharge of their duties resulting in miscarriage of justice. The High Court was in that view right in interfering with the orders passed by the Disciplinary Authority and the Appellate Authority."

38. While dealing with the scope of the Court to interfere with the finding of fact recorded in a departmental inquiry on the basis of the evidence available on record, similar view has been reiterated by the Supreme Court in the case of State of Bihar and others Vs. Phulpari Kumari, (2020) 2 SCC 130 in paragraph 6 of the judgement, which reads as under:-

"6. The criminal trial against the Respondent is still pending consideration by a competent criminal Court. The order of

dismissal from service of the Respondent was pursuant to a departmental inquiry held against her. The Inquiry Officer examined the evidence and concluded that the charge of demand and acceptance of illegal gratification by the Respondent was proved. The learned Single Judge and the Division Bench of the High Court committed an error in reappreciating the evidence and coming to a conclusion that the evidence on record was not sufficient to point to the guilt of the Respondent.

6.1 It is settled law that interference with the orders passed pursuant to a departmental inquiry can be only in case of "no evidence'. Sufficiency of evidence is not within the realm of judicial review. The standard of proof as required in a criminal trial is not the same in a departmental inquiry. Strict rules of evidence are to be followed by the criminal Court where the guilt of the accused has to be proved beyond reasonable doubt. On the other hand, preponderance of probabilities is the test adopted in finding the delinquent guilty of the charge.

6.2 The High Court ought not to have interfered with the order of dismissal of the Respondent by re-examining the evidence and taking a view different from that of the disciplinary authority which was based on the findings of the Inquiry Officer."

39. In the light of the aforesaid discussion, I do not find that the disciplinary authority, appellate authority or the reviewing committee had committed any error while awarding the punishment of removal from service to the petitioner. This Court holds that the disciplinary inquiry was conducted strictly in accordance with law and there was no requirement to prove the documents, which were admitted by the petitioner, by examining the witnesses. Further, when the petitioner has himself denied to cross-examine the witnesses, there was no further requirement to lead the evidence by the presenting officer.

40. This Court does not find that there has been any procedural infarction or violation of the principles of natural justice in conducting the disciplinary inquiry against the petitioner. Banking business is of faith and trust of the general public. The bank officials and employees discharge very important function in dealing with the public money. They have fiduciary duty towards the customers. The bank officials/employees are required to perform duties with utmost devotion, diligence, integrity and honesty. If an official discharges his function with dishonesty, acting in a manner of unbecoming a bank officer, this Court should not interfere in the punishment of dismissal from service of such an official.

41. Considering the facts of this case, this Court finds that the act of misconduct are serious enough to justify the punishment of removal from service of the petitioner.

42. In view thereof, this Court does not find any substance in the present writ petition, which is hereby ***dismissed.*** Interim order, if any, stands vacated.

(2022)03ILR A637
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.02.2022

BEFORE

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

Writ A No. 40290 of 2012

Chandra Prakash ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Chandra Prakash (In Person), Ms. Subash Rathi (A.C.)

Counsel for the Respondents:
C.S.C., Sri Praveen Kumar Srivastava, Sri Vivek Singh, Sri Arun Kumar Gupta.

A. Service Law – Railway Servants (Pension) Rules, 1993 – Rule 9 – Withholding of the Pension – Inquiry about the genuineness of caste certificated was concluded much earlier in favour of petitioner – No judicial proceeding had been instituted or pending against the petitioner prior to his superannuation or thereafter – Authority's power to withhold the pension challenged – Held, the question of withholding pensionary benefits could arise only after initiation of the departmental inquiry within the meaning of Rule 9(5) with the issuance of the charge-sheet by the disciplinary authority – The respondents, therefore, have no authority of law to withhold pension and other retiral benefits of the petitioner in absence of any judicial proceeding or departmental proceeding pending against him. (Para 31, 37 and 46)

Writ petition allowed. (E-1)

List of Cases cited:-

1. St. of A.P. & ors. Vs Nagam Chandrasekhara Lingam; AIR 1988 SCC 1309

2. G. Sundarsan Vs U.O.I. & anr. (1995) 4 SCC 644

3. B.S. Gaur Vs U.O.I. & ors.; (2001) 9 SCC 706

(Delivered by Hon'ble Mrs. Sunita Agarwal, J.
&
Hon'ble Krishan Pahal, J.)

1. Heard Sri Chandra Prakash, Petitioner (in person) along with Ms. Subhash Rathi, learned Amicus Curiae who assisted the Court on behalf of the petitioner and Sri Praveen Kumar Srivastava and Sri Arun Kumar Gupta, learned counsels for the respondents.

2. Ms. Subhash Rathi, learned Amicus Curiae has filed the written submissions on behalf of the petitioner.

3. By means of the present writ petition, the petitioner has prayed for the following reliefs:-

"I. To issue a writ or order or a writ in the nature of Certiorari quashing the impugned order dated 1.3.2012 of Central Administrative Tribunal, Allahabad Bench passed in O.A. No.1235 of 2011 (Chandra Prakash Vs. U.O.I. & Others),

II. To issue a writ or order or a writ in the nature of Certiorari quashing the impugned order No. b@50@fjt@lalnh; lfefr@V@ikVZ&11 dated 26/02/2010 passed by respondent No. 4.

III. To issue a writ or order or a writ in the nature of Certiorari quashing the part of impugned order No. Nil dated 03/03/2010 passed by respondent No.4, as far as it relates to withholding of "petitioner's all Retirement dues & benefits",

IV. To issue a writ or an order or direction in the nature of mandamus directing the respondents Railway Administration to retire the petitioner with immediate effect (as the petitioner is waiting for "order of his retirement' since 01.03.2010 as mentioned in para-93 & 94 of writ petition) & serve to the petitioner "Retirement Order cum Service Certificate" & pay the salary {last pay drawn} of the

petitioner from 01.03.2010 to till date of receipt of retirement order by the petitioner along with interest at the bank rate (i.e. @18%) upon its arrears.

V. To issue a writ or an order or direction in the nature of mandamus directing the respondents Railway Administration to release & pay all retirement dues & benefits of the petitioner i.e.:-

i. Pension Payment Order (PPO) from the date of retirement

ii. Gratuity

iii. Leave in Cashment

iv. Pension Commutation from the date of retirement

v. Remaining part of P.F. of period September/October, 1973 to December, 1994.

vi. Composite Transfer Grant etc. along with interest at the bank rate (i.e. @18%) upon aforesaid amounts from the date of retirement.

VI. To issue a writ or an order or direction in the nature of mandamus directing the respondents Railway Administration to release & serve petitioner's:-

i. Service Medal,

ii. Medical Card for post retirement medical facilities,

iii. Other Post Retirement facilities.

VII. To issue a writ or an order or direction in the nature of mandamus directing the respondents Railway Administration to pay compensation of Rs.20 lacs for the irreparable losses & damages caused due to non-payment of petitioner's all retirement dues & benefits as mentioned in para-100 & XLVI of writ petition."

Factual Matrix:-

4. Facts in brief giving rise to the present writ petition are that in the year 1969, the Railway Service Commission, Allahabad vide its Employment Notice No.3/69-70 advertised 24 posts of Apprentice Assistant Telecommunication Inspector. The petitioner applied for the said post mentioning his caste as "Bhuiya" which is recognised as Scheduled Caste in the State of U.P. The petitioner along with 23 other candidates were selected for the said post and in the final selection panel, the petitioner found his place at S.No.23 in the merit list. Thereupon, the petitioner joined as Apprentice Assistant Telecommunication Inspector in North-East Railway, Gorakhpur on 31.07.1970. After completion of 12 years of service in Railway, an inquiry was initiated by the General Manager (Personal), North-East Railway, Gorakhpur, U.P. (Respondent No.4) with regard to the validity of the caste certificate submitted by the petitioner. The District Magistrate, Gorakhpur submitted a report vide Letter No.354 /जाति प्रमाण पत्र/वाद लिपिक dated 09.02.1983, the relevant part of the said report reads as under:-

".... श्री चन्द्र प्रकाश पुत्र लालता प्रसाद, ग्राम- गजपुर, तहसील- बॉसगांव जाति के भूज है, जो पिछड़ी जाति के अन्तर्गत आते है। उनके द्वारा अनुसूचित जाति का प्रमाण पत्र यदि कोई दिया गया है तो यह गलत है।"

5. On the basis of the said report of the District Magistrate, Gorakhpur, a criminal case was registered against the petitioner, his real elder brother Om Prakash Bhuiya and his parents wherein charge-sheet was submitted against them. The Criminal Case No.601 of 1984, u/S 409 and 420 IPC had been decided in favour of the petitioner by the Additional Chief Judicial Magistrate, Gorakhpur vide order dated 14.05.1984. It was held that the petitioner and his family members belonged to the Scheduled Caste "Bhuiya" and the privileges accorded to them as per the said caste certificate were proper. The operative part of the judgement and order dated 14.05.1984 reads as under:-

"(7) उपरोक्त प्रेक्षणो के आधार पर यह स्पष्ट है कि अभियुक्त ओम प्रकाश भुइया व उसके माता श्रीमती रामप्यारी देवी भुइया व उसके पिता लालता प्रसाद व उसके दोनो भाई चन्द्र प्रकाश व कृष्ण कुमार, भुइया जाति के ही है जो कि अनुसूचित जाति के अन्तर्गत आता है और सक्षम जिलाधिकारी द्वारा प्रमाण पत्र प्राप्त करने के बाद अनुसूचित जाति को मिलने वाली छात्रवृत्ती व अन्य सुविधाए प्राप्त किया है, जो कि सर्वथा उचित है।"

6. It is submitted that thereafter the petitioner and his family members had moved application in the Court of Additional Chief Judicial Magistrate, Gorakhpur for issuing the caste certificates in their favour in order to avoid further illegal harassment. The learned Additional Chief Judicial Magistrate, Gorakhpur after inviting objections from the District Magistrate, Gorakhpur issued caste certificates in favour of the petitioner and his family members on 12.06.1984. The State of U.P. being aggrieved by the aforesaid judgement and order dated 14.05.1984 filed a revision being Original Revision No.158 of 1984 in the Court of District and Sessions Judge, Gorakhpur which was dismissed vide order dated 11.12.1984 affirming the findings reformed in the judgement and order dated 14.05.1984. The said order has not been challenged in any judicial proceedings and as such has attained finality. Meanwhile in the year 1983, a disciplinary enquiry under Rule 9 of Railway Servants (Discipline and Appeal) Rules, 1968 was initiated against the petitioner and a charge-sheet vide Memorandum dated 26.03.1984 had been served. The disciplinary Authority framed charge against him, which read as under:-

"Where as Sri Chandra Prakash TCI/MW/GKP has committed misconduct in as much as that he got his appointment in Railway Service in an irregular manner by misdeclaring his caste as BHUIYA, which is recognised as Scheduled Caste, although he belongs to BHARBHUJ Caste, which comes under category of backward class. On the basis of this misdeclaration of caste, he has also taken the irregular benefit in promotion grade of Rs.550-750.

The above act of Sri Chandra Prakash shows lack of absolute integrity, failure to maintain devotion to duty and an act unbecoming of a Railway Servant, which tentamounts to misconduct and thereby he has contravened Rules 3(I)(I), (II) and (III) of Railway Services Conduct Rule, 1966."

7. A Special Leave Petition (Civil) No.14633 of 1986 was filed by the petitioner before the Supreme Court challenging the decision of the Disciplinary authority to initiate enquiry, wherein the petitioner was directed to cooperate in the enquiry. The following order was passed on 29.04.1987:-

"After hearing counsel on both sides we do not consider that it is a fit for the grant of special leave petition, however we consider that in the interest of justice a direction should be issued from this Court to the respondent to complete the Disciplinary Proceedings initiated against the petitioner and pass final orders within three months from today. The petitioner will fully cooperate in the enquiry for the time scheduled. With the above observations and directions, the Special Leave Petition will stand dismissed."

8. It is argued on behalf of the petitioner that pursuant to the order of the Supreme Court, the Enquiry Officer had concluded the enquiry and submitted its report on 24.07.1987 to Disciplinary Authority holding the charges levelled against the petitioner to be false and baseless. The findings of the Enquiry Officer are as under:-

"I. Shri Chandra Prakash can not be classed as a member of a Scheduled Caste Community i.e. ''Bhuiya' in absence of any valid certificate issued by any of the authorities competent to grant such certificate. I feel that if the various certificates including the certified photo-stat copies of the judgements are accepted in Shri Chandra Prakash's case, the generations of this family will not need a caste certificate from the competent authority.

II. The mis-declaration of the caste with a malafide intention of getting irregular appointment is not established beyond doubts.

III. The aspect of getting promotion is not proved."

9. It is further argued on behalf of the petitioner that the Disciplinary Authority on 11.08.1987 accepted the enquiry report and dropped the charges levelled against the petitioner by passing the following order:-

"The consideration of the Enquiry Report of E.O./HQ shows that the charges levelled against you have not been proved and therefore, the charges are dropped."

10. The Enquiry Report dated 24.07.1987 and the order of the Disciplinary Authority dated 11.08.1987 had not been challenged in any Court and, thus, the same had attained finality.

11. It is further contended that when the petitioner was not provided the pre-selection coaching for ASTE Group-B selection from 14.02.2000 to 11.03.2000 along with other SC/ST candidates and was directed to appear as a General candidate, he filed objections on 03.04.2000 and 18.08.2000 which were replied by the General Manager (Personal), North-East Railway, Gorakhpur, U.P. vide his letter No. का/254/6-ससिदूई(1) dated 31.08.2000 and the same is reproduced hereunder:-

"आप के जाति प्रमाण पत्र के सम्बंध मे जिलाधिकारी, गोरखपुर द्वारा सत्यापन कराया गया है और यह पाया कि आप भड़भूज/भूज जाति के है जो कि पिछड़ी जाति के अन्तर्गत आते है। इससे स्पष्ट है कि आप अनु० जा०/ अनु०ज०जाति को दिये जाने वाले लाभ के लिए पात्र नही हैं।"

12. It is contended by the petitioner that the aforesaid report has also been fetched behind his back and he had no knowledge whatsoever of any enquiry being conducted after the aforesaid

disciplinary and judicial enquiry having attained finality.

13. The order dated 31.8.2000 passed by the General Manager (Personnel), North Eastern Railway, Gorakhpur U.P. was challenged in the Original application no.1140 of 2001 before the Central Administrative Tribunal, Allahabad.

14. The argument of the petitioner that the full fledged inquiry had been conducted on the basis of report of the District Magistrate, Gorakhpur and since the applicant had been exonerated in the said departmental proceeding, no fresh inquiry regarding the genuineness of the caste certificate could be conducted, had been rejected. However, on the question of opportunity of hearing, it was noted that the petitioner had not been given any opportunity to show that the certificate filed by him was genuine before passing the impugned order. Taking into consideration of the decision of the Apex Court in the ***State of Andhra Pradesh 7 ors v.Nagam Chandrasekhara Lingam;*** reported in ***AIR 1988 Supreme Court 1309,*** it was observed that the inquiry into the validity of social status certificate should be entrusted to Commissioner Social Welfare.

With the above reasons, while allowing the original application, quashing the order dated 31.08.2000, following directions had been issued in the judgment and order dated 19.11.2001 by the tribunal:

"The respondent no.5 General Manager (P), N.E. Railway, Gorakhpur and District Magistrate Gorakhpur Respondent no.7 are directed to place the matter before the commissioner, social welfare of the State Government of Uttar Pradesh to hold an enquiry regarding the validity of the caste certificate issued in favour of the applicant. The applicant shall be allowed participation in such an inquiry and opportunity to file evidence in support of his claim. The District Magistrate shall also be entitled to place evidence which was found by him against the applicant. The enquiry shall be completed within a period of four month from the date it is entrusted to Commissioner Social Welfare of the State. The status of the applicant in service shall be determined in accordance with the order passed by the Commissioner Social Welfare. There will be no order as to costs."

15. The aforesaid order dated 19.11.2001 of the Central Administrative Tribunal was challenged by the petitioner in Civil Misc. Writ Petition No.10784 of 2002 wherein interim order dated 13.03.2002 was passed by this Court to the following effect:-

"*Until further order operation of the order dated 19.11.2001 as for as it directs holding enquiry regarding validity of the caste certificate issued in favour of the petitioner shall remain stayed."*

The said writ petition had been dismissed on 07.04.2016 by this Court.

16. Ms. Subhash Rathi, learned Amicus Curie appearing for the petitioner has stated that the petitioner, thus, continued to be treated as "Scheduled Caste' candidate as he was on the date of his initial appointment. The petitioner was promoted to the higher post as "ASTE" on 12.05.2008 and worked on the said post till his superannuation i.e. on 28.02.2010.

17. Prior to the date of superannuation of the petitioner, a communication dated 22.2.2010 was sent from the office of the

General Manager (Personnel) N.E. Railways, Gorakhpur to the effect that the retiral benefits and other dues of the petitioner had been withheld in view of the interim order dated 13.03.2002 passed by this Court in Writ petition no.10784 of 2002 (Shri Chandra Prakash vs Union of India) and the decision of the Railway board communicated vide letter dated 28.06.1996.

18. This order was further challenged before the Central Administrative Tribunal in Original application no.1235 of 2011. The tribunal had dismissed the Original application vide judgment and order dated 01.03.2012 noticing that :

"11. In the background of the fact and circumstance of the case it may relevant to quote from the judgment of the Apex Court in the case of ***G. Sundarsan v. Union of India & another; (1995) 4 Supreme Court Cases 644,*** *wherein it has held that continuance of onus of, on the person appointed in the quota of Scheduled Castes does not cease merely because of continuing in service for a long period on the basis of a caste certificate granted by the competent authority earlier, where it is subsequently, found on evidence that the appointee did not belong to a Scheduled Caste and that he had procured appointment in reserved quota by submitting a false certificate, imposition of punishment of forfeiture of his pension, is held to be proper. In another case reported in (2001) 9* ***Supreme Court Cases 706 B.S. Gaur v. Union of India & others*** *the Apex court held that after revocation of SC Certificate, employee's status as SC had come under cloud. Merely because the applicant has obtained stay order does not conclude the dispute.*

12. Having regard to the above position, the ratio of law in regard to such cases is clear. In case, Caste certificate of an employee comes under cloud, the Department is within its rights to withhold the terminal benefits of the concerned employee. The payment or forfeiture of these benefits will necessarily be contingent upon the final determination of the status of the applicant regarding whether he belongs to schedule caste or not. Since this issue is pending consideration of the Hon'ble Allahabad High Court, any further action in this matter can be taken only after the Hon'ble High Court decide the controversy.

19. At this stage, it may be necessary to note that on 20.12.2021, when this writ petition came up for consideration, the Court had noted that even provisional pension had not been paid to the petitioner. Taking serious view of the matter, explanation was called from the respondents and the General Manager (Personnel), North Eastern Railways, Gorakhpur was directed to remain present on 22.12.2021. The affidavit of compliance dated 22.12.2021 has been filed on behalf of the respondent wherein it is stated that the pensionary benefits could not be released in favour of the petitioner for two reasons; firstly for the fact that the petitioner had challenged the order dated 01.03.2012 passed by the Tribunal in the present petition wherein the order dated 26.04.2017 has been passed noticing that the special leave petition has been filed challenging the order dated 07.04.2016 dismissing Writ A no.10784 of 2002 and simultaneously review application has also been filed by the petitioner in the said writ petition. The Court, therefore, observed that the present petition be heard after disposal of the review application and the special leave petition filed by the petitioner

against the order dated 07.04.2016 as final outcome of those matters would be relevant for deciding the present petition.

20. The contention is that the Special Leave Petition no.3516 of 2019 challenging the order dated 07.04.2016 has been dismissed vide order dated 15.11.2021 and the review application is still pending consideration.

21. The second contention is that the release of pensionary benefits and retiral dues to the petitioner is dependent upon the inquiry conducted by the Director Social Welfare as directed by the Tribunal and the High Court. The retiral benefits of the petitioner has not been released by the department due to pendency of the present petition and the order dated 26.04.2017 passed in this writ petition as also due to pendency of the inquiry.

22. It is submitted by the learned Amicus appearing for the petitioner that as on date neither any departmental inquiry nor any judicial proceeding is pending against the petitioner. No such inquiry has been initiated by the department after retirement of the petitioner.

23. In the said scenario, pensionary benefits cannot be withheld as against the Rule 9 of the Railway Services (Pension) Rules, 1993.

24. Per contra, Sri Praveen Kumar Srivastava learned counsel appearing for the respondents vehemently argued that the initial appointment of the petitioner in the railway taking benefit of the Scheduled Caste category is under cloud. Initially in the year, 1999, the inquiry was conducted by the District Magistrate into the genuineness of the caste certificate and the report was submitted that the petitioner actually belong to the caste BHARBHUJ which is backward class category and nor BHUIYA (scheduled caste) as indicated in the caste certificate. At every stage, when the challenge has been raised by the petitioner regarding competence of the authority to initiate inquiry into the validity of the caste certificate, he was turned down by the Court and was directed to participate in the inquiry. The petitioner instead of participating in inquiry in compliance of the order passed by the Tribunal on 19.11.2001 had initiated fresh litigation and got an interim order from this Court. The inquiry into the correctness of the caste of the petitioner could not be initiated on account of the interim order granted by this Court. After dismissal of the writ petition on 07.04.2016, on vacation of the interim order by this Court, Special Leave Petition was filed which has been decided vide order dated 15.11.2021. As the petitioner did not cooperate in the inquiry, the department cannot be held responsible for non release of the pensionary benefits. The order of withholding the pensionary benefits is strictly in accordance with the Railway Services (Pension) Rules, 1993. The respondents had no option but to wait the final outcome of the writ petition filed by the petitioner including the present petition.

25. Having considered the submissions of the learned counsel for the parties and perused the record, before entering into the factual inquiry, it would be appropriate to take note of the relevant rule which confers power on the competent authority to withhold pension of the superannuated railway employee. Relevant Rule 9 of the Railway Services (Pension) Rules 1993 framed by the President of India in exercise of power conferred by the

proviso to Article 309 of the Constitution is to be quoted:

"9. Right of the President to withhold or withdraw pension.

The President reserves to himself the right of with holding or withdrawing a pension or gratuity, or both, either in full or in part, whether permanently or for a specified period, and of ordering recovery from a pension or gratuity of the whole or part of any pecuniary loss caused to the Railway, if, in any departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of his service, including service rendered upon re-employment after retirement;

Provided that the Union Public Service Commission shall be consulted before any final orders are passed.

Provided further that where a part of pension is withheld or withdrawn, the amount of such pension shall not be reduced below the amount of rupees three hundred seventy five per mensem.

2. The departmental proceedings referred to in sub-rule (1)

a. if instituted while the railway servant was in service whether before his retirement or during his re-employment, shall after the final retirement of the railway servant, be deemed to be proceeding under this rule and shall be continued and concluded by the authority by which they were commenced in the same manner as if the railway servant had continued in service.

Provided that where the departmental proceedings are instituted by an authority subordinate to the President, that authority shall submit a report recording its findings to the President;

b. if not instituted while the railway servant was in service, whether before his retirement or during his re-employment

i. shall not be instituted save with the sanction of the President;

ii. shall not be in respect of any event which took place more than four years before such institution; and

iii. shall be conducted by such authority and in such place as the President may direct and in accordance with the procedure applicable to departmental proceedings in which an order of dismissal from service could be made in relation to the railway servant during his service.

3. In the case of a railway servant who has retired on attaining the age of superannuation or otherwise and against whom any departmental or judicial proceedings are instituted or where departmental proceedings are continued under sub-rule (2), a provisional pension as provided in Rule 10 Rule 96 shall be sanctioned.

Amended vide Railway Board's letter No. F(E) III/99/PN 1/38 (Modification) dated 23.05.2000 (RBE 100/2000).

4. Where the President decides not to withhold or withdraw pension but orders recovery of pecuniary loss from pension, the recovery shall not ordinarily be made at a rate exceeding one third of

the pension admissible on the date of retirement of a railway servant.

5. For the purpose of this rule

a. departmental proceedings shall be deemed to be instituted on the date on which the statement of charges is issued to the railway servant or pensioner, or if the railway servant has been placed under suspension from an earlier date, on such date; and

b. judicial proceedings shall be deemed to be instituted

i. in the case of criminal proceedings, on the date on which the complaint or report of a Police Officer, of which the Magistrate takes cognisance, is made; and

ii. in the case of civil proceedings, on the date the plaint is presented in the Court."

26. A perusal of the said rule indicates that the pension or gratuity or both, either in full or in part, whether permanently or for a specific period, can be withheld or withdrawn and also an order of recovery from pension or gratuity of the whole or part can be made, in case of any pecuniary loss caused to the railway, in the event that the pensioner is found guilty of grave misconduct or negligence during the period of his service, including service rendered upon re-employment after retirement, in any departmental or judicial proceedings.

27. The requirement of the Rule is that a pensioner shall have to be found guilty of grave misconduct or negligence in a departmental or judicial proceedings, for a decision to be taken for withholding or withdrawal of pension or gratuity or both, either in full or in part, permanently or for a specified period.

28. Sub-rule 2(a) of the Rule further provides that the departmental proceeding, if instituted while the railway servant was in service shall be continued after his retirement and shall have to be concluded by the competent authority in the same manner as if the railway servant had continued in service. The proviso further states that the departmental authority has to submit a report recording its findings to the President.

29. Sub-Rule 2(b) of Rule 9 further contemplates a situation where departmental proceeding has not been instituted while the railway servant was in service. It states that the departmental inquiry, if not instituted while railway servant was in service, shall not be instituted without sanction of the President; and shall not be in respect of any event which took place more than four years before such institution. Sub-rule (3) of Rule 9 further states that where railway servant who has retired on attaining the age of superannuation or otherwise and against whom any departmental or judicial proceedings are instituted or where departmental proceedings are continued under sub-rule (2), a provisional pension as per Rule 10, Rule 96 shall be sanctioned. Sub-rule (5) further contains a deeming provision to interpret the terms "departmental" and "judicial proceeding" for the purpose of sub rule (1). It states:

(i). departmental proceeding shall be deemed to be instituted on the date on which the statement of charges is issued to the railway servant or pensioner, or if the railway servant has been placed under

suspension from an earlier date, on the date of suspension.

(ii). With regard to judicial proceedings, it is stated that judicial proceeding of criminal nature shall be deemed to be instituted on the date on which the complaint or report of a police officer, of which the Magistrate takes cognizance, is made; in civil proceedings, on the date of presentation of the plaint in the Court.

30. Having carefully gone through the Rule 9, 1993 Rules which empowers the respondent to withhold or withdraw the pensionary benefits of a pensioner/railway servant, it is evident that the pensionary benefits can be withheld only in two conditions, which are:-

(i). a departmental or judicial proceeding against such railway servant was instituted prior to the date of retirement

(ii). the departmental proceeding if not instituted prior to the retirement, has been instituted with the sanction of the President after his retirement. The relevant date for institution of departmental proceedings is the date of issuance of the statement of charges by the disciplinary authority/inquiry officer or the date of suspension, whichever is earlier. There is no other situation in which the pensionary benefits of railway servant can be withheld under the Rules.

31. In the instant case, admittedly, no judicial proceeding had been instituted or pending against the petitioner prior to his superannuation or thereafter. As regards the departmental proceeding, it is evident that the petitioner has not been placed under suspension prior to his superannuation. The departmental inquiry initiated against him had been concluded much earlier in his favour. No fresh proceeding had been instituted by the departmental authority. As on the date of superannuation of the petitioner, i.e. on 28.2.2010, apart from the directions issued by the Tribunal vide order dated 19.11.2001 to conduct an inquiry into the correctness of the caste of the petitioner, no other adverse order was passed against the petitioner. The order dated 31.08.2000 issued by the department initiating inquiry against the petitioner had already been quashed. Even in the order dated 19.11.2001, the Tribunal had observed that the matter be placed before the Commissioner, Social Welfare of the State of U.P. to hold an inquiry regarding the validity of the caste certificate issued in favour of the petitioner and that the petitioner was allowed participation in such an inquiry and to be provided due opportunity to file evidence in support of his claim during the said inquiry. On the basis of evidence of rival parties, the inquiry report was directed to be submitted by the Commissioner, Social Welfare of the State within the period of four months from the date of the said order. The status of the petitioner in service was required to be determined in accordance with the order passed by the Commissioner, Social Welfare.

32. We are conscious of the fact that this inquiry could not commence on account of the interim order dated 13.03.2002 passed by this Court in Writ petition no.10784 of 2002, challenging the order dated 19.11.2001, passed by the Tribunal directing the Commissioner, Social Welfare of the State to conduct an inquiry.

33. However, it is pertinent to note that the said writ petition was dismissed on

07.04.2016 noticing that the judgment of the Tribunal did not warrant any interference and any finding in the previous inquiry or the caste certificate allegedly issued by the Additional Chief Judicial Magistrate, Gorakhpur has no relevance, in as much as, no judicial officer has power to issue such certificate. The position, thus, remains that an inquiry was required to be conducted by the Commissioner, Social Welfare of the State in accordance with the order dated 19.11.2001 passed by the Tribunal after dismissal of the writ petition on 07.04.2016. We may further note that there was no challenge to the judgment and order dated 07.04.2016 of dismissal of the writ petition filed by the petitioner till the year 2019 when Special Leave Petition (C) no.3516 of 2019 (Chandra Prakash vs Union of India) was filed before the Apex Court. There is nothing on record which would indicate that the respondents were restrained from proceeding with the inquiry regarding correctness of the caste certificate through Commissioner, Social Welfare by any order of a Court of law.

34. From 07.04.2016 till the date of hearing of this writ petition, i.e 22.12.2021, no such inquiry had been conducted which is evident from the affidavit of the respondents filed on 22.12.2021. The explanation offered by the respondent in the said affidavit is that the petitioner did not comply with the order of the Tribunal and did not participate for inquiry before the Director, Social Welfare, U.P. Neither any record of the said inquiry has been placed before us nor it is averred that the competent authority namely the Director Social Welfare, U.P had issued any notice to the petitioner to participate in the inquiry. No such statement even has been made in the latest affidavit of the officer filed on behalf of the respondents on 22.12.2021 in compliance of the order of this Court.

35. The plea that the inquiry into the correctness of the caste certificate could not be conducted on account of the order dated 26.4.2017 passed by this Court in the present petition is of no benefit to the respondents. The order dated 26.4.2017 was in no way a restraint on the respondents or the Director Social Welfare , U.P. to conduct the fact finding inquiry.

36. In any case, the inquiry contemplated into the correctness of the caste certificate of the petitioner was not with regard to the genuineness of the caste certificate rather it was with respect to the caste to which actually the petitioner belong. The cause of the said inquiry was the report of the District Magistrate, Gorakhpur wherein it was stated that the petitioner belong to BHARBHUJ which is a backward class. To ascertain this, a fact finding inquiry was required to be conducted by the Commissioner, Social Welfare Department. The said inquiry required leading of evidence by both sides.

37. Nevertheless, the said inquiry could only fall in the category of a fact-finding or vigilance inquiry and the same even if completed could not have been said to be a 'departmental inquiry' within the meaning of Rule 9 of the Railway Service (Pension) Rules, 1993. Even on receipt of the said inquiry report, a departmental inquiry was required to be initiated by the Railways after getting sanction from the President in accordance with the Rule 9 (2)(b) of the Railway Service (Pension) Rules 1993. The question of withholding pensionary benefits could arise only after initiation of the departmental inquiry within the meaning of Rule 9(5) with the issuance

of the chargesheet by the disciplinary authority.

38. In the instant case, since the petitioner had already been retired on 28.02.2010, only option before the respondents after 07.04.2016 was to conclude the vigilance inquiry or fact finding inquiry through the Commissioner, Social Welfare and then approach the President to grant sanction for initiation of the departmental proceeding, i.e to serve chargesheet on the petitioner as to why his initial appointment be not cancelled on account of the submission of incorrect or wrong caste certificate.

39. The decision to withhold pension of the petitioner had been taken in the year 2010 on account of pendency of the writ petition no.10784 of 2002 and the interim order passed therein which was vacated on 07.04.2016. It is evident from the record that there was no restraint order after 07.04.2016 against the respondent stopping them from concluding the inquiry pursuant to the order of the tribunal, which itself was a fact finding inquiry.

40. It may further be noted that the pendency of the review application of the petitioner cannot be a ground to say that the respondents could not proceed with the inquiry.

41. In the said scenario, it cannot be successfully argued by the respondents that the order of withholding of pension and other retiral dues is subject to conclusion of the inquiry initiated by the Director, Social Welfare under the direction issued by the Tribunal on 19.11.2001. No record of such an inquiry has been placed before us.

42. For the aforesaid, we have no option but to hold that there is complete inaction on the part of the respondents to conduct the fact finding inquiry through the Commissioner, Social Welfare in accordance with the order of the Tribunal. Moreso, five years have passed since after dismissal of the Writ petition no.10784 of 2002 wherein the respondents had been initially restrained from conducting the inquiry. We may also note that Rule 9(2)(b)(ii) provides that no departmental inquiry, if not instituted prior to the retirement of railway servant, shall be instituted if the charges are stale i.e in respect of the event which took place more than four years before the institution of inquiry. We are also conscious of the fact that the inquiry instituted by the respondent goes to the very root of appointment of the petitioner. But, we are not getting any explanation from the respondents for not completing even the fact finding inquiry for a period of more than five years. The excuse taken by the respondents for not initiating the said inquiry after the dismissal of the writ petition on 07.04.2016 is not convincing.

43. Moreover, the inquiry is not about the genuineness of the certificate in as much as the report of the District Magistrate, Gorakhpur also does not say that the caste certificate which is the basis of appointment of the petitioner on the post in question had not been issued by the competent authority. The said caste certificate has not been cancelled or revoked by the competent authority till date. The correctness of the caste certificate had been doubted by the respondents on the basis of the report of the District Magistrate Gorakhpur submitted in the year, 1983 that the petitioner and his family members do not belong to scheduled caste *BHUIYA* rather they are of backward class named by *BHARBHUJ*. An extensive fact finding

inquiry was required to be conducted to ascertain the said fact that too after giving opportunity of hearing to the petitioner to file evidence to support his contention that he belong to scheduled caste named as *BHUIYA* and not *BHARBHUJ*, a backward category as alleged by the District Magistrate, Gorakhpur. It is evident that the report of the District Magistrate dated 09.02.1983 was obtained behind the back of the petitioner and at no stage of the said inquiry, opportunity of hearing had been granted to the petitioner, which is the reason for quashing of the order dated 31.08.2000 of the General Manager (P) North Eastern Railway, Gorakhpur, by the tribunal.

44. The respondents, therefore, could not be demonstrate before us that the petitioner had secured appointment in the year 1970 on the basis of a forged caste certificate of a caste to which he does not belong. They could not demonstrate before us that they have conducted any inquiry or any departmental inquiry is pending against the petitioner which could have justified the action of the respondents in withholding pension and other retiral benefits of the petitioner. The stand taken by the respondent for withholding retiral benefits and pension of the petitioner does not fall within the scope of Rule 9 of the Railway Services (Pension) Rules 1993 which is the only Rule empowering the Railways to withhold the pension or other retiral benefits of the petitioner.

45. For the above noted facts, in view of the position of law as noted above, we are of the considered opinion that the order dated 22.02.2010 issued by the General Manager (Personnel) North Eastern Railway, Gorakhpur (Annexure-2 to the instant writ petition), therefore, has lost its tenor as on date, as the said order could survive only till 07.04.2016 when the writ petition no.10784 of 2002 was dismissed. The said order which comes in the way of the petitioner in getting his pensionary benefits does not survive after 07.04.2016. No fresh order of withholding pension and other retiral dues of the petitioner has been passed by the respondents after dismissal of the Writ petition on 07.04.2016 on the basis of any departmental proceeding instituted against him with the sanction of the competent authority in accordance with the Rule 9(2)(b) of Rules 1993.

46. The respondents, therefore, have no authority of law to withhold pension and other retiral benefits of the petitioner in absence of any judicial proceeding or departmental proceeding pending against him.

47. For the aforesaid, we **allow** the present writ petition with the direction to the respondents to immediately release pension and other retiral dues of the petitioner by making a computation of the same w.e.f 28.02.2010, the date of his superannuation and pay the same within a period of four months from the date of receipt of copy of this order. The petitioner is also held entitled to simple interest @ 7 % per annum since 08.04.2016, on the above computation of pension and other retiral benefits, in view of the fact that there was no restraint order of this Court after 07.04.2016 and the respondents were under obligation to pay retiral benefits to the petitioner, in absence of any departmental or judicial proceeding.

48. No order as to costs.

(2022)03ILR A651
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.02.2022

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE PIYUSH AGRAWAL, J.

Civil Misc. Review Application No. 349 of 2021
(In WRIT -C No. 60276 of 2015)
With
Civil Misc. Review Application No. 359 of 2021
(In WRIT -C No. 60276 of 2015)

State Of U.P. & Ors. ...Petitioners
Versus
Ishan International Education Society, Patna ...Respondent

Counsel for the Petitioners:

Mr. Tushar Mehta, Senior Advocate through V.C., Mr. Raghvendra Singh, Advocate General through V.C., Mr. M.C. Chaturvedi, Additional Advocate General, Ms. Archana Singh, Additional Chief Standing Counsel, Mr. Gopal Chandra Saxena, Standing Counsel, Mr. Arun Singh, Advocate, Ms. Sakshi Kakkar, Advocate, Mr. Shakti Singh, Advocate

Counsel for the Respondent:

Mr. Chandan Sharma, Advocate, Mr. Shiva Kant Mishra, Advocate

Civil Procedure Code, 1908 - Section 114 - Order 47 - Rule 1 - Review - Error Apparent on record - Review not permissible where practically arguments have to be reheard - an order cannot be reviewed on grounds, which were not existing at the time of passing of the initial order under review - Only the material, which was available, as on the date of initial order, could be referred to or relied upon for the purpose of review of such order - happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent (Para 40)

Process of acquisition started before the enactment of the 2013 Act, however, the award was announced on May 8, 2015 i.e. after the 2013 Act came into force - In the order under review, the Division Bench relied upon a communication from the Government of India dated October 26, 2015 and directed that the market value of the land has to be determined as on January 1, 2014 – Review was sought on the ground that there is error apparent on record, as reliance on a communication issued by Government of India is misplaced for the reason that it was not an order issued under Section 113 of the 2013 Act - Even otherwise, if the aforesaid communication is taken to be issued under Section 113 of the 2013 Act, the same having not been laid before the Parliament is otherwise also non est and could not have been relied upon - Held - Practically, the arguments have to be reheard - not a case where the error is apparent on record as review of the order is sought on the ground of subsequent communication of Government of India dated September 26, 2018, which were not existing at the time of passing of initial order by this Court. Review petition liable to be dismissed

Dismissed . (E-5)

List of Cases cited :

1. Hori Lal Vs St.of U.P. & ors., Writ-C No. 44731 of 2016, 09.03.2017

2. Hori Lal Vs St. of U.P. & ors. Civil Appeal No.1462 of 2019, 05.02.2019

3. Aligarh Development Authority Vs Megh Singh & ors. Civil Appeal No. 4821 of 2016 12.02.2019

4. The St. of W.B. & ors. Vs Kamal Sengupta & ors. (2008)8 SCC 612

5. Kunhayammed & ors. Vs St. of Kerala & anr. (2000)6 SCC 359

(Delivered by Hon'ble Rajesh Bindal, C.J.)

1. Review of the order dated May 9, 2017 passed by the Division Bench of this Court has been sought by filing the present applications.

2. Before we notice the arguments raised by the learned counsel for the parties, we deem it appropriate to notice certain dates, which are not in dispute.

RELEVANT DATES PERTAINING TO REVIEW APPLICATION FILED BY THE STATE

Date of Decision of the Writ Petition (order under review)	May 9, 2017
Date of dismissal of Special Leave Petition filed against the order dated May 9, 2017	February 9, 2021
Date of filing of present Review Application	October 27, 2021

RELEVANT DATES PERTAINING TO REVIEW APPLICATION FILED BY THE GHAZIABAD DEVELOPMENT AUTHORITY

Date of Decision of the Writ Petition (order under review)	May 9, 2017
Date of dismissal of Special Leave Petition filed against the order dated May 9, 2017	July 19, 2017
Date of dismissal of Review Petition filed before Hon'ble the Supreme Court against the order dated July 19, 2017	December 5, 2017
Date of dismissal of Curative Petition	August 28, 2019
Date of filing of present review application	October 27, 2021

SUBMISSIONS OF PARTIES

3. Mr. Tushar Mehta, learned Senior Advocate appearing for the applicants, submitted that the legal issue involved in the present case is as to the date on which the amount of compensation payable to the land owners has to be assessed. It is with reference to Section 24(1)(a) of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (hereinafter referred to as "the 2013 Act').

4. In the case in hand, the process of acquisition started before the enactment of the 2013 Act, however, the award was announced on May 8, 2015 i.e. after the 2013 Act came into force. The date for assessment of compensation was taken as the date on which notification under Section 4 of the Land Acquisition Act, 1894 (hereinafter referred to as "the 1894 Act') was issued. In the order under review, the Division Bench of this Court, while relying upon a communication from the Government of

India dated October 26, 2015, had directed that the market value of the land has to be determined as on January 1, 2014. Even in the cases where the acquisition proceedings started when the 1894 Act was in force, the date of issuance of notification under Section 4 of the 1894 Act, is the crucial date for assessment of compensation. The aforesaid communication from Government of India was relied upon, without the same being placed on record by the writ petitioners. The same was considered to be a direction issued by the Government of India under Section 113 of the 2013 Act. However, Section 113(2) of the 2013 Act provides that any order issued under Section 113 of the 2013 Act has to be laid before the Parliament. It was not done. Hence, the same could not be relied upon by the Court. When the confusion arose with reference to the aforesaid communication of Government of India, clarification was issued by the Government of India on September 26, 2018 that the earlier communication dated October 26, 2015 was not issued under Section 113 of the 2013 Act.

5. Mr. Mehta, learned Senior Advocate, while referring to Section 24(1)(a) of the 2013 Act, submitted that it does not talk about the date on which the compensation is to be assessed. Section 26 of the 2013 Act deals with determination of market value of the land. Proviso to Section 26 of the 2013 Act provides that crucial date for determination of compensation is the date on which the notification under Section 11 of the 2013 Act is issued. The same is similar to Section 4 of the 1894 Act. As the provisions of the 2013 Act are quite clear, there was no ambiguity, which required clarification.

6. As legal issues are involved, which need to be considered, present review applications are maintainable.

7. In response thereto, learned counsel for the respondent submitted that a perusal of communication dated October 26, 2015 shows that the same was issued in response to a clarification sought by the State of Maharashtra. It was only after taking opinion from the Department of Legal Affairs, Ministry of Law & Justice that the clarification was issued. It is only an order passed under Section 113 of the 2013 Act, which is to be laid before the Parliament, not the direction. In the case in hand, it is clearly a direction issued by the Government of India. He further submitted that there is huge delay in filing the Review Applications.

8. Learned counsel for the respondent referred to an order passed by Division Bench of this Court in **Writ-C No. 44731 of 2016, titled as Hori Lal v. State of U.P. and others,** decided on March 9, 2017, vide which bunch of writ petitions, where similar claim was made by the writ petitioners, was dismissed. The matter was taken to Hon'ble the Supreme Court. In **Civil Appeal No.1462 of 2019, titled as Hori Lal v. State of U.P. and others, d**ecided on February 5, 2019, the claim of the land owners was conceded by the State, while relying upon the aforesaid communication of the Government of India dated October 26, 2015 to the extent that the date for assessment of market value of the land for which the acquisition process started under the 1894 Act and is completed under the 2013 Act, is to be taken as January 1, 2014. The stand of the State was accepted. Reference was also made to another order of Hon'ble the Supreme Court dated February 12, 2019 passed in **Civil Appeal No. 4821 of 2016 titled as Aligarh Development Authority v. Megh Singh and others,** where similar stand taken by the State has been noticed

and while relying upon the earlier order passed in **Hori Lal's** case (supra), the compensation was directed to be assessed as on January 1, 2014.

9. Once the stand taken by the State before Hon'ble the Supreme Court in earlier litigation with reference to the same issue is in terms of the clarification issued by the Government of India October 26, 2015, it should not be permitted to raise a different plea in the present case.

10. It was further argued that reliance on the communication issued by the Government of India on September 26, 2018 is totally misplaced for the reason that it was not in place when the writ petition was decided by this Court. Only the material, which was available as on that date, could be referred to or relied upon for the purpose of review of any order passed. After the dismissal of Special Leave Petitions, Review Petition and even Curative Petition by Hon'ble the Supreme Court, nothing lies in the mouth of the review-applicant to re-open the issue before this Court. In support, reliance was placed upon a judgment of Hon'ble the Supreme Court in **The State of West Bengal and others v. Kamal Sengupta and others (2008)8 SCC 612.**

11. In response, Mr. Mehta, learned Senior Advocate, submitted that even if the Special Leave Petitions or Review Petition had been dismissed by the Supreme Court, review is maintainable as the order passed by this Court, review of which is sought, does not merge with the order of Hon'ble the Supreme Court. In support, reliance was placed upon a judgment of Hon'ble Supreme Court in **Kunhayammed and others v. State of Kerala and another (2000)6 SCC 359.**

12. He further submitted that there is error apparent on record, as reliance on a communication issued by Government of India is misplaced for the reason that it was not an order issued under Section 113 of the 2013 Act. It is established from the subsequent communication of the Government of India. Even otherwise, if the aforesaid communication is taken to be issued under Section 113 of the 2013 Act, the same having not been laid before the Parliament is otherwise also non est and could not have been relied upon. The communication is dated October 26, 2015 whereas it was relied upon by this Court in its order May 9, 2017 and there were number of sessions of Parliament in between. He further submitted that even otherwise concession given by the State counsel, on a matter of law, is not binding.

DISCUSSIONS

13. Heard learned counsel for the parties and perused the paper book.

14. The notifications under Sections 4 and 6 of the 1894 Act in the case in hand were issued on October 16, 2004 and November 28, 2005, respectively. As the award could not be announced before the 2013 Act came into force, the same was announced on May 8, 2015 in terms of the provisions of the 2013 Act. Delay was on account of pendency of litigation. The writ petition was filed in this Court. The sole contention was that the date of determination of the compensation for the acquired land should be taken as January 1, 2014, the date on which the 2013 Act came into force. In support of the arguments, reliance was placed upon the communication issued by the Government of India dated October 26, 2015. It is stated to be under Section 113 of the 2013 Act.

The letter of the Government of India was relied upon by this Court while accepting the writ petition holding that for assessment of compensation the date should be taken as January 1, 2014. This Court also observed that the Government of India had not issued any order rather had issued only the directions after taking the opinion from the Department of Legal Affairs, Ministry of Law & Justice and these directions were not required to be laid before the two Houses of Parliament and are also not inconsistent with the provisions of the 2013 Act.

15. It may be relevant to add here that the aforesaid order of the Government of India dated October 26, 2015, on which reliance was placed upon by the writ petitioners, was not part of the record, as apparently the same was produced in Court at the time of hearing, which had been extracted in toto in the order dated May 9, 2017. Otherwise, the existence thereof has not been disputed by the learned counsel for the review-applicants.

16. Before we proceed to deal with the arguments raised by the learned counsel for the parties, it would be apt to refer to certain provisions of the 2013 Act.

17. Sections 24, 26 and 113 of the Right To Fair Compensation And Transparency In Land Acquisition, Rehabilitation And Resettlement Act, 2013, are extracted below:-

"**24. Land acquisition process under Act No. 1 of 1894 shall be deemed to have lapsed in certain cases**.-(1) Notwithstanding anything contained in this Act, in any case of land acquisition proceedings initiated under the Land Acquisition Act, 1894,-

(a) where no award under section 11 of the said Land Acquisition Act has been made, then, all provisions of this Act relating to the determination of compensation shall apply; or

(b) where an award under said section 11 has been made, then such proceedings shall continue under the provisions of the said Land Acquisition Act, as if the said Act has not been repealed.

(2) Notwithstanding anything contained in sub-section (1), in case of land acquisition proceedings initiated under the Land Acquisition Act, 1894 (1 of 1894), where an award under the said section 11 has been made five years or more prior to the commencement of this Act but the physical possession of the land has not been taken or the compensation has not been paid the said proceedings shall be deemed to have lapsed and the appropriate Government, if it so chooses, shall initiate the proceedings of such land acquisition afresh in accordance with the provisions of this Act:

Provided that where an award has been made and compensation in respect of a majority of land holdings has not been deposited in the account of the beneficiaries, then, all beneficiaries specified in the notification for acquisition under section 4 of the said Land Acquisition Act, shall be entitled to compensation in accordance with the provisions of this Act."

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"**26. Determination of market value of land by Collector.**-(1) The Collector shall adopt the following criteria

in assessing and determining the market value of the land, namely:--

(a) the market value, if any, specified in the Indian Stamp Act, 1899 (2 of 1899) for the registration of sale deeds or agreements to sell, as the case may be, in the area, where the land is situated; or

(b) the average sale price for similar type of land situated in the nearest village or nearest vicinity area; or

(c) consented amount of compensation as agreed upon under sub-section (2) of section 2 in case of acquisition of lands for private companies or for public private partnership projects, whichever is higher:

Provided that the date for determination of market value shall be the date on which the notification has been issued under section 11.

(2) The market value calculated as per sub-section (1) shall be multiplied by a factor to be specified in the First Schedule.

(3) Where the market value under sub-section (1) or sub-section (2) cannot be determined for the reason that-

(a) the land is situated in such area where the transactions in land are restricted by or under any other law for the time being in force in that area; or

(b) the registered sale deeds or agreements to sell as mentioned in clause (a) of sub-section (1) for similar land are not available for the immediately preceding three years; or

(c) the market value has not been specified under the Indian Stamp Act, 1899 (2 of 1899) by the appropriate authority, the State Government concerned shall specify the floor price or minimum price per unit area of the said land based on the price calculated in the manner specified in sub-section (1) in respect of similar types of land situated in the immediate adjoining areas:

Provided that in a case where the Requiring Body offers its shares to the owners of the lands (whose lands have been acquired) as a part compensation, for acquisition of land, such shares in no case shall exceed twenty-five per cent, of the value so calculated under sub-section (1) or sub-section (2) or sub-section (3) as the case may be:

Provided further that the Requiring Body shall in no case compel any owner of the land (whose land has been acquired) to take its shares, the value of which is deductible in the value of the land calculated under sub-section (1):

Provided also that the Collector shall, before initiation of any land acquisition proceedings in any area, take all necessary steps to revise and update the market value of the land on the basis of the prevalent market rate in that area:

Provided also that the appropriate Government shall ensure that the market value determined for acquisition of any land or property of an educational institution established and administered by a religious or linguistic minority shall be such as would not restrict or abrogate the right to establish and administer educational institutions of their choice."

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"113. Power to remove difficulties.-(1) If any difficulty arises in giving effect to the provisions of this Part, the Central Government may, by order, make such provisions or give such directions not inconsistent with the provisions of this Act as may appear to it to be necessary or expedient for the removal of the difficulty:

Provided that no such power shall be exercised after the expiry of a period of two years from the commencement of this Act.

(2) Every order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament."

18. The communications from the Government of India dated October 26, 2015 and September 26, 2018, are also extracted below:

"Government of India
Department of Land Resources
Ministry of Rural Development
Hukum Singh Meena, IAS
Joint Secretary

Dated 26th October, 2015

Dear,

Please refer to your letter No. R&FD/General-2014 CR-31/A4, dated the 11th September, 2014 regarding directions under section 113 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013.

2. The issues raised by you along with the view of this Department were sent to the Department of Legal Affairs, Ministry of Law & Justice for opinion in the matter. The issues raised by the Government of Maharashtra and the opinion of the Department, as concurred in by the Department of Legal Affairs, thereon are enumerated below:-

S. No.	Issues raised by the Government of Maharashtra	Opinion of the DoLR
1.	While determining the amount of compensation under Section 27 of the RFCTLARR Act, 2013 of Hon'ble Supreme Court's orders are followed or cost of assets have to be separately computed in addition to cost of land?	Under Section 26 of the RFCTLARR Act, 2013 market value of the land is determined while under section 27, value of all assets attached to the land is added to die market value to determine, the amount of compensation. Thus, it is not contradictory to me Supreme Court's orders quoted in me letter of Maharashtra Government.
2.	Under Section 24(1), the reference date for calculating 12% interest	Under section 24 (1), the reference date for calculating 12% interest should be date of preliminary notification under Land Acquisition Act,

	should be date of preliminary notification under Land Acquisition Act, 1894.	1894. Department of Land Resources agrees to this, as there is no other reference date, that can be treated as equivalent to date of SIA notification under die RFCTLARR Act, 2013.
3.	For calculation of market value, under Section 24 (1)(a), reference date should be 01.01.2014 (commencement of RFCTLARR Act, 2013) or date of issuing preliminary notification under Land Acquisition Act, 1894?	The reference date for calculation of market value, under Section 24(1) (a) should be 01.01.2014 (commencement of RFCTLARR Act, 2013), as the Section reads "in any case of land acquisition proceedings initiated under the Land Acquisition Act, 1894, where no award under section 11 of the said Land Acquisition Act has been made then, all provisions of this Act relating to the determination of compensation shall apply Under section 26 reference date is date of preliminary notification, but section 24 is a special case of application of the Act. In retrospective cases, and a later date of determination of market value is suggested (i.e. 01.01.2014) with a view to ensure that the land owners/farmers/affected families get enhanced compensation under the provisions of RFCTLARR Act, 2013 (as also recommended by Standing Committee in its 31st report).

Sd/-
(Hukum Singh Meena)

Shri Manu Kumar Srivastava
Principal Secretary
Revenue & Forest Department
Government of Maharashtra,

Copy to :-

All Principal Secretaries of States/UTs (except of States of Maharashtra & Govt. of Jammu & Kashmit) for information and necessary action.

(Hukum Singh Meena)
Joint Secretary (LR)
Tele No. 011-23063462"

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"No.13013/2017-LRD
Government of India
Ministry of Rural Development
Department of Land Resources
NBO Building, Nirman Bhawan, New Delhi

Dated:26th September, 2018

To,

Shri Vikas Kharge
Secretary, Revenue & Forest Department
Government of Maharashtra,
Mantralaya Annex-32
Tel 011-23063462"

Subject : Clarification regarding reference date for calculation of market value in cases of land acquisition under LA Act, 1894-reg.

Sir,

I am direction to refer to your letter no. R& FD/General-2014/CR-31/A-4 dated 3rd May, 2017 addressed to the Secretary, Ministry of Law & Justice in reference to this Department's D.O. letter no.13013/01/2014-LRD (pt) dated 26.10.2015, letter no.13013/01/2014-LRD dated 14.06.2016 and your letter no.R&FD/ General-2014/CR-31/A-4 dated 30th October, 2017 on the subject mentioned above and to say that:

(i) The quantum of compensation and rate of interest is to be decided by a quasi-judicial authority/collector by application of his own mind, based on facts & merits of each case as per the relevant provision of law.

(ii) D.O. Letter No.13013/01/2014-LRD (pt) dated 26.10.2015 of this Department is only a D.O. letter and not an order under Section 113 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013.

Yours faithfully,
Sd/-
(Hukum Singh Meena)
Joint Secretary to the Government of India

REGARDING CLARIFICATION ISSUED BY THE GOVERNMENT OF INDIA

19. Section 113(1) of the 2013 Act enables the Government of India to issue any order to remove difficulty arising in giving effect to the provisions of that part. Though the 2013 Act is not divided into different parts, however, there are XIII Chapters. Section 113 of the 2013 Act is part of Chapter XIII. This Chapter contains Sections 91 to 114. Any order passed under Section 113 of the 2013 Act cannot be inconsistent with the provision of the 2013 Act, rather is meant for removal of any difficulty. Every order made under the aforesaid section has to be laid before each House of Parliament.

20. In the case in hand, it is not in dispute that the communication dated October 26, 2015, which is stated to be issued under Section 113 of the 2013 Act, was not laid before any of the House of Parliament. This Court had made a distinction in two words used in Section 113 of the 2013 Act i.e. "order' and "direction'. A distinction is sought to be made while referring to Sub-section (2) thereof holding that only an order passed under Section 113 of the 2013 Act is to be laid before the Parliament and not the direction. The issue may require consideration as to whether the aforesaid two terms are different or the word "order' has been used in generinc sense.

21. A perusal of the communication dated October 26, 2015 reveals that State of Maharashtra had sought certain directions with reference to the 2013 Act from the Government of India. It was clarified that for the purpose of calculation of market value, the crucial date is January 1, 2014, in case the acquisition process

was initiated under the 1894 Act and was completed under the 2013 Act.

22. The aforesaid communication was later on clarified by the Government of India vide letter dated September 26, 2018 to mean that the same was not issued under Section 113 of the 2013 Act. Letter dated September 26, 2018 was issued after the decision of writ petition by this Court on May 9, 2017 and even dismissal of the Special Leave Petition and Review Petition filed by the Ghaziabad Development Authority, on July 19, 2017 and December 5, 2017, respectively.

EARLIER ORDERS OF COURT

23. The fact remains that in the case in hand the Division Bench of this Court, in the order under review, relied upon the aforesaid clarification issued by the Government of India dated October 26, 2015 and directed for taking the date of assessment of compensation as January 1, 2014.

24. Prior to that, a Division Bench of this Court in **Hori Lal's** case (supra) had rejected the same argument while holding that the proper remedy is available to the land owners under Section 64 of the 2013 Act for assessment of fair compensation. The order passed by this Court in **Hori Lal's** case (supra) was subject matter of challenge before Hon'ble the Supreme Court in **Civil Appeal No.1462 of 2019 titled as Hori Lal v. State of U.P. and others,** which was disposed of on February 5, 2019. In the aforesaid order the stand taken by the State was recorded that the crucial date for assessment of compensation shall be taken as January 1, 2014, in case where the acquisition proceedings started before commencement of the 2013 Act.

25. Subsequent thereto, in the order passed by Hon'ble the Supreme Court in **Aligarh Development Authority's** case (supra) also Hon'ble the Supreme Court while relying upon earlier order passed in **Hori Lal's** case (supra) directed that the compensation in similar situation has to be given taking the crucial date as January 1, 2014. The notification under Section 4 of the 1894 Act shall be deemed to be issued as on January 1, 2014.

26. In the case in hand, the Special Leave Petition filed by the Ghaziabad Development Authority was dismissed on July 19, 2017 and the Special Leave Petition filed by the State was dismissed on February 9, 2021. The Review Petition as well as the Curative Petition filed by the Ghaziabad Development Authority were also dismissed on December 5, 2017 and August 28, 2019, respectively.

27. Earlier, this Court in **Writ-C No.15804 of 2016 titled as Prahlad Singh and others v. State of U.P. and others**, decided on September 26, 2016, while relying upon the communication issued by the Government of India dated October 26, 2015, had taken the view that the crucial date for assessment of compensation is January 1, 2014.

28. Prior to the order passed by the Division Bench of this Court in the case in hand on May 9, 2017, this Court vide order dated April 18, 2017 passed in **Writ-C No.44720 of 2016 titled as Krishna Autar and others v. State of U.P. and others**, while relying upon the communication issued by the Government of India dated October 26, 2015, had taken the view that the crucial date for assessment of compensation is January 1, 2014. The **Special Leave Petition (Civil) Diary**

No.26271 of 2017, titled as Moradabad Development Authority v. Krishna Autar and others filed by the Moradabad Development Authority against the aforesaid Division Bench judgment of this Court was dismissed on December 5, 2017. Even the Review Petition filed by the Moradabad Development Authority was dismissed by Hon'ble the Supreme Court on February 6, 2018.

29. Vide order dated March 28, 2017 passed by Division Bench of this Court in **Writ-C No.40 of 2017, titled as Deepak Kumar and others v. State of U.P. and others,** direction was issued for determination of compensation as on January 1, 2014. It was a case in which the acquisition process was initiated under the 1894 Act, however, the award was announced after the 2013 Act came into force. Reliance was placed upon the communication issued by the Government of India dated October 26, 2015. It may be out of place, if not added here, that the Ghaziabad Development Authority vide **Special Leave Petition (Civil) No.25061 of 2017, titled as Ghaziabad Development Authority v. Deepak Kumar Singh and others** had challenged the aforesaid order passed by Division Bench of this Court, wherein vide order dated September 22, 2017 leave was granted and operation of the order passed by this Court was stayed.

30. In yet another case bearing **Writ-C No.9277 of 2019, titled as Natthu Singh and others vs. State of U.P. and others,** Division Bench of this Court vide order dated March 14, 2019 relying upon the judgment of Hon'ble the Supreme Court in Aligarh Development Authority's case (supra), directed for assessment of compensation as on January 1, 2014. Against the aforesaid order, **Special Leave Petition (Civil) Diary No.30658 of 2019, titled as the State of Uttar Pradesh and others v. Nathu Singh and others** was filed by the State of U.P. in which notice was issued on September 11, 2019 and proceedings in the pending contempt petition were stayed. It was directed to be tagged with Special Leave Petition (Civil) No.24242 of 2018.

31. Against the Division Bench judgment of this Court dated April 18, 2017 passed in **Writ-C No.44720 of 2016, titled as Krishna Autar and others v. State of U.P. and others,** the State of U.P. filed S**pecial Leave Petition (Civil) No.27415 of 2018, titled as State of U.P. and others v. Krishna Autar and others** before the Hon'ble Supreme Court, wherein vide order dated September 4, 2018 notice was issued and operation of the impugned order passed by Division Bench of this Court was stayed. While passing the order dated September 4, 2018, Hon'ble the Supreme Court, on the basis of the statement made at the Bar that the issue, which is subject matter of consideration in the aforesaid special leave petition, is pending consideration before the Larger Bench in Special Leave Petition (Civil) No.9036-9038 of 2016, titled as Indore Development Authority and others v. Manoharlal and others, directed that the said matter be listed after the judgment is rendered by the Larger Bench.

CONCLUSIONS

32. Prior to the order passed in the case in hand, this Court in **Prahlad Singh's** case (supra), vide order dated October 26, 2016 directed that the compensation be assessed as on January 1, 2014. Nothing was stated before this Court by either of the

parties as to whether the aforesaid order passed by this Court was challenged before Hon'ble the Supreme Court or not.

33. Further, prior to the order passed by this Court in the case in hand on May 9, 2017, this Court vide order dated March 9, 2017 passed in **Hori Lal's** case (supra) had dismissed the said writ petition, in which similar claim was made. Immediately thereafter, this Court vide orders dated March 28, 2017 and April 18, 2017 passed in **Deepak Kumar and others'** case (supra) and **Krishna Autar and others'** case (supra), filed raising the same issue, allowed the said writ petitions taking the view that the crucial date for assessment of compensation is January 1, 2014.

34. In Special Leave Petition (Civil) No.25061 of 2017 filed by the Ghaziabad Development Authority against the judgment of this Court dated March 28, 2017 passed in **Deepak Kumar and others'** case (supra), leave was granted by Hon'ble the Supreme Court and operation of the impugned order was stayed, vide order dated September 22, 2017.

35. Against the judgment of this Court dated April 18, 2017 passed in **Krishna Autar and others'** case (supra), Special Leave Petition (Civil) Diary No.26271 of 2017 filed by the Moradabad Development Authority was dismissed by Hon'ble the Supreme Court on November 14, 2017. Whereas in Special Leave Petition No.25061 of 2017 filed by the State of U.P. and others against the same judgment, notice was issued and operation of the impugned order of the Division Bench of this Court was stayed, vide order dated September 4, 2018.

36. Further, this Court in **Natthu Singh and others'** case (supra) had granted the relief to the land owners relying upon the order of Hon'ble the Supreme Court in **Aligarh Development Authority's** case (supra). Against that order, in the Special Leave Petition filed by the State of U.P. and others, notice was issued and pending contempt proceedings were stayed, vide order dated September 11, 2019.

37. Considering the aforesaid factual matrix, one thing is clear that the State has not been diligent in pursuing its case where identical issues were involved before this Court. Apparently, the facts were also not properly presented before Hon'ble the Supreme Court with reference to pendency or decision of the cases.

38. Though dismissal of the Special Leave Petition may not be a bar for entertaining the Review Application, however, the fact remains that where this Court had taken the view that crucial date for assessment of compensation is January 1, 2014, Special Leave Petitions filed by State and Ghaziabad Development Authority in the case in hand were dismissed by Hon'ble the Supreme Court, whereas three Special Leave Petitions, as referred to in the preceding paragraphs, have been entertained thereafter and are pending consideration. Where the view taken by this Court was that the land owners are not entitled for assessment of compensation as on January 1, 2014.

39. Further, for interpretation of the communication of the Government of India dated October 26, 2015, arguments are sought to be readdressed referring to the subsequent communication of Government of India dated September 26, 2018, which

came in existence after the writ petition was decided by this Court.

40. Practically, the arguments have to be reheard. In the facts and circumstances of the case, it may not be a case where the error is apparent on record as review of the order is sought on grounds, which were not existing at the time of passing of order by this Court.

41. For the reasons mentioned above, we do not find any case is made out for entertaining the present Review Applications. The Review Applications along with all accompanying applications are, accordingly, dismissed.

(2022)03ILR A663
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.03.2022

BEFORE

THE HON'BLE MANISH MATHUR, J.

Writ C No. 649 of 2022

Smt. Sharma Devi & Ors. ...Petitioners
Versus
State Of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Shiv Pal Singh

Counsel for the Respondents:
C.S.C.

A. Civil Law – Allotment of fair price shop on compassionate ground - Indian Stamp Act, 1899 - Section 47-A - The very nature of compassionate appointment is the financial need or necessity of the family. **The daughter-in-law on the death of her husband does not cease to be a part of the family.** The concept that such daughter-in-law must go back and stay with her parents is abhorrent to our civilized society. Such **daughter-in-law must, therefore, have also right to be considered for compassionate appointment as she is part of the family where she is married and if staying with her husband's family.** (Para 6)

The daughter in law upon death of her husband does not cease to be part of family. Applying the same logic in the case of daughter in law which has not been widowed, it can be seen that the later would have a better claim than a widowed daughter in law since she continues to be a part of family as much as a widowed daughter in law. As such no distinction can be carved out between a daughter in law whose husband is alive and a widowed daughter in law. (Para 7)

It is apparent that petitioner's application for compassionate appointment of the fair price shop in question has been rejected only on the ground that she does not come within the definition of 'family' as per paragraph IV(X) of the GO dated 5th August, 2019 since petitioner is the daughter in law of the earlier fair price shop agreement holder. This aspect of the matter having already been covered by the judgments of this Court, the ground for rejection of petitioner's application for compassionate appointment is clearly unsustainable. (Para 2, 8)

Writ petition allowed. (E-4)

Precedent followed:

1. Pushpa Devi Vs St. of U.P. & ors., Writ-C No. 18519 of 2021, Order dated 22.11.2021 (Para 3)

2. U.P. Power Corp. Ltd. Vs Smt. Urmila Devi, 2011(3) ADJ 432 (Para 3)

Present petition challenges orders dated 12.01.2022 whereby petitioner's application for allotment of fair price shop on compassionate ground has been rejected.

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

1. Heard learned counsel for petitioner and learned State Counsel appearing on behalf of opposite parties.

2. Petition has been filed assailing order dated 12th January, 2022 whereby petitioner's application for allotment of fair price shop on compassionate ground has been rejected on the ground that she does not come within definition of 'family' as drescribed in paragraph IV(10) of the Government Order dated 5th August, 2019 since petitioner is the daughter in law of the earlier fair price shop agreement holder.

3. Learned counsel for petitioner submits that initially petitioner's father in law namely late Shyam Lal was the fair price shop agreement holder of the fair price shop in question, who passed away on 27th November, 2021 and petitioner being his daughter in law filed the application for compassionate appointment. It is submitted that the petitioner otherwise is fully eligible to be appointed a fair price shop dealer of the shop in question. It has been further submitted that the aspect that daughter in law does not come within the preview of 'family' has already been dealt with by this Court in the judgment and order dated 22nd November, 2021 passed in Writ-C No. 18519 of 2021, Pushpa Devi versus State of U.P. and others in which the petition for compassionate appointment by daughter in law was allowed placing reliance on the Full Bench judgment of this Court in the case of U.P. Power Corporation Limited versus Smt. Urmila Devi reported in 2011(3) ADJ 432. As such it is submitted that the impugned order is clearly against the dictum of this Court.

4. Learned State Counsel refuting submissions advanced by learned counsel for petitioner submits that petitioner's application for compassionate appointment could have been decided only in terms of the government order applicable in the matter and since a daughter in law has not been defined as a part of family in paragraph IV(10) of the government order dated 5th August, 2019 petitioner's application was rightly rejected.

5. Upon consideration of submissions advanced by learned counsel for parties and perusal of material on record, it is apparent that petitioner's case is fully covered by the judgment of this Court in the case of Pushpa Devi (surpa) and the Full Bench decision in the case of U.P. Power Corporation Limited (supra).

6. While it is correct that a daughter in law is not covered within the definition of 'family' in the government order dated 5th August, 2019 but such an exclusion has already been held the ultra vires the constitution of India in the judgment rendered by Full Bench of this Court in the case of U.P. Power Corporation Limited (supra). Relevant portion of the judgment is as follows:-

"We must, however, note one feature of the definition of the word 'family' as generally contained in most Rules. The definition of 'family' includes wife or husband; sons; unmarried and widowed daughters; and if the deceased was an unmarried government servant, the brother, unmarried sister and widowed mother dependant on the deceased government servant. It is, therefore, clear that a widowed daughter in the house of her parents is entitled for consideration on compassionate appointment. However, a widowed daughter-in-law in the house where she is married, is not entitled for compassionate appointment as she is not

included in the definition of 'family'. It is not possible to understand how a widowed daughter in her father's house has a better right to claim appointment on compassionate basis than a widowed daughter-in-law in her father-in-law's house. The very nature of compassionate appointment is the financial need or necessity of the family. The daughter-in-law on the death of her husband does not cease to be a part of the family. The concept that such daughter-in-law must go back and stay with her parents is abhorrent to our civilized society. Such daughter-in-law must, therefore, have also right to be considered for compassionate appointment as she is part of the family where she is married and if staying with her husband's family. In this context, in our opinion, arbitrariness, as presently existing, can be avoided by including the daughter-in-law in the definition of 'family'. Otherwise, the definition to that extent, prima facie, would be irrational and arbitrary. The State, therefore, to consider this aspect and take appropriate steps so that a widowed daughter-in-law like a widowed daughter, is also entitled for consideration by way of compassionate appointment, if other criteria is satisfied.

Learned Chief Standing Counsel to forward a copy of this order to the Secretary of the concerned Department in the State Government for appropriate consideration."

7. Although the aforesaid Full Bench judgment pertains to right of a widowed daughter in law and in the present case the petitioner is not a widowed daughter in law but in the considered opinion of this Court, the same would not have any difference whatsoever and the rigor of the Full Bench would be applicable in the present case as well. The reason for the said opinion of this Court is self evident from the reasoning indicated in the Full Bench decision itself in which it has been stated that the daughter in law upon death of her husband does not cease to be part of family. Applying the same logic in the case of daughter in law which has not been widowed, it can be seen that the later would have a better claim than a widowed daughter in law since she continues to be a part of family as much as a widowed daughter in law. As such no distinction can be carved out between a daughter in law whose husband is alive and a widowed daughter in law.

8. Upon applicability of aforesaid judgment, it is apparent that petitioner's application for compassionate appointment of the fair price shop in question has been rejected only on the ground that she does not come come within the definition of 'family' as per paragraph IV(X) of the government order dated 5th August, 2019 this aspect of the matter having already been covered by the judgments of this Court indicated herein above, the ground for rejection of petitioner's application for compassionate appointment is clearly unsustainable.

9. In view of aforesaid, the impugned order dated 12th January, 2022 is quashed by issuance a writ in the nature of Certiorari at the admission stage itself. The opposite party No.4 i.e. Up Ziladhikari, Tehsil Bhinga, District Shrawasti is directed to reconsider the petitioner's application for appointment as fair price shop dealer on compassionate basis expeditiously, within the period of six weeks from the date a copy of this order is produced before him. The application shall be considered by reasoned and speaking order taking into account the judgments

rendered by this Court as indicated herein above.

10. With the aforesaid directions, the petition succeeds and is allowed.

(2022)03ILR A666
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.02.2022

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE JAYANT BANERJI, J.

Writ C No. 1755 of 2022

Bank Of Baroda, Branch, Gorakhpur ...Petitioner
Versus
D.M., Maharajganj & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shashi Bhushan Singh

Counsel for the Respondents:
C.S.C.

Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 'SARFAESI Act' - Section 14 - Expeditious disposal of S. 14 applications - D.M. to pass suitable orders for the purpose of taking possession of the secured assets within a period of thirty days from the date of application - if no order is passed within the said period of thirty days for reasons beyond his control, D.M. may, after recording reasons in writing, pass the order within such further period but not exceeding in aggregate sixty days - In Writ-C No.7126 of 2021 High Court issued a general direction on 24.08.2021 to all the District Magistrates to keep a record/register of all the pending applications filed u/s 14 of the Act - said register to be duly inspected by the District Magistrate from time to time and also countersigned by him - a quarterly report of all institution of applications filed u/s 14 of the Act together with the length of pendency of each application be sent to the Registrar General of the High Court in the tabular form who shall place the same before the appropriate Committee dealing with the functioning of the Debt Recovery Tribunals and Debt Recovery Appellate Tribunals – G.O. dated 13.09.2021 & 11.02.2022 issued directing strict compliance of the order dated 24.08.2021 passed in Writ-C No.7126

Disposed of. (E-5)

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

1. Heard Shri Shashi Bhushan Singh, learned counsel for the petitioner and Shri B.P. Singh Kachhawaha, learned Standing Counsel for the State-respondents.

2. When the case was listed on 10.02.2022, the following order was passed :-

"Heard Shri Shashi Bhushan Singh, learned counsel for the petitioner and the learned Standing Counsel for the respondent-State.

This writ petition has been filed by the bank praying for the following reliefs:-

"(i) Issue a writ, order or direction in the nature of mandamus commanding the Respondent no.1/District Magistrate, Maharajganj to decide the application dated 15.04.2017 bearing case no.289 of 2017 and computerised case no D 201705470289 titled as "Manager Dena

bank Gorakhpur vs. Maya Devi and others" preferred by the petitioner bank, U/Sec. 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, as the statutory time period has elapsed much back; and

(ii) Issue in favour of the petitioner any other writ, order or direction which this Hon'ble Court may deem just and proper in the circumstances of the case as also in the interest of justice."

In Writ-C No.7126 [Indian Bank (Erstwhile Allahabad Bank) vs. State Of U.P. and 4 Others], a coordinate Bench of this Court passed the following order on 24.08.2021:-

"Heard Shri Habib Ahmad, learned counsel for the petitioner and Shri B.P. Singh Kachhawah, learned Standing Counsel for the State.

This petition has been filed by the Bank seeking a direction in the nature of mandamus for timely conclusion of the proceedings under Section 14 of The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as an 'SARFAESI Act') being Case No. 3878 of 2018 (Allahabad Bank vs. Sushmita Srivastava and others).

Submission of learned counsel for the petitioner is that the proceedings under Section 13 of the Act had been concluded on 24.11.2017. Thereafter, the petitioner had filed an application dated 23.01.2018 under Section 14 of the Act before the District Magistrate, Gorakhpur to secure the physical possession of the secured asset, but the same has remained pending for more than three and a half years. He further submits that the first proviso to Section 14 of the SARFAESI Act clearly provides a time period of 30 days for concluding those proceedings. In any case, the second proviso thereto provides for an extension of that time period to 60 days, for reasons recorded in writing. That being the clear mandate of the law, all efforts should be made by the concerned to ensure strict compliance, so that the proceedings under Section 14 of the Act are concluded, within a period of 60 days from the date of filing of such application.

While the Act requires recording of reasons beyond delay of 30 days, we feel that in the event of delay beyond 60 days, the matter should be monitored by the concerned District Magistrate. The reasons for delay should be regularly examined and necessary directions issued in writing to ensure full/effective compliance of the law.

The Apex Court in C.Bright vs. The District Collector & Ors. 2020 AIR SC 5747 has held as under:-

"20. The Act was enacted to provide a machinery for empowering banks and financial institutions, so that they may have the power to take possession of secured assets and to sell them. The DRT Act was first enacted to streamline the recovery of public dues but the proceedings under the said Act have not given desirous results. Therefore, the Act in question was enacted. This Court in Mardia Chemical, Transcore and Hindon Forge Private Limited has held that the purpose of the Act pertains to the speedy recovery of dues, by banks and financial institutions. The true intention of the Legislature is a determining factor herein. Keeping the objective of the Act in mind, the time limit to take action by the District Magistrate

has been fixed to impress upon the authority to take possession of the secured assets. However, inability to take possession within time limit does not render the District Magistrate Functus Officio. The secured creditor has no control over the District Magistrate who is exercising jurisdiction under Section 14 of the Act for public good to facilitate recovery of public dues. Therefore, Section 14 of the Act is not to be interpreted literally without considering the object and purpose of the Act. If any other interpretation is placed upon the language of Section 14, it would be contrary to the purpose of the Act. The time limit is to instill a confidence in creditors that the District Magistrate will make an attempt to deliver possession as well as to impose a duty on the District Magistrate to make an earnest effort to comply with the man- date of the statute to deliver the possession within 30 days and for reasons to be recorded within 60 days. In this light, the remedy under Section 14 of the Act is not rendered redundant if the District Magistrate is unable to handover the possession. The District Magistrate will still be enjoined upon, the duty to facilitate delivery of possession at the earliest."

Since, large number of matters are coming up before this Court on regular basis, wherein, repeatedly banks are seeking directions of this Court to conclude the proceedings under Section 14 of the Act, we find that the trend thus developing runs against the statutory scheme as explained by the Supreme Court in the decision of C.Bright (Supra).

Accordingly, we dispose of the writ petition with a direction that the instant proceedings be concluded necessarily within a period 30 days' unless there is any legal impediment in the nature of any stay order obtained by the competent court.

In view of large number of petitions coming up before this Court, we issue a direction to all the District Magistrates in the State of U.P. to keep a record/register of all the pending applications filed under Section 14 of the Act that may clearly disclose to the District Magistrate (on a fortnightly basis) details of all institutions of such applications made in that district and their disposal within that time.

The said register may be duly inspected by the District Magistrate from time to time and also countersigned by him. Based on the entries recorded in such register, a quarterly report of all institution of applications filed under Section 14 of the Act together with the length of pendency of each application be sent to the Registrar General of this Court in the tabular form that may indicate the requirement of the Act is being fulfilled, in letter and spirit, who shall place the same before the appropriate Committee dealing with the functioning of the Debt Recovery Tribunals and Debt Recovery Appellate Tribunals.

The above direction has become necessary because at present, it appears that generally the proceedings for obtaining actual physical possession are being delayed much beyond the time limit set by the statute. It creates avoidable litigation and defeats the very object of the Act.

Let a copy of this order be communicated by the Registrar General to the Chief Secretary, Government of Uttar Pradesh for further intimation and

compliance by all the District Magistrates in the State of U.P and the Debt Recovery Appellate Tribunal, Prayagraj. Also, let a copy of this order be placed before the appropriate Committee dealing with the functioning of the Debt Recovery Tribunals and Debt Recovery Appellate Tribunals."

We find that despite clear orders of this Court, the District Magistrates of different districts are not yet complying with the aforesaid directions. It appears that the Chief Secretary of the Government of Uttar Pradesh has also not taken any action to ensure compliance of the orders of this Court.

In view of the aforesaid, we direct the Chief Secretary of Uttar Pradesh to file his personal affidavit within one week from today and show cause for non-compliance of the statutory provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 as well as the order of this Court in the case of Indian Bank (supra). The respondent no.1 is also directed to file counter affidavit within the same period.

Put up as a fresh case before the appropriate Bench on 18.02.2022."

3. A personal affidavit of the Chief Secretary, U.P. Lucknow dated 18.02.2022 and a counter affidavit on behalf of respondent no.1/District Magistrate, Maharajganj dated 18.02.2022 have been filed today, which are taken on record. Learned Standing Counsel has also produced before us instructions of the Additional Chief Secretary, Home, dated 14.02.2022, which is kept on record.

4. Shri Durga Shanker Mishra, Chief Secretary, Uttar Pradesh, Lucknow in his personal affidavit has stated as follows:-

"5. That, it is most respectfully submitted that in compliance of the order dated 24-08-2021 passed by this Hon'ble Court in Writ Petition No.(C) No.7126/2021 Indian Bank (Allahabad Bank) Vs. State of U.P. and others, the Secretary, Finance (Institutional) Govt. of U.P. Lucknow, vide Government Order No.-533B/V.(San.) Anu.-35-2020-21 dated 13.09.2021 has issued directions to all the District Magistrate of the Uttar Pradesh to this effect to decide all the pending matters, filed under Section 14 of the SARFAESI Act, 2002, within 30 days (if there is no legal obstruction of any kind) on priority basis by running a special campaign. For kind perusal of this Hon'ble Court, the copy of the Government Order dated 13.09.2021 issued by the Secretary, Finance (Institutional) U.P. Govt. Lucknow is being filed herewith and marked as ANNEXURE NO.1 to this affidavit.

6. That, it is further most respectfully submitted that in compliance of the order dated February 10, 2022 passed by Hon'ble Court in Writ Petition No. 1755/2022 Bank of Baroda Versus District Magistrate Maharajganj and others, again the Finance Department has Government Order No.41 B/V.(San.) Anu-35-2021 dated 11 February, 2022, wherein direction have been issued to all the District Magistrates, Uttar Pradesh and others to ensure strict compliance of earlier Government Order dated 13.09.2021 issued by the Secretary Finance (institutional) Govt. of U.P. Lucknow in compliance of the order dated 24.08.2021 passed by this Hon'ble Court in WRIT PETITION (C) No.7126/2021 Indian Bank (Allahabad Bank) Vs. State of Uttar Pradesh and others. For kind perusal of this Hon'ble Court, the copy of the Government Order dated 11.02.2022, issued by the Finance

Department is being filed herewith and marked as ANNEXURE NO.2 to this affidavit."

5. Annexure-1 to the aforequoted affidavit is reproduced below:-

"संख्या-533 बी०/ वि०(सं०) अनु०-35-2021

प्रेषक,

संजय कुमार,
सचिव,
उ०प्र० शासन।

सेवा में,

1. समस्त जिलाधिकारी,
उत्तर प्रदेश।
2. ऋण वसूली अपीलीय न्यायाधिकरण,
प्रयागराज।

वित्त (संस्थागत) अनुभाग-35
लखनऊ: दिनांक: 13 सितम्बर, 2021

विषय- सिक्योरिटाइजेशन एंड रिकंस्ट्रक्शन ऑफ फाइनेंशियल एसेट्स एंड एनफोर्समेंट ऑफ सिक्योरिटी इंटरेस्ट एक्ट (सरफेसी अधिनियम) 2002 की धारा-14 के तहत कार्यवाही किए जाने के सम्बन्ध में।

महोदय,

उपर्युक्त विषयक स्थायी अधिवक्ता मा० उच्च न्यायालय, इलाहाबाद के पत्र सं०-सिविल/डब्ल्यू 4317सी दिनांक 02.09.2021 (छायाप्रति संलग्न) का कृपया संदर्भ ग्रहण करने का कष्ट करें, जिसके माध्यम से मा० उच्च न्यायालय, इलाहाबाद द्वारा पारित निर्णय दिनांक 24.08.2021 के क्रम में समस्त जिलाधिकारियों के साथ-साथ ऋण वसूली अपीलीय न्यायाधिकरण को सरफेसी अधिनियम-2002 की धारा-14 के तहत दिशा-निर्देश जारी किए जाने के निर्देश दिये गये हैं।

2- अतः इस सम्बन्ध में मुझे यह कहने का निर्देश हुआ है कि कृपया अपने-अपने जिलों में मा० उच्च न्यायालय, इलाहाबाद के आदेश दिनांक 24.08.2021 के क्रम में सरफेसी अधिनियम-2002 की धारा-14 के तहत दायर सभी लम्बित प्रकरणों पर विशेष अभियान चलाकर प्राथमिकता के आधार पर 30 दिनों (यदि किसी प्रकार की कोई कानूनी/विधिक बाधा न हो तो) के अन्दर निस्तारित करने की कार्यवाही सुनिश्चित कराने का कष्ट करें।

संलग्नकः यथोक्त।।

भवदीय,
(संजय कुमार)
सचिव ।"

6. In the counter affidavit filed on behalf of the respondent no.1/District Magistrate, Maharajganj by Shri Vivekanand Dubey, posted as Naib Tehsildar, Nautanwa, District Maharajganj, it has been stated that on 04.05.2017, the file was transferred by the respondent no.1 to the Additional District Magistrate (Finance & Revenue), Maharajganj for 'expedite' disposal, which has been decided on 14.02.2022. It has further been stated that during pendency of the case in the court of the Additional District Magistrate (Finance & Revenue) Maharajganj, the debtor has filed Writ-C No.22486 of 2017 in which, by an order dated 22.05.2017, the debtor was directed to pay the outstanding amount of the bank in four installments, i.e. 30.06.2017, 31.10.2017, 28.02.2018, 30.06.2018. It is stated that no amount was

paid by the borrower on the said dates. It is further stated that due to COVID-19, the judicial work was suspended in the last years. A copy of the order dated 14.02.2022 passed by the Additional District Magistrate (F & R) Maharajganj as well as the copy of the judgment and order dated 22.05.2017 passed in Writ-C No.22486 of 2017 have been enclosed with this counter affidavit.

7. The enclosures to the personal affidavit of the Chief Secretary reveal that a Government Order dated 13.09.2021 was issued by the Secretary, Government of Uttar Pradesh directing all the District Magistrates of Uttar Pradesh to decide all the pending cases under Section 14 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short 'SARFAESI Act') within 30 days (in case there is no legal impediment to the same) pursuant to the judgment dated 24.08.2021 passed by this Court. Further, the second enclosure is another Government Order issued by the Special Secretary to the Government of U.P. dated 11.02.2022 to all the District Magistrates directing strict compliance of the Government Order dated 13.09.2021 issued pursuant to the judgment and order dated 24.08.2021 passed in Writ-C No.7126 of 2021.

8. The judgment of this Court dated 24.08.2021 has already been quoted above. A specific direction has been issued to all the District Magistrates of the State ***to keep a record/register of all the pending applications filed under Section 14 of the SARFAESI Act that may clearly disclose to the District Magistrate (on a fortnightly basis) details of all institutions of such applications made in that district and their disposal within time.*** Further directions in the judgment are as follows:-

"The said register may be duly inspected by the District Magistrate from time to time and also countersigned by him. Based on the entries recorded in such register, a quarterly report of all institution of applications filed under Section 14 of the Act together with the length of pendency of each application be sent to the Registrar General of this Court in the tabular form that may indicate the requirement of the Act is being fulfilled, in letter and spirit, who shall place the same before the appropriate Committee dealing with the functioning of the Debt Recovery Tribunals and Debt Recovery Appellate Tribunals."

9. There is nothing on record to demonstrate that the District Magistrates are maintaining record/registers and are monitoring the disposal of applications filed under Section 14 of the SARFAESI Act. The counter affidavit filed on behalf of the District Magistrate in the case in hand reflects that by an order dated 22.05.2017, this Court in Writ-C No.22486 of 2017 directed further proceedings against the respondent no.2 to be kept in abeyance with liberty to deposit the demanded amount with up-to-date interest with four equal installments with the last installment to be paid by 30.06.2018. It has nowhere been stated in the counter affidavit that the application under Section 14 of the SARFAESI Act could not be disposed of by the authority concerned for want of information regarding non-compliance of the aforesaid judgment and order dated 22.05.2017 passed by this Court in Writ- C No.22486 of 2017. Rather, it has been stated that due to COVID-19, the judicial work was suspended in the last years.

10. Such a conduct by the authority, charged with deciding/disposing of the applications filed under Section 14 of the SARFAESI Act, cannot but be said to be action taken pursuant to the order dated 10.02.2022 passed by this Court in the present writ petition. It is evident that the Government Order dated 13.09.2021, that has been enclosed as Annexure-1 to the personal affidavit filed by the Chief Secretary has been neglected by the respondent-authority/the authority seized of the case under Section 14 of the SARFAESI Act.

11. This Court is dealing with several writ petitions every week being filed by secured creditors seeking directions to the District Magistrate for deciding applications under Section 14 of the SARFAESI Act.

12. Under the circumstances, it is for the Chief Secretary of the State to take a serious look at the state of affairs and ensure compliance of the judgment and order dated 24.08.2021 passed by this Court as well as the Government Orders issued by the Government itself and take suitable action for violation of the same. We also direct the Chief Secretary of State of Uttar Pradesh to also ensure compliance of those directions in the judgment dated 24.08.2021 which are highlighted in bold letters above.

13. Learned counsel for the petitioner-bank has submitted that in view of the counter affidavit filed on behalf of the District Magistrate, the cause of action does not survive.

14. Therefore, subject to the directions made above for appropriate action by the Chief Secretary of the State of Uttar Pradesh, this writ petition is **disposed of.**

(2022)03ILR A672
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.12.2021

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE VIKAS BUDHWAR, J.

Writ C No. 28617 of 2021

M/s Sayeed Absar Bidi Works, Alld. & Ors. ...Petitioners

Versus

State Of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Vivek Kumar Singh, Sri Bhagwati Prasad Singh

Counsel for the Respondents:
C.S.C.

Biological Diversity Act, 2002 - Biological Diversity Rules, 2004 - Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations, 2014 - U.P. Tendu Patta (Vyapar Viniyaman Adhiniyam) Adhiniyam, 1972 - both the Acts namely Tendu Patta Act, 1972 and the Biological Diversity Act, 2002 operate in different fields - fields/areas occupied by them are not overlapping - Registration in Tendu Patta Act, 1972 would not exclude the petitioners from the purview of the Biological Diversity Act, 2002, to share the benefits obtained from biological resources used for commercial purposes, to contribute to the fund for conservation of biological diversity and ensure sustenance of its components – As per section 59 of Biological Diversity Act, 2002 provisions of the 2002 Act shall be in addition to, and not in derogation of, the provisions in any other law, for the time

being in force, relating to forests or wildlife. (Para 28)

Petitioners contented that being manufacturers of bidi & registered firms and companies under the Tendu Patta Act 1972 shall not fall within the purview of Biological Diversity Act, 2002 because of the language employed in Section 2(c) which excludes the "value added products" from the meaning of biological resources - Held - Contention of petitioner misconceived - petitioners are under obligation to contribute to the National Biodiversity Fund by providing fair and equitable benefit sharing for commercial utilization of biological resource (Tendu leaves in this case) so as to achieve the objective of the Biodiversity Act, 2002, for application/utilization of the said funds for conservation and promotion of biological resource (Tendu leaves, a plant product) (Para 29)

Disposed Of. (E-5)

(Delivered by Hon'ble Mrs. Sunita Agarwal, J.
&
Hon'ble Vikas Bhudwar, J.)

1. Heard Sri Bhagwati Prasad Singh learned Senior Advocate assisted by Sri Vivek Kumar Singh learned counsel for the petitioners and learned Standing Counsel for the State-respondents.

2. The petitioners herein are challenging the orders dated 6.7.2021 passed by the respondent no. 2 namely the Secretary, U.P. State Biodiversity Board and the consequential order dated 20.7.2021 passed by the respondent no. 3 namely the Divisional Director, Social Forestry, Forest Division, Prayagraj asking the petitioners to comply with the provisions of the Biological Diversity Act, 2002 (hereinafter referred to as "the Act, 2002"), by depositing the Access and benefit sharing amount in Form '1' of the Biological Diversity Rules, 2004 (hereinafter referred to as "the Rules, 2004") and Form 'Ka' of the Regulations, 2014 framed under the Act, 2002.

3. The petitioners herein are manufacturers of bidi and are registered partnership firms and company under the relevant Acts. For the purposes of their business, they are registered under the G.S.T. Act with the competent authority as well as the U.P. Tendu Patta (Vyapar Viniyaman Adhiniyam) Adhiniyam, 1972 [herein referred to as "the Tendu Patta Act" or U.P. Act No. 19 of 1972, as and where the reference requires] with the Forest Department of the State of the Uttar Pradesh.

The registration period of the petitioners under the U.P. Act No. 19 of 1972 is one year which has been renewed from time to time in accordance with the statutory provisions. The last renewal being for the year 2021, the petitioners are certified to carry on the business of manufacturing bidi.

4. The arguments of the learned Senior Advocate to challenge the orders impugned are two folds.

Firstly, it is contended that the petitioners are engaged in manufacturing bidi for the past several years and they are purchasing Tendu leaves from the respective State Department, inasmuch as, the collection and purchase of Tendu leaves have been monopolized by the State Government under the U.P. Act No. 19 of 1972. It is contended that under the Tendu Patta Act, 1972 the collection, sale, purchase and transportation of Tendu leaves is solely regulated by the State Government. The petitioners only purchase

Tendu leaves from the respective State Department to use it to wrap the bidi as a "value added product" and do not purchase Tendu leaves from their growers or collectors and as such would not fall within the meaning of 'Traders' under the Act, 2002. After manufacturing bidi, they sell it as a "value added product" in the open market and, therefore, would not fall within the meaning of "manufacturer" from "biological resources" for "commercial utilization" as per the Act, 2002. It is the State Government which can only be termed as 'trader' of Tendu leaves and since the business or the commercial activities of the petitioners is/are regulated by the U.P. Act No. 19 of 1972, the provisions of the Act, 2002 would not be applicable.

In the second limb of submissions, it is argued that various notices in the month of December, 2020 and January, 2021 were issued to each petitioners separately, requiring them to comply with the provisions of Sections 7 of 24 of the Act, 2002. A common reply to the said notices was given by the petitioners on 25.2.2021 addressed to the Secretary, U.P. State Biodiversity Board, Lucknow raising objection with regard to the applicability of the Act, 2002. It was specifically pleaded therein that the Act, 2002 is in no way applicable to the petitioners and they cannot be made liable for any benefit sharing under the Act, 2002 or the Rules and the Regulations framed thereunder. The bidis manufactured by the petitioners' firms/Companies being "value added" product wherein other material as well are used which are excluded from the definition of the "biological resources" as defined under Section 2(c) of the Act, 2002, the utilization of Tendu leaves will not be covered under the definition of "commercial utilization" of "biological resources" within the meaning of Section 2(f) of the Act, 2002. The impugned notices seeking compliance of Sections 7 and 24 of the Biological Diversity Act, 2002 (the Act, 2002) are, thus, illegal and liable to be set aside.

5. It is vehemently argued by the learned Senior Counsel for the petitioners that none of above contentions of the petitioners have been dealt with while passing the order dated 6.7.2021 by the respondent no. 2 namely the U.P. State Biodiversity Board. The orders impugned, thus, suffer from the vice of violation of principles of natural justice. The orders impugned being result of non-application of mind, non-speaking orders are liable to be set aside.

It is lastly contended that the petitioners cannot be relegated to file appeal under Section 52-A of the Act, 2002 before the National Green Tribunal for two reasons; (i) firstly, that no Green Tribunal has been constituted within the State of U.P. and relegating the petitioners to approach the National Green Tribunal located in Delhi would cause irreparable loss to them and (ii) secondly, that since the orders impugned are non-speaking orders, the Court has inherent jurisdiction to quash the same in order to meet the ends of justice. In such a situation, the petitioners cannot be relegated to file appeal before the National Green Tribunal and as such the writ petition may not be dismissed on the ground of alternative remedy.

6. The notice of the writ petition on behalf of the respondent nos. 1 and 3 has been received in the office of the learned Chief Standing Counsel. There is no counsel designated to appear on behalf of the respondent no. 2/Board.

7. We have heard the learned Senior Counsel for the petitioners on the question of applicability of the Act, 2002 and do not find any reason to relegate the petitioners on the said issue, inasmuch as, being a Court of extraordinary jurisdiction, in exercise of the powers under Article 226 of the Constitution of India, the question of applicability of the Act can be looked into and need not be relegated to the National Green Tribunal, moreso, for the language employed in Section 52-A of the Act 2002, which provides the remedy of appeal to a person aggrieved by any determination of benefit sharing or order of the State Biodiversity Board.

Moving to the issue of applicability of the Act, 2002 in view of the arguments of the learned Senior Counsel for the petitioners in light of the U.P. Act No. 19 of 1972, it would be apposite to go through the provisions of both the Acts in order to ascertain the area or the field occupied by them. The U.P. Act No. 19 of 1972 has been enacted, in the public interest, to create State monopoly in the purchase and distribution of Tendu leaves and for matters connected therewith.

In the Act, 1972, "grower of Tendu leaves" means:-

(i) in respect of tendu leaves grown on land which is for the time being vested in and held by the State Government or constituted as a reserved forest or protected forest under the Indian Forest Act, 1927- the State Government Act XVI of 1927).

(ii) in respect of tendu leaves grown on land which is for the time being vested in and held by a Gaon Sabha or other local authority such Gaon Sabha or other local authority;

(iii) in respect of tendu leaves grown on land which is for the time being held by a tenure-holder-such tenure holder;

(iv) in respect of tendu leaves grown on land which is for the time being held by a mortgagee in possession or tenant or lessee on behalf of the State Government or such Gaon Sabha, local authority or tenure-holder as aforesaid-such mortgagee in possession, tenant or lessee, as the case may be;

(v) in respect of tendu leaves grown on land which is for the time being in the custody of a receiver appointed by a court or by some other authority in exercise of a power conferred by law- such receiver;

(vi) in respect of tendu leaves of on land which is for the time being held by any other person- such person;"

The Act, 1972 extends to the whole of Uttar Pradesh and Section 3 states that the entire area, to which the Act applies, may be divided into such number of units as the State Government may deem fit. Section 5 of the Act, 1972 puts restrictions on sale, purchase and transport of Tendu leaves. It provides that no person shall sell or purchase Tendu leaves to or from any person other than the State Government, officer or agent, in respect of the unit in which the leaves have grown, on any land of which he is not owner or tenure-holder.

8. It further restricts transportation of Tendu leaves except in the cases provided under sub-clauses (i) to (iii) of clause (c) of sub-section (1) of Section 5. Sub-section (2) of Section 5 provides for issuance of permits by the State Government or an officer authorised by it for purchase and

transportation of Tendu leaves in or outside the State of U.P. The State Government is empowered to fix price at which Tendu leaves shall be purchased by or for it in each unit of the division during the concerned year, on the advice of the Advisory Committee constituted under Section 6 of the Act, 1972. Section 8 obliges the State Government to purchase at the price fixed under Section 7, all Tendu leaves offered for sale to or for it during the normal hours of business at a depot set up by the State Government in that behalf. Section 9 mandates registration of growers of Tendu leaves other than the State Government or a Gaon Sabha or other local authority as also manufacturer of bidi and exporter of Tendu leaves on payment of such fee and in such manner as may be prescribed. Section 10 provides that the Tendu leaves purchased by or for the State Government shall be sold or otherwise disposed of in such manner as the State Government may direct. Any contravention of the provisions of the Act, 1972 is an offence within the meaning of Chapter IX of the Indian Forest Act, 1927 and would be subjected to penalty as per Sections 13 and 14 of the Act, 1972. Section 18 of the Act, 1972 empowers the State Government to bring the rules to carry out the provisions of the Act and to prescribe for the publication of the price list of Tendu leaves.

9. The U.P. Tendu Patta (Vyapar Viniyaman) Niyamawali, 1972 defines 'manufacturer of bidis' under Rule 2(7) as including a person manufacturing bidis through mazdoors by advancing them either Tendu leaves or tobacco or both. The 'purchaser' within the meaning of Rule 2(9) means a person to whom Tendu leaves have been sold by the State Government under the Act. Rule 3-A provides that a person who has been appointed a purchaser as per the provisions of Rule 9 may be issued a permit in Form "Q' by the Divisional Forest Officer authorising him to collect Tendu leaves from the grower(s) of the particular unit of which he is a purchaser. The permit will, however, contain the names of all growers of Tendu leaves in the unit and estimated quantity of leaves to be collected besides the name of the purchaser. The said purchaser shall collect Tendu leaves from the growers directly on the payment of price thereof as offered in the bid for the unit in his tender/auction, in the manner as agreed to under Form "R'. The said purchaser shall also pay to such persons as are engaged in the collection of leaves, such collection charges as may have been notified in the Official Gazette. The purchaser, as noted above, shall be deemed to be an agent of the State Government for the purposes of Clauses (a) and (b) of sub-section (1) of Section 5 of the Act. Rule 8 which deals with the registration of manufacturers of bidis and/or exporters of Tendu leaves provides that the manufacturers of bidis shall be registered in the manner provided in the said rules after payment of an annual registration fee of Rs. 50/- and that every registered manufacturer of bidis shall maintain a register of account of Tendu leaves in Form "1' and shall submit to the Divisional Forest Officer two returns of stock in prescribed Form "J' on 31st March and 30th September; each year. The Conservator of Forest is empowered to terminate the agreement and cancel the certificate of registration of manufacturer of bidi who has been punished under Section 13 of the Act for committing any breach of the provisions of the Act and may also refuse registration for such further period as it may deem proper.

The manner of disposal of Tendu leaves has been provided in Rule 9 framed in accordance with Section 10(1) of the

Act, 1972 which is by a tender notice advertised in the newspaper and selection of successful tenderer or bidder after issuance of the certificate of sale by the State Government or its officer or the agent.

10. A comprehensive reading of the U.P. Act No. 19 of 1972 and the Rules, 1972 framed thereunder makes it clear that the scope of the said Act is confined to the sale, purchase and transport of Tendu leaves at the price fixed by the State Government and the quantity permitted by it. The registration of manufacturers of bidis under the Act, 1972 is to regulate the purchase of Tendu leaves, i.e. to achieve the object of the U.P. Act No. 19 of 1972.

11. On the other hand, the Act, 2002 has been framed with the object to provide for conservation of biological diversity, sustainable use of its components and share and equitable sharing of the benefits arising out of the use of biological resources; knowledge and for matters connected therewith or incidental thereto. The said Act has been enacted in order to give effect to the United Nations Convention on biological diversity, to which India is a signatory on 5th June, 1992. The Convention has been signed by the contracting parties with the main objective of conservation of biological diversity being conscious of the importance of biological diversity for evolution and for maintaining life sustaining systems of the biosphere. The preamble of United Nations Convention on Biological Diversity affirms that the conservation of biological diversity is a common concern of humankind and reaffirms that States have sovereign rights over their biological resources and are responsible for conserving their biological diversity and for using their biological resources in a sustainable manner. It has taken note of the concern of the contracting parties that biological diversity has been insignificantly reduced by certain human activities and noted that it is vital to anticipate, prevent and attack the causes of significant reduction or loss of biological diversity at source. It was noted in the U.N. Convention signed at Rio de Janeiro on 5th June, 1992 that where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat. The fundamental requirement for the conservation of biological diversity is the in-situ conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings.

12. In order to provide for conservation, sustainable utilization and equitable sharing of benefit arising out of utilization of genetic resources and to give effect to the said convention, the Parliament has enacted the Biodiversity Act, 2002 which has been extended to the whole of India.

The words "biological diversity", "biological resources", "commercial utilization", "fair and equitable benefit sharing", "sustainable use" and "value added products" have been defined in the Act, 2002 in the following manner:-

"2. (b) "biological diversity" means the variability among living organisms from all sources and the ecological complexes of which they are part and includes diversity within species or between species and of eco-systems;

(c) "biological resources" means plants, animals and micro-organisms or

parts thereof, their genetic material and by-products (excluding value added products) with actual or potential use or value but does not include human genetic material;

(f) "commercial utilization" means end user of biological resources for commercial utilization such as drugs, industrial enzymes, food flavours, fragrance, cosmetics, emulsifiers, oleoresins, colours, extracts and genes used for improving crops and livestock through genetic intervention, but does not include conventional breeding or traditional practices in use in any agriculture, horticulture, poultry, dairy farming, animal husbandry or bee keeping;

(g) "fair and equitable benefit sharing" means sharing of benefits as determined by the National Biodiversity Authority under section 21;

(o) "sustainable use" means the use of components of biological diversity in such manner and at such rate that does not lead to the long-term decline of the biological diversity thereby maintaining its potential to meet the needs and aspirations of present and future generations.

(p) "value added products" means products which may contain portions or extracts of plants and animals in unrecognizable and physically inseparable form."

13. Section 3 puts a restriction on certain persons, who are not citizen of India, a non-resident Indian and a body corporate or association not incorporated or registered in India for research or for commercial utilization or for bio-survey and bio-utilization of any biological resources occurring in India, without previous approval of the National Biodiversity Authority which is established under Section 8 of the Act, 2002. For others, such as Indian citizen, a body corporate, association or organization registered in India, Section 7 provides that no such person shall obtain any biological resource for commercial utilization, or bio-survey and bio-utilization for commercial utilization, except after giving prior intimation to the State Biodiversity Board concerned. The only exception to this provision is under the proviso to Section 7 which states that the said restriction shall not apply to the local people and communities of the area, including growers and cultivators of biodiversity and vaids and hakims, who have been practising indigenous medicine.

14. The National Biodiversity Authority is a body corporate established by notification in the Official Gazette by the Central Government. Functions and powers of the National Biodiversity Authority has been provided in Section 18 of the Act, 2002. Section 22 of the Act, 2002 contemplates establishment of the State Biodiversity Board by notification in the Official Gazette by the State Government for the purposes of the Act, which is a body corporate and shall discharge functions and powers as provided under Sections 23 and 24 of the Act, 2002. Under Section 23(b), one of the functions of the State Biodiversity Board is to regulate by granting of approvals or otherwise requests for commercial utilization or bio-survey and bio-utilization of any biological resources by Indians. Section 24 provides that any citizen of India or a body corporate, organization or association registered in India intending to undertake any activity referred to in Section 7 shall give prior intimation in such

form as may be prescribed by the State Government, to the State Biodiversity Board. The State Biodiversity Board, on receipt of such intimation, may in consultation with the local bodies concerned and after making enquiries, by order, prohibit or restrict any such activity which in its opinion is detrimental or contrary to the objectives of conservation and sustainable use of biodiversity or equitable sharing of benefits arising out of such activity. Section 32 of the Act, 2002 contemplates Constitution of State Biodiversity Fund wherein all sums received by the State Biodiversity Board apart from the grants and loans received by it shall also be credited. The State Biodiversity Fund as per sub-section (2) of Section 32 shall be applied for (c) conservation and promotion of biological resources apart from other purposes as provided in clauses (a), (b), (d) and (e) therein.

15. Section 41 of the Act, 2002 contemplates Constitution of Biodiversity Management Committee by the local body within its area, for the purpose of promoting conservation, sustainable use and documentation of biological diversity including preservation of habitats etc.... The National Biodiversity Authority and the State Biodiversity Boards are required to consult the Biodiversity Management Committee while taking any decision relating to the use of biological resources and knowledge associated with such resources occurring within the territorial jurisdiction of the Biodiversity Management Committee. The Biodiversity Management Committee is also empowered to levy charges by way of collection fees from any person for accessing or collecting any biological resource for commercial purposes from areas falling within its territorial jurisdiction. The Local Biodiversity Fund constituted under Section 43 as contained in Chapter XI of the Act, 2002 is to be utilized for conservation and promotion of biodiversity in the areas falling within the jurisdiction of the concerned local body and for the benefit of the community in so far such use is consistent with conservation of biodiversity.

16. Section 21 of the Act, 2002 deals with the determination of equitable benefit sharing by National Biodiversity Authority and reads as under:-

*"**21. Determination of equitable benefit sharing by National Biodiversity Authority.**--*

(1) The National Biodiversity Authority shall while granting approvals under section 19 or section 20 ensure that the terms and conditions subject to which approval is granted secures equitable sharing of benefits arising out of the use of accessed biological resources, their by-products, innovations and practices associated with their use and applications and knowledge relating thereto in accordance with mutually agreed terms and conditions between the person applying for such approval, local bodies concerned and the benefit claimers.

(2) The National Biodiversity Authority shall, subject to any regulations made in this behalf, determine the benefit sharing which shall be given effect in all or any of the following manner, namely:--

(a) grant of joint ownership of intellectual property rights to the National

Biodiversity Authority, or where benefit claimers are identified, to such benefit claimers;

(b) transfer of technology;

(c) location of production, research and development units in such areas which will facilitate better living standards to the benefit claimers;

(d) association of Indian scientists, benefit claimers and the local people with research and development in biological resources and bio-survey and bio-utilisation;

(e) setting up of venture capital fund for aiding the cause of benefit claimers;

(f) payment of monetary compensation and other non-monetary benefits to the benefit claimers as the National Biodiversity Authority may deem fit.

(3) Where any amount of money is ordered by way of benefit sharing, the National Biodiversity Authority may direct the amount to be deposited in the National Biodiversity Fund:

Provided that where biological resource or knowledge was a result of access from specific individual or group of individuals or organisations, the National Biodiversity Authority may direct that the amount shall be paid directly to such individual or group of individuals or organizations in accordance with the terms of any agreement and in such manner as it deems fit.

(4) For the purposes of this section, the National Biodiversity Authority shall, in consultation with the Central Government, by regulations, frame guidelines."

17. The Biological Diversity Rules, 2004 have been framed in exercise of the powers conferred by Section 62 of the Biological Diversity Act, 2002.

Rule 20 (1) & (2) of the Rules, 2004 provide criteria for "equitable benefit sharing" as contemplated in Section 21. As per the said provisions, the Authority namely the National Biodiversity Authority shall formulate the guidelines to describe the benefit sharing formula by notification in the Official Gazette, which shall provide for such monetary and other benefits as given in the sub-rule (2). Such benefit sharing formula as per sub-rule (3) of Rule 20 shall be determined on case-by-case basis. Rule 20(5) and (6) provides that the quantum of benefits shall be mutually agreed upon between the persons applying for approval before the authority and depending upon each case, the authority shall stipulate the time frame for assessing benefit sharing on the nature of benefits being short, medium and long term. Rule 20(7) and (10) states that the authority shall stipulate that benefits shall ensure conservation and sustainable use of biological diversity and that it shall monitor the flow of benefits determined under sub-rule (4) in a manner determined by it.

In exercise of powers conferred by Section 64 read with sub-section (1) of Section 18 and sub-section (4) of Section 21 of the Biological Diversity Act, 2002, the Regulations named as Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations, 2014 (In short as "the Regulations, 2014") have been framed.

Regulation 2 of the Regulations, 2014 provides that:-

*"**2. Procedure for access to biological resources, for commercial utilization or for bio-survey and bio-utilization for commercial utilization**. -- (1) Any person who intends to have access to biological resources including access to biological resources harvested by Joint Forest Management Committee (JFMC)/ Forest dweller/ Tribal cultivator/ Gram Sabha, shall apply to the NBA in Form-I of the Biological Diversity Rules, 2004 or to the State Biodiversity Board (SBB), in such form as may be prescribed by the SBB, as the case may be, along with Form "A' annexed to these regulations.*

(2) The NBA or the SBB, as the case may be, shall, on being satisfied with the application under sub-regulation (1), enter into a benefit sharing agreement with the applicant which shall be deemed as grant of approval for access to biological resources, for commercial utilization or for bio-survey and bio-utilization for commercial utilization referred to in that sub-regulation."

Regulations 3 and 4 deal with the formula and mode of benefit sharing for access to biological resources for commercial utilization which read as under:-

*"3**. Mode of benefit sharing for access to biological resources, for commercial utilization or for bio-survey and bio-utilization for commercial utilization.--** (1) Where the applicant/ trader/ manufacturer has not entered into any prior benefit sharing negotiation with persons such as the Joint Forest Management Committee (JFMC)/ Forest dweller/ Tribal cultivator/ Gram Sabha, and*

purchases any biological resources directly from these persons, the benefit sharing obligations on the trader shall be in the range of 1.0 to 3.0% of the purchase price of the biological resources and the benefit sharing obligations on the manufacturer shall be in the range of 3.0 to 5.0% of the purchase price of the biological resources:

Provided that where the trader sells the biological resource purchased by him to another trader or manufacturer, the benefit sharing obligation on the buyer, if he is a trader, shall range between 1.0 to 3.0% of the purchase price and between 3.0 to 5.0%, if he is a manufacturer:

Provided further that where a buyer submits proof of benefit sharing by the immediate seller in the supply chain, the benefit sharing obligation on the buyer shall be applicable only on that portion of the purchase price for which the benefit has not been shared in the supply chain.

(2) Where the applicant/ trader/ manufacturer has entered into any prior benefit sharing negotiation with persons such as the Joint Forest Management Committee (JFMC)/ Forest dweller/ Tribal cultivator/ Gram Sabha, and purchases any biological resources directly from these persons, the benefit sharing obligations on the applicant shall be not less than 3.0% of the purchase price of the biological resources in case the buyer is a trader and not less than 5.0% in case the buyer is a manufacturer.

(3) In cases of biological resources having high economic value such

as sandalwood, red sanders, etc. and their derivatives, the benefit sharing may include an upfront payment of not less than 5.0%, on the proceeds of the auction or sale amount, as decided by the NBA or SBB, as the case may be, and the successful bidder or the purchaser shall pay the amount to the designated fund, before accessing the biological resource.

***4. Option of benefit sharing on sale price of the biological resources accessed for commercial utilization under regulation 2.**--When the biological resources are accessed for commercial utilization or the bio-survey and bio-utilization leads to commercial utilization, the applicant shall have the option to pay the benefit sharing ranging from 0.1 to 0.5 % at the following graded percentages of the annual gross ex-factory sale of the product which shall be worked out based on the annual gross ex-factory sale minus government taxes as given below:-*

Annual Gross ex-factory sale of product Benefit sharing component
Up to Rupees 1,00,00,000 0.1 %
Rupees 1,00,00,001 up to 3,00,00,000 0.2 %
Above Rupees 3,00,00,000 0.5 % "

Regulation 17, however, exempts certain activities and classes of persons from requiring approval of the National Biodiversity Authority or State Biodiversity Board, named as:-

*"17. **Certain activities or persons exempted from approval of NBA or SBB. --***

The following activities or persons shall not require approval of the NBA or SBB, namely:-

(a) Indian citizens or entities accessing biological resources and/ or associated knowledge, occurring in or obtained from India, for the purposes of research or bio-survey and bio-utilization for research in India;

(b) collaborative research projects, involving the transfer or exchange of biological resources or related information, if such collaborative research projects have been approved by the concerned Ministry or Department of the State or Central Government and conform to the policy guidelines issued by the Central Government for such collaborative research projects;

(c) local people and communities of the area, including growers and cultivators of biological resources, and vaids and hakims, practising indigenous medicine, except for obtaining intellectual property rights;

(d) accessing biological resources for conventional breeding or traditional practices in use in any agriculture, horticulture, poultry, dairy farming, animal husbandry or bee keeping, in India;

(e) publication of research papers or dissemination of knowledge, in any seminar or workshop, if such publication is in conformity with the guidelines issued by the Central Government from time to time;

(f) accessing value added products, which are products containing portions or extracts of plants and animals in unrecognizable and physically inseparable form; and

(g) biological resources, normally traded as commodities notified by the Central Government under section 40 of the Act."

A notification dated 7th April, 2016 has been published in the Gazette of India by the Central Government in exercise of the powers conferred by Section 40 of the Biological Diversity Act, 2002, which contains the table having the details of said biological resources which are normally traded commodities subject to the terms enumerated in the notes given below in the said table.

18. We may note that the said table gives details of the items, the biological resources, illustrative trade or common name, plant part and the source from which the said plant part is obtained.

19. We may note, at the outset, that Tendu leaves is not enlisted in the aforesaid notification as "normally traded commodities" nor it is exempted in any of the clauses of Regulation 17 of the Regulations, 2014.

20. The meaning of the "biological resources" as contained in Section 2(c) of the Act shows that it includes plants with actual or potential use or value and excludes "value added products" and "human genetic material". The "commercial utilization" as defined in Section 2(f) means end user of biological resources for commercial utilization and excludes conventional breeding or traditional practices in use in any agriculture, horticulture, poultry, dairy farming, animal husbandry or bee keeping. The "value added products" as defined in Section 2(p) means products which may contain portions or extracts of plants in unrecognizable and physically inseparable form. The "fair and equitable benefit sharing" as defined in Section 2(g) as determined by the National Biodiversity Board as per the criteria provided in Rule 20 of the Rules, 2004 is for the purpose to ensure the conservation and sustainable use of biological diversity.

21. The Regulations, 2014 framed by the National Biodiversity Authority in exercise of the power conferred by Section 64 read with Section 21(4) of the Act, 2002 contains guidelines for access to biological resources and provides for benefit sharing formula. Regulation 2 clearly states that any person who intends to have access to biological resources for commercial utilization shall apply to the National Biodiversity Authority or the State Biodiversity Authority, in the prescribed format, as the case may be, and further states that such authority or the Board shall enter into a benefit sharing agreement with the applicant on being satisfied with the application so moved and such agreement shall be deemed as grant of approval for access to biological resources for commercial utilization. Regulations 3 and 4 provides the mode and option of benefit sharing for access to biological resources, wherein formula for the applicants/traders/manufacturers who have entered into any prior benefit sharing negotiation with the concerned person or who have not entered into any such negotiation has been prescribed.

22. The object and purpose of the Act, 2002 by regulating use of biological resources for commercial utilization is with the main objective of conservation of biological diversity and sustainable use of its components. By providing the idea of fair and equitable sharing of the benefits

arising out of biological resources, as determined by the National Biodiversity Authority under Section 21, the object is to achieve the end result, the conservation of biological resources and its sustainable utilization, i.e. use of components of biological diversity in such manner and at such rate that does not lead to the long term decline of the biological diversity, and thereby maintaining its potential to meet the needs and aspirations of present and future generations. The idea, thus, is to give back to the Mother Nature the products which have been used by the humankind for their sustenance or usage.

The "benefit claimers" as per Section 2(a) are the conservers of biological resources, creators and holders of knowledge and information relating to use of such biological resources. The "commercial utilization" as defined under the Act, 2002 means the end user of biological resources for commercial utilization and only excludes the conventional or traditional practices in use of such resources in any agriculture or related activity. Being a signatory to the United Nations Convention on Biological Diversity at Rio de Janeiro, India was committed to bring appropriate legislation in the Country in order to give effect to the provisions of the treaty. It was in this background and to achieve the purpose and objects noted above, the Parliament enacted the Biodiversity Act in the year 2002. The first and foremost objectives of the Act, 2002 is the conservation of biological diversity. The second is sustainable use of its components and third is fair and equitable sharing of the benefits arising out of utilization of biological resources.

23. Looking to the above, we may deal with the first argument of the learned Senior Counsel for the petitioners that the petitioners being registered firms and companies under the U.P. Act No. 19 of 1972 are excluded from the purview of the Act, 2002. We are afraid to accept the said submission and it is liable to be rejected, at the outset, in view of the scope of the Act, 2002 and the language employed in Section 59 which says that the provisions of the Act, 2002 shall be in addition to, and not in derogation of, the provisions of any other law, for the time being in force, relating to forests or wildlife. The Act, 2002, thus, supplant the existing provisions of the U.P. Act No. 19 of 1972, i.e. the U.P. Tendu Patta (Vyapar Viniyaman) Adhiniyam, 1972.

24. We may note as a clarification to the above opinion that the object and purpose of the U.P. Act No. 19 of 1972 is to regulate the purchase and distribution of Tendu leaves, which is admittedly a plant product and would fall within the meaning of "biological resources" under Section 2(c) of the Act, 2002. The object of the Act, 1972 is to create monopoly of the State, which is one of the growers of the Tendu leaves, in the matter of sale and purchase of Tendu leaves at a fixed price and the manufacturers of bidi (which is the end product), are required to be registered under the Act, 1972 in order to participate in the tender which is to be held in accordance with Rule 9 of the Rules, 1972 for purchase of a fixed quantity of Tendu leaves at a fixed price in a particular year.

Whereas under the Act, 2002, the State Biodiversity Board is established as a body corporate to achieve the object of implementing concept of sustainable use of biological resources "as a component of biological diversity" with the main object of conservation of biological diversity.

Section 7 cast an obligation on any person, an individual or association or organization or a body corporate registered in India to give prior intimation to the Board for obtaining any biological resource for commercial utilization.

The purpose and object with which the Act, 2002 has been enacted is clearly distinct from the U.P. Act No. 19 of 1972. By the mere fact that the State Government regulates sale and purchase of Tendu leaves, which is used as an end product in manufacturing bidis and that the manufacturers of bidi are required to be registered under the U.P. Act No. 19 of 1972, it cannot be said that by the registration of the bidi manufacturers under the Act, 1972, their obligation under the Act, 2002 to give prior intimation to the State Biodiversity Board for obtaining the biological resources (Tendu leaves) for commercial utilization is meted out. The traders and manufacturers of biological resources, both, are covered under the Regulations, 2014 framed by the National Biodiversity Authority which provides the formula of benefit sharing for access to biological resources for commercial utilization. The idea of benefit sharing is to create a fund which is called as "National Biodiversity Fund" which includes any charges and royalty received by the National Biodiversity Authority under the Act and grants and loans received by the National Biodiversity Authority from the Central Government. The State Biodiversity Fund as provided in Section 32 of the Act, 2002 is created by the grants and loans from the State Government as also the grants and loans made by the National Biodiversity Authority and sum received from such other sources as decided upon by the State Government. The above funds are to be utilized/applied for the conservation and promotion of biological resources as is provided in clause (c) of sub-section (2) of Section 32 of the Act, 2002, apart from other purposes.

25. We may note, at the cost of repetition, that the Regulations, 2014 providing for the guidelines for access to biological resources for commercial utilization, clearly states that any person who intends to have access to biological resources including access to biological resources harvested by Joint Forest Management Committee/Forest dweller/Tribal cultivator/Gram Sabha, shall have to apply to the State Biodiversity Board, in the prescribed format as annexed to the said regulations. The State Biodiversity Board on dealing with the said application, if satisfied with the information given therein may enter into a benefit sharing agreement with the applicant which shall be deemed as grant of approval for access to biological resources for commercial utilization. On such agreement being arrived, the mode of benefit sharing would be as per Regulation 3(2) of the Regulations, 2014. For such manufacturers, traders and applicants who have not entered into prior benefit sharing negotiation with the person such as Joint Forest Management Committee/Forest dweller/Tribal cultivator/Gram Sabha and purchase any biological resources directly from these persons, the benefit sharing obligations shall be in accordance with the formula provided in Regulation 3(1) of the Regulations, 2014. An option has been given in Regulation 4 for benefit sharing on sale price of the biological resources accessed for commercial utilization under the Regulation 2 at the graded percentages of the annual gross ex-factory sale of the product as per the formula provided in Regulation 4 of the Regulations, 2014.

26. There is no challenge to the provisions of Regulations, 2014 which has been framed by the National Biodiversity Authority in exercise of powers conferred under sub-section (4) of Section 21. Section 21(2) empowers the National Biodiversity Authority to determine the benefit sharing formula subject to the regulations made by it which shall be in the manner as provided in clauses (a) to (f) of sub-section (2) of Section 21. Clause (f) of sub-section (2) provides that the benefit sharing may be in the manner of payment of monetary compensation and other non-monetary benefits to the benefits claimers as the National Biodiversity Authorities may deem fit. The "benefits claimers" as defined under the Act, noted above, include the conserver of biological resources who may be the growers of the plant parts which is being used for commercial utilization.

27. Going a step further, we may note that in the matter of Tendu leaves, the "grower of Tendu leaves" may be the State Government or the local authority or Gram Sabha in respect of Tendu leaves grown on the land vested in and held by it and tenure holder in respect of Tendu leaves grown on the land held by such tenure holder. The U.P. Act No. 19 of 1972 though creates State's monopoly in the matter of sale, purchase of distribution of Tendu leaves but cast on obligation on the State to purchase all Tendu leaves offered for sale and also provides that in case, the State Government refuses to purchase any leaves terming it as unfit for the purposes of manufacturing bidis, the person aggrieved by such rejection may make a complaint to the concerned officer and in case, the rejection is found improper, the aggrieved person may be compensated for any damage or loss suffered by him because of such improper rejection, i.e. on account of the Tendu leaves becoming unsuitable for manufacturers of bidis in the interregnum (on account of improper rejection). The State Government, thus, while regulating the sale and purchase of Tendu leaves is also duty bound to ensure that all Tendu leaves grown in the area regulated by it are disposed of in a proper manner and the "growers of Tendu leaves" other than the State may not suffer for any improper act of its officers.

28. The above discussion, thus, make it clear that both the Acts namely Tendu Patta Act, 1972 and the Act, 2002 operate in different fields and the fields/areas occupied by them are not overlapping. They have been enacted with distinct objects and registration in Tendu Patta Act, 1972 would not exclude the petitioners from the purview of the Act, 2002, to share the benefits obtained from biological resources used for commercial purposes, to contribute to the fund for conservation of biological diversity and ensure sustenance of its components.

29. Lastly, the contention of the learned Senior Counsel for the petitioners that the petitioners being manufacturers of bidi shall not fall within the purview of Act, 2002 because of the language employed in Section 2(c) which excludes the "value added products" from the meaning of biological resources, is found misconceived, inasmuch as, the manufacturers of the "value added products" which contain portions or extracts of plants, which is produced by commercial utilization of the biological resource, i.e. by the end user of the biological resources (including plants) is covered in the benefit sharing formula, as formulated in Regulations 3 and 4 of

the Regulations, 2014. The exclusions as provided in the proviso to Section 7 of the Act, 2002 and Regulation 17 of the Regulations, 2014 are not attracted in the case of the petitioners as they can neither be said to be the growers and cultivators of biodiversity within the meaning of the proviso to Section 7 nor can be said to be dealing with "biological resources" which are "normally traded as commodities" notified by the Central Government under Section 40 of the Act. The petitioners are, thus, under obligation to contribute to the National Biodiversity Fund by providing fair and equitable benefit sharing for commercial utilization of biological resource (Tendu leaves in this case) so as to achieve the objective of the Biodiversity Act, 2002, for application/utilization of the said funds for conservation and promotion of biological resource (Tendu leaves, a plant product).

30. Thus, on both the above counts, the challenge to the decision of the respondent authorities asking the petitioners to comply with the provisions of the Biological Diversity Act, 2002 cannot be sustained. The competence of the U.P. State Biodiversity Board to put the petitioners to notice to comply with the provisions of the Act, 2002 cannot be questioned.

31. Now, only question that may arise is of computation of the benefits received by the petitioners from commercial utilization of the biological resources and their shares as per the formula provided in the Regulations, 2014. In this regard, we may note that the petitioners have been asked to submit information in the requisite format and the benefits to be shared by them as per their self-assessment in Form-A of Regulations, 2014. The record indicates that the petitioners have not provided information for use of biological resource which is to be furnished by them in Form-A as self-disclosure till date. The question of computation of their liabilities, therefore, does not arise.

32. We leave it open, that in the event, the petitioners comply with the direction of the respondent no. 2 namely the U.P. State Biodiversity Board by submitting the information in the prescribed format as per the Regulations, 2014, it would be open for them to raise dispute with regard to the computation of their liability towards fair and equitable sharing of benefits, which may arise and the Board shall be required to deal with the same in its final decision.

computation of their liabilities by writing to the Board at the time of submission of the prescribed form, alongwith the copy of this decision.

In case, the petitioners comply with the above directions, the respondent no. 2/U.P. State Biodiversity Board shall be under obligation to provide adequate opportunity to the petitioners on the issue of quantum and shall be required to pass a reasoned and speaking order, in accordance with law, determining the obligations of the petitioners in quantum as sharing of benefit as per Section 21 of the Act, 2002 readwith Regulations 3 and 4 of the Regulations, 2014.

With the above observations and directions, the writ petition is **disposed of.**

(2022)03ILR A688
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.02.2022

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ C No. 48353 of 2007

Lahari Singh ...Petitioner
Versus
Labour Court, Ghaziabad & Ors. ...Respondents

Counsel for the Petitioner:
Sumati Rani Gupta, Dr. Rajesh Kumar Srivastava

Counsel for the Respondents:
C.S.C., Sri Ramanuj Pandey, Sri V.C. Dixit, Sri Vivek Mishra

Civil law - Domestic enquiry - Labour Court - labour court is enjoined by law to consider the domestic enquiry & to determine the validity and findings of the domestic enquiry on their merits - it is imperative for the labour court to make an objective consideration of the domestic enquiry and return findings in that regard - labour court is also enjoined by law to reverse findings of the domestic enquiry which according to it are vitiated - if required it can call for evidence and enter independent findings on the relevant issues - however labour court cannot overlook the findings returned in such enquiry (Para 16)

Domestic enquiry proceedings taken out against the petitioner, a driver of the UPSRTC bus, on two charges - one of the charge was that the petitioner travelled a distance of only 26 kms causing financial loss to the UPSRTC – defence of the petitioner was that the conductor had taken ill during the course of journey and was not medically fit to travel any further – In the absence of conductor the bus could not continue its onward journey to the final destination - enquiry officer found that the second charge was not proved – However the disciplinary authority did not found the reply of the petitioner to be satisfactory & services of the petitioner was terminated - labour court did not call relevant witnesses while enquiring into the charge no. 2, labour court neglected to consider the findings of the enquiry report and did not reverse the findings of the enquiry officer - Held - labour court failed to consider the evidences of the petitioner, the employer witness Vedpal who had deposed regarding the illness of the conductor - labour court erred in law by neglecting to consider vital pieces of evidences - Since the petitioner was dismissed in the year 1991 & labour court award was passed on 02.12.2006 court found that no purpose will be served by remitting the matter to the authorities - Court granted 40% backwages to the petitioner & all other terminal dues to be paid without deduction.

Allowed. (E-5)

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

1. Heard Dr. Rajesh Kumar Srivastava, learned counsel for the petitioner and Sri Ramanuj Pandey, learned counsel for the respondent Corporation.

2. Domestic enquiry proceedings were taken out against the petitioner on two charges (the chargesheet is not part of the record). The substance of the charges as enumerated in the impugned award of the labour court is extracted thus:

On 08.03.1990 the petitioner was taking a UPSRTC bus from Khurja to Aligarh. The petitioner was driver of the bus while Dinesh Kumar was the conductor. En-route an investigation team boarded the bus and found that 21 passengers were without tickets. The way bill did not contain any details of 15 passengers who had boarded the bus

between Khurja and Aligarh. The petitioner and the conductor Dinesh Kumar created impediments in the investigation by inciting the passengers. The petitioner as well as the conductor declined to put their signatures to the way bill and the inspectors encountered difficulties in making entries in the way bill.

3. The second charge against the petitioner is this. On 08.03.1990 the scheduled distance of the bus journey was 306 kms. However the petitioner and the conductor travelled a distance of only 26 kms. causing financial loss to the UPSRTC.

4. The domestic enquiry officer submitted his report on 12.04.1991. The enquiry officer found credence in the defence of the petitioner that the conductor and not the petitioner was responsible for issuance of tickets to the passengers. On this footing the enquiry officer exonerated the petitioner of the charge of permitting ticket less passengers in the bus. However in regard to creating impediments in the conduct of the investigation the petitioner was found guilty by the enquiry officer. The inspecting team members testified that the petitioner had instigated the passengers and the team members had to flee for their lives. The petitioner prevented the inspection team from completing the investigation against him and the conductor. The enquiry officer believed the testimonies of the members of the inspecting team and indicted the petitioner.

5. As regards the second charge the defence of the petitioner was that the conductor had taken ill during the course of journey and was not medically fit to travel any further. The medical certificate of the conductor Dinesh Kumar was proved before the enquiry officer. The stand of the petitioner was also corroborated by Dinesh Kumar. DW-1, Lahari Singh testified before the enquiry officer that he had got the conductor admitted to a hospital, and also provided the supporting medical certificate. These facts were also stated in the duty slip, which was marked as exhibit-3 and duly proved before the enquiry officer. DW-2 Vedpal who accompanied the petitioner to the depot, deposed that he had taken the conductor to the doctor. DW-3 Ali Sher, chowkidar testified that Vedpal and the petitioner arrived together at the bus stop in the bus. The medical condition of the conductor Dinesh Kumar was duly intimated to the competent authority through one Udaiveer Singh. However, the authorities failed to send a relieving conductor. In the absence of conductor the bus could not continue its onward journey to the final destination. The enquiry report found that the credibility of the said witnesses could not be impeached by the employer during the enquiry proceedings. The enquiry officer on the aforesaid material concluded that the second charge against the petitioner that he had caused financial loss to the Corporation was not proved. The petitioner was exonerated on this score.

6. Upon submission of the enquiry report a show cause notice was issued to the petitioner. The petitioner tendered his reply to the notice which was not found satisfactory by the disciplinary authority. The services of the petitioner were terminated on 17.09.1991.

7. An industrial reference was made in regard to the validity of the termination of the petitioner by the order dated 17.09.1991. The labour court adjudicated the aforesaid reference and passed the impugned award dated 02.12.2006

upholding the termination of the petitioner. The labour court in the award recorded the fact that the petitioner was working as a temporary driver in the respondent Corporation w.e.f. 1976 till his termination in the year 1991. After noticing the charges laid out against the petitioner the labour court entered upon a consideration of the controversy on merits. The labour court found that the enquiry was conducted in consonance of principles of natural justice and no procedural impropriety therein could be established.

8. The following witnesses appeared before the labour court on behalf of the parties. The petitioner appeared as DW-1. On behalf of the employer Jaiveer Singh as appeared as EW-1, H.N. Kaushik has appeared as EW-2, Ashutosh Gaur as EW-3 and Sri Rajendra Singh Solanki as EW-4. The domestic enquiry report discussed earlier was introduced as evidence by the employer.

9. The labour court in the impugned award has affirmed the indictment on charge no. 1 though not in a detailed manner. It is noteworthy that the enquiry officer found the petitioner guilty of the part of charge no. 1 which was of instigating the passengers against the inspection team and threatening their lives and preventing them from discharging their duties. The domestic enquiry found that applicant impeded the inspection team and precluded them from completing the enquiry. The inspection team escaped with their lives after being threatened by the passengers instigated by the petitioner. The aforesaid finding was based on materials in the record and supported by reasons. There is no infirmity in the aforesaid finding. No material to establish illegality in the said finding of the domestic enquiry was referred to this Court either from the impugned award or the record of the case. The said finding by the domestic enquiry officer remains unrebutted and has to be upheld.

10. As regards the second charge laid out against the petitioner of causing loss to the Corporation, the petitioner had clearly deposed before the labour court that he could not traverse the entire route as the conductor Dinesh Kumar had fallen ill during the course of journey. No relieving conductor was sent by the employer despite communication having been sent to the depot. The health condition of conductor Dinesh Kumar was communicated to the competent authority by the petitioner through Udaiveer. The witness who had appeared on behalf of the employer testified before the labour court that the petitioner had informed him that the conductor of his bus had fallen ill.

11. The report of B. P. Singh, Senior Station Master marked as Exh. 26 contains a recital that the petitioner and the conductor were required to traverse 306 KM. from Khurja Aligarh to Delhi. The conductor and the driver only traversed 26 KM and abandoned the vehicle. There was no technical fault in the vehicle. The petitioner and the conductor were responsible for causing financial loss to the Corporation. The labour court relying only upon the report of B.P. Singh concluded that the second charge stood established by evidence. Finding for the employer it was held that both the charges laid out against the petitioner stood proved and declined to interfere in the punishment of dismissal.

12. The labour court in the impugned award failed to consider the evidences of the petitioner, the employer witness Vedpal

who had deposed regarding the illness of the conductor and failure of the authorities to send a reliever.

13. The labour court in the impugned award also neglected to consider the findings of the enquiry report. The labourt court did not call relevant witnesses while enquiring into charge no. 2. The findings of the enquiry officer as discussed earlier exonerated the petitioner from charge no. 2 were based upon fair consideration of evidences.

14. Labour court in the impugned award did not advert to the aforesaid facts and evidences. The labour court while entering the impugned award did not reverse the findings of the enquiry officer.

15. In the opinion of this Court domestic enquiry findings were reasonable and made upon due consideration of the evidences in the record. The labour court clearly erred in law by neglecting to consider such vital piece of evidences.

16. The labour court is enjoined by law to consider the domestic enquiry and cannot overlook the findings returned in such enquiry. The labour court was under an obligation of law to determine the validity and findings of the domestic enquiry on their merits. The labour court was also enjoined by law to reverse findings of the domestic enquiry which according to it are vitiated. Further it was required (to call for evidence if required) and enter independent findings on the relevant issues.

17. This Court in U.P. State Road Transport Corporation Vs State of U.P. and 2 others, (Writ-C No. 6374 of 2021) while examining the importance of a domestic enquiry held it was imperative for the labour court to make an objective consideration of the domestic enquiry and return findings in that regard:

"The labour court in the impugned award has neglected to return a finding on the third charge namely continuous absence from duty with effect from 18.01.2004 onwards. This absence was proved and found to be wilful in the domestic enquiry proceedings. Since no contrary finding has been recorded in the impugned award, the domestic enquiry report in regard to the same has to be given effect to.

Secondly, the labour court has not examined some relevant findings returned by the domestic enquiry, and has not reversed the said findings. Domestic enquiries have a critical role to play in industrial relations. Domestic enquiries cannot be given a short shift or completely ignored by the labour court as was done in this case. This failure of the labour court is sufficient to vitiate the impugned award."

18. The labour court award is arbitrary, illegal and vitiated. The award passed by the labour court dated 02.12.2006 is liable to be set aside and is set aside.

19. The findings of the domestic enquiry are upheld.

20. Admittedly from the material in the record the first charge against the petitioner stands established. The charge is of a serious nature. The petitioner was dismissed from service in the year 1991. The labour court award was passed on 02.12.2006. No purpose will be served by remitting the matter to the authorities and

sending the parties into another orbit of litigation. Interests of justice will be served by deciding the matter finally and bring the controversy to a litigative rest. The petitioner has long superannuated from service, relief of reinstatement in service cannot be granted at this stage. In view of the indictment of the petitioner on the first charge, which is a major misconduct, the petitioner cannot get away scot free. The appropriate relief in this case would be to grant 40% backwages to the petitioner. However all other terminal dues shall be paid without deduction.

21. The Managing Director, UPSRTC, is commanded to ensure that the aforesaid benefits is disbursed to the petitioner or his legal heirs within a period of four months from the date of receipt of a copy of this order downloaded from the official website of the High Court of Judicature at Allahabad.

22. The writ petition is allowed to the extent indicated above.

(2022)03ILR A692
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.03.2022

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Writ C No. 1001107 of 2007

The Assembly of God North India Balrampur & Anr. ...Petitioners
Versus
State Of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Dhruv Mathur, D.M. Shukla

Counsel for the Respondents:
C.S.C.

Civil Law - Indian Stamp Act, 1899 - Section 47-A - Deficit stamp duty - stamp duty is payable on the *'market value'* of the property & not on the *'circle rate'* - stamp duty is payable on consideration paid or "market value" of the property, whichever is greater - *Determination of Market Value of property* - Market value of the property has to be determined with reference to the use to which the land is capable reasonably of being put to, immediately or in the proximate future - possibility of the land becoming available in the immediate or near future for better use and enjoyment reflects upon the potentiality of the land - potential has to be assessed with reference to the date of the execution of the instrument - use to which land in the area had been put is a material consideration - Collector would be within jurisdiction in referring to exemplars which have a bearing on the true market value of property which is required to be assessed (Para 27, 28)

Indian Stamp Act, 1899 - Section 27 - Uttar Pradesh Stamp (Valuation of Property) Rules, 1997, Rule 3, 4,5, 6 - Facts affecting duty to be fully & truly set forth in instrument - duty is cast upon the parties to a deed to truly set forth/mention in instrument, the consideration, if any, and all other facts and circumstances affecting the chargeability of any instrument with duty - in case of instruments relating to immovable property chargeable with an ad valorem duty, the duty is payable on the true value of the property and not on the value set forth in the instrument (Para 20)

Petitioner-society purchased a land & paid stamp duty on a sale consideration of Rs.24 Lakhs - Deputy Registrar found that the land purchased had commercial use, for which stamp duty ought to have been paid on commercial rate, whereas the stamp duty was paid at agricultural rate of the land petitioners' society in his reply submitted that nature of the land in

question was agricultural land and, therefore, the stamp duty on commercial rate was not payable - After reply, Collector (Stamp) himself along with Area Lekhpal visited the land - It was found that the petitioner-society had purchased the land for housing purposes - However, this fact was not clearly mentioned in the sale deed - Collector (Stamp) found that on adjacent land, residential/commercial buildings were standing & the land was adjacent to the main Public Works Department Road – collector held that the stamp duty ought to have been paid considering the future use of the land & thus directed petitioner-society to make payment of the deficit stamp duty with penalty along with interest @1.5% per month from the date of execution of the sale deed - Held - it is admitted case of the petitioners that they had bought the land not for agricultural purposes, but for household (Grihasti) purposes and in fact within a few months, they started construction of the houses on the said land - Collector (Stamp) determined the true market value of the property after considering the relevant factors - No error in the impugned order

Dismissed. (E-5)

List of Cases cited :

Smt. Pushpa Sareen Vs St. of U.P. & ors., 2015 (2) ESC 819 (All) (FB)

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

1. The present writ petition has been filed impugning the orders dated 29.9.2006 and 9.1.2007 passed by the Collector (Stamp), Balrampur and Commissioner, Devipatan Division, Gonda under the provisions of the Indian Stamp Act, 1899 (for short 'the Act)

2. Petitioner no.1 claims to be a registered society under the provisions of the West Bengal Societies Registration Act, 1961 having its registered office at 18 Ride Street, Kolkata, West Bengal. It is a society formed by the Pentecostal believers. The object of the society is to promote education at all levels for the children of all communities of India through schools, existing institutions and adult literacy programmes.

3. The petitioner-society had purchased a land comprised in Gata Nos.497 and 498, area 0.408 hectares situated at Village Amaya Deveria, Pargana Utraula, District Balrampur vide sale deed dated 6.1.2006. Petitioner-society paid stamp duty on a sale consideration of Rs.24 Lakhs.

4. Deputy Registrar, Utraula in his report dated 28.2.2006 said that the land purchased by the petitioner-society had commercial use, for which the rate was fixed at Rs.5,400/- per Sq. M., whereas the stamp duty was paid at agricultural rate of the land i.e. Rs.3,50,000/- per acre. Total stamp duty of Rs.1,91,000/- was paid by the petitioners' society.

5. On 13.2.2006, spot inspection of the land in question was made and it was found that on north of the land, there was a house of one Izharul Hasan and on the south, house of Pankaj was being constructed and on west, after the pathway, houses of Raza Pajtan and Israt Husain were constructed. 50 Meters away from the land in question, petrol pump and National Modern Public Junior High School were situated.

6. Considering the use of the land, it was said that the stamp duty ought to have been paid on commercial rate. However, by concealing the material facts, deficit stamp duty of Rs.3,12,360/- was paid. On the basis of the aforesaid report, after impounding the sale deed, a notice was

issued for payment of the deficit stamp duty of Rs.3,12,360/- to the petitioner-society.

7. The petitioners' society in his reply submitted that the land in question was being used for agricultural purposes. There was Bore-well situated on the land. The stamp duty was paid at Rs.24 Lakhs, whereas the sale consideration was only Rs.23,45,000/-. It was said that nature of the land in question was agricultural land and, therefore, the stamp duty on commercial rate was not payable by the petitioner-society. The petitioner-society had submitted khasra for 1413 Fasli in respect of the land in question showing land being used for agricultural purposes.

8. After the above reply, Collector (Stamp) himself along with Area Lekhpal visited the land in question on 11.8.2006. It was found that the petitioner-society had purchased the land for housing purposes. However, this fact was not clearly mentioned in the sale deed. Collector (Stamp) also noted that at the time when the land was purchased, it was said that the land would be used for household (Grihasti) purposes, but at the time of inspection, construction activities of houses were being carried out.

9. Collector (Stamp) also found that on adjacent land, residential/commercial buildings were standing. The land is adjacent to the main Public Works Department Road. It was said that the stamp duty ought to have been paid considering the future use of the land and the petitioner-society got the sale deed registered by concealing the important facts.

10. In view thereof, the Collector (Stamp) passed the impugned order dated 29.9.2006 directing the petitioner-society to make payment of the deficit stamp duty of Rs.3,12,360/- with penalty of Rs.1,00,000/- along with interest @1.5% per month from the date of execution of the sale deed.

11. Aggrieved by the said order passed by the Collector (Stamp), petitioner-society filed an appeal under Section 56(1-A) of the Act before the Divisional Commissioner. The Divisional Commissioner vide impugned order dated 9.1.2007 dismissed the appeal and affirmed the order passed by the Collector (Stamp). However, the penalty was reduced from Rs.1,00,000/- to Rs.50,000/-

12. Sri Dhruv Mathur, learned counsel for the petitioner has submitted that for the purposes of payment of stamp duty, nature of the land at the time of execution of the sale deed is the relevant factor. The future use of the land cannot be considered for payment of the stamp duty. He has further submitted that the land was being used for agricultural purposes. There was a Bore-well on the land. In the relevant khasra also, the land was used for agricultural purposes and, therefore, the levy of stamp duty considering its futuristic use, is wholly untenable and the two orders passed by the stamp authorities are liable to be quashed.

13. Learned counsel for the petitioner has further submitted that all true and correct facts were disclosed in the sale deed. It was mentioned that the land would be used for household (Grihasti) purposes. The sale consideration i.e. Rs.23,45,000/- was less than the amount i.e. Rs.24 Lakhs, on which stamp duty was paid. It is, therefore, submitted that the finding recorded by the two authorities that true and correct facts were not disclosed in the

sale deed, are not correct. He has also submitted that since the petitioner is using the land for housing purposes, it would not determine the stamp duty payable inasmuch as when the petitioner-society bought the land, it was being used for agricultural purposes only, and the petitioner had paid the stamp duty accordingly on the sale consideration as per the Rules prescribed for the agricultural land.

14. On the other hand, Sri Rishi Raj, leaned counsel representing the State has supported the two orders passed by the stamp authorities. He has submitted that for the purposes of payment of stamp duty, relevant factor is the market value of the property.

15. Under Section 27 of the Act read with Rules, 3, 4, 5 and 6 of the Uttar Pradesh Stamp (Valuation of Property) Rules, 1997 (for short "Rules, 1997'), the duty is cast upon the parties to a deed to set forth/mention in instrument, the consideration, if any, and all other facts and circumstances affecting the chargeability of any instrument with duty on the amount of the duty with which it is chargeable.

16. Learned counsel representing for the State has also submitted that under Section 27(2) of the Act, instrument relating to an immovable property chargeable with ad valorem duty on the value of the property requires setting forth of various factors or may be prescribed under the Rules, 1997. The stamp duty is payable on the "market value" of the property and not on the circle rate fixed by the Collector under Rule 4 of the Rules, 1997. The Collector fixes the minimum value under Rule 4 and Article 23 of Schedule I-B of the Act. Article 23 of Schedule I-B of the Act provides that stamp duty is payable on amount or value of the consideration paid or "market value" of the property, whichever is greater.

17. Learned counsel representing for the State has also submitted that location is one of the relevant factor for assessing the marker value of the property. He has drawn attention of this Court to the report dated 28.2.2006 and 1.8.2006 of the Deputy Registrar and Collector (Stamp), which have been placed on record along with counter affidavit to submit that the land in question had commercial use when it was purchased and in fact the same was being used for commercial purpose i.e. construction of houses by the petitioner-society. The petitioner did not purchase the land for agricultural purposes, but had purchased the land for housing purposes and, therefore, the stamp duty was to be paid on the rate fixed for commercial purpose of the land.

18. Learned counsel representing the State has further submitted that petitioner did not mention clearly that the land was being purchased for housing purposes, but it was said that it was for household (Grihasti) purposes. He has, therefore, submitted that there is no substance in the submissions of learned counsel for the petitioner that all true and correct facts were disclosed in the sale deed. He has also submitted that the penalty could have been imposed four times of the deficit amount of stamp duty paid, but the Collector (Stamp) has been considerate in imposing only One Lakh penalty. He has also submitted that the case is not of futuristic use of the land and rather it is concealment of material particulars by the petitioner for the purposes of evading the stamp duty and instead of mentioning the housing purpose, he has mentioned household (Grihasti) in the sale deed.

19. I have considered the submissions advanced on behalf of the learned counsel

for the petitioners as well as by the learned counsel representing the State and perused the record of the writ petition.

20. Under Section 27 of the Act, it is provided that besides consideration, all other facts and circumstances affecting the chargeability of any instrument with duty are required to be truly set forth in the instrument. Under this Section, in case of instruments relating to immovable property chargeable with an ad valorem duty, the duty is payable on the true value of the property and not on the value set forth in the instrument. Section 27 of the Act reads as under:-

"27. Facts affecting duty to be set forth in instrument. --(1) The consideration (if any) and all other facts and circumstances affecting the chargeability of any instrument with duty, or the amount of the duty with which it its chargeable, shall be fully and truly set forth therein.

(2) In the case of instruments relating to immovable property chargeable with an ad valorem duty on the value of the property, and not on the value set forth, the instrument shall fully and truly set forth the annual land revenue in the case of revenue paying land, the annual rental or gross assets, if any, in the case of other immovable property the local rates, Municipal or other taxes, if any, to which such property may be subject and any other particulars which may be prescribed by rules made under this Act."

21. Where it is found that an instrument is undervalued, the procedure has been set forth under Section 47-A of the Act for assessing the correct stamp duty on the instrument. Section 47-A of the Act reads as under:-

"47-A. Under-valuation of the instrument.--- *"(1) (a) If the market value of any property which is the subject of any instrument, on which duty is chargeable on the market value of the property as set forth in such instrument, is less than even the minimum value determined in accordance with the rules made under this Act, the registering officer appointed under the Registration Act, 1908 shall, notwithstanding anything contained in the said Act, immediately after presentation of such instrument and before accepting it for registration and taking any action under section 52 of the said Act, require the person liable to pay stamp duty under section 29, to pay the deficit stamp duty as computed on the basis of the minimum value determined in accordance with the said rules and return the instrument for presenting again in accordance with section 23 of the Registration Act, 1908.*

(b) When the deficit stamp duty required to be paid under clause (a), is paid in respect of any instrument and the instrument is presented again for registration, the registering officer shall certify by endorsement thereon, that the deficit stamp duty has been paid in respect thereof and the name and the residence of the person paying them and register the same.

(c) Notwithstanding anything contained in any other provisions of this Act, the deficit stamp duty may be paid under clause (a) in the form of impressed stamps containing such declaration as may be prescribed.

(d) If any person does not make the payment of deficit stamp duty after receiving the order referred to in clause (a) and presents the instrument again for

registration, the registering officer shall, before registering the instrument, refer the same to the Collector, for determination of the market value of the property and the proper duty payable thereon."

(2) On receipt of a reference under sub-section (1) the Collector shall, after giving the parties a reasonable opportunity of being heard and after holding an inquiry in such manner as many be prescribed by rules made under this Act, determine the market value of the property which is the subject of such instrument and the proper duty payable thereon.

(3) The Collector may, suo motu, or on a reference from any court or from the Commissioner of Stamps or an Additional Commissioner of Stamps or a Deputy Commissioner of Stamps or an Assistant Commissioner of Stamps or any officer authorized by the State Government in that behalf, within four years from the date of registration of any instrument on which duty is chargeable on the market value of the property not already referred to him under sub-section (1) call for and examine the instrument for the purpose of satisfying himself as to the correctness of the market value of the property which is the subject for of such instrument, and the duty payable thereon and if after such examination he has reason to believe that market value of such property has not been truly set forth in such instrument he may determine the market value of such property and the duty payable thereon:

Provided that, with the prior permission of the State Government, an action under this sub-section may be taken after a period of four years but before a period of eight years from the date of registration of the instrument on which duty is chargeable on the market value of the properly.

....."

22. From the reading of Section 47-A of the Act, it is evident that what has to be seen is the market value of the property and, if it is found that value of the property mentioned in the instrument is less than even the minimum value determined in accordance with the rules made under this Act, the registering officer is empowered to impound the instrument when it is presented for registration and require the person liable to pay stamp duty with deficit stamp duty as computed on the basis of the minimum value determined in accordance with the rules and return the instrument for presenting again for registration.

23. The Collector (Stamp) is empowered to determine the correct stamp duty on receipt of reference or by suo motu. If on inquiry and examination, the Collector finds that the market value of the property has not been truly set forth and the instrument is not properly stamped, he is empowered to order for payment of proper duty and also for making the deficiency good together with a penalty on an amount not exceeding four times the amount of deficit duty besides statutory interest 1.8% per month.

24. The State Government in exercise of powers under Sections 27, 47-A and 75 of the Act has framed Rules, 1997. Rule 3 of the aforesaid Rules prescribes the facts to be set forth in an instrument relating to immovable property chargeable with an ad valorem duty.

25. Under Rule 4 of the Rules, 1997, the Collector is empowered to fix minimum

rate for value of land, construction value of non-commercial building and minimum rate of rent of commercial building. This minimum value is to be fixed biennially after taking into consideration the facts as mentioned in the Rules.

26. Rule 5 of the Rules, 1997 provides for calculation of minimum value of land, grove, garden and building for the purposes of payment of the stamp duty as may be prescribed under the said Rule.

27. A Full Bench of this Court in the case of ***Smt. Pushpa Sareen Vs. State of U.P. and others,*** 2015 (2) ESC 819 (All) (FB) has held that the power of Collector to determine the market value either on a reference under Sub-section (1) or (2) of Section 47-A or acting suo motu under sub-section (4) was to determine the correct market value of the property. The market value of the property has to be determined with reference to the use to which the land is capable reasonably of being put to immediately or in the proximate future. The Collector would be within jurisdiction in referring to exemplars which have a bearing on the true market value of property which is required to be assessed. The Full Bench considered the following questions in the said judgement:-

"(1) Whether the registering officer can refer a document even if he does not find that the market value of the property as set forth in the instrument is less than even the market value determined in accordance with the rules made under this Act;

(2) Whether the Collector Stamps has power to fix the valuation of a plot on the assumption that the same is likely to be used for commercial purposes, and whether the presumed future prospective use of the land can be a criterion for valuation by the Collector;

(3) What should be the norms for fixing the valuation of a free-hold land viz-a-vis lease land;

(4) Whether the Collector can demand stamp duty under Section 47-A of the Stamp Act without a finding of fact that the market value as stated in the document is less than that which was actually agreed upon between the parties;

(5) Whether the orders passed by the Chief Controlling Revenue Authority can be reviewed if it is shown that the known norms of valuation have not been followed in the case."

28. The Full Bench while answering Question No.2 has held that power and jurisdiction of the Collector under Section 47-A of the Act is to determine the actual market value of the property. The Collector in making that determination is not bound either by the value as described in the instrument or for that matter, the value as discernible on the basis of the Rules. It has been further held that the market value of the property has to be determined with reference to the use to which the land is capable reasonably of being put to immediately or in the proximate future. The possibility of the land becoming available in the immediate or near future for better use and enjoyment reflects upon the potentiality of the land. Paragraphs 26, 27 and 28 of the said judgement which are relevant, are extracted herein below:-

"26.The true test for determination by the Collector is the market value of the property on the date of the instrument because, under the

provisions of the Act, every instrument is required to be stamped before or at the time of execution. In making that determination, the Collector has to be mindful of the fact that the market value of the property may vary from location to location and is dependent upon a large number of circumstances having a bearing on the comparative advantages or disadvantages of the land as well as the use to which the land can be put on the date of the execution of the instrument.

27. Undoubtedly, the Collector is not permitted to launch upon a speculative inquiry about the prospective use to which a land may be put to use at an uncertain future date. The market value of the property has to be determined with reference to the use to which the land is capable reasonably of being put to immediately or in the proximate future. The possibility of the land becoming available in the immediate or near future for better use and enjoyment reflects upon the potentiality of the land. This potential has to be assessed with reference to the date of the execution of the instrument. In other words, the power of the Collector cannot be unduly circumscribed by ruling out the potential to which the land can be advantageously deployed at the time of the execution of the instrument or a period reasonably proximate thereto. Again the use to which land in the area had been put is a material consideration. If the land surrounding the property in question has been put to commercial use, it would be improper to hold that this is a circumstance which should not weigh with the Collector as a factor which influences the market value of the land.

28. The fact that the land was put to a particular use, say for instance a commercial purpose at a later point in time, may not be a relevant criterion for deciding the value for the purpose of stamp duty, as held by the Supreme Court in State of U.P. and others Vs. Ambrish Tandon and another, (2012) 5 SCC 566. This is because the nature of the user is relateable to the date of purchase which is relevant for the purpose of computing the stamp duty. Where, however, the potential of the land can be assessed on the date of the execution of the instrument itself, that is clearly a circumstance which is relevant and germane to the determination of the true market value. At the same time, the exercise before the Collector has to be based on adequate material and cannot be a matter of hypothesis or surmise. The Collector must have material on the record to the effect that there has been a change of use or other contemporaneous sale deeds in respect of the adjacent areas that would have a bearing on the market value of the property which is under consideration. The Collector, therefore, would be within jurisdiction in referring to exemplars or comparable sale instances which have a bearing on the true market value of the property which is required to be assessed. If the sale instances are comparable, they would also reflect the potentiality of the land which would be taken into consideration in a price agreed upon between a vendor and a purchaser."

29. In the present case, it is admitted case of the petitioners that they had bought the land in question not for agricultural purposes, but for household (Grihasti) purposes and in fact within a few months, they had started construction of the houses on the said land, which is evident from the report of the Collector dated 11.8.2006. The Collector (Stamp) has determined the true market value of the property after

considering the relevant factors as mentioned above in the said judgement of Smt. Pushpa Sareen (supra).

30. Considering the aforesaid facts, I do not find that either the Collector (Stamp) or the Commissioner erred in determining the true market value of the property and accordingly the stamp duty payable on the instrument.

31. In view thereof, the present writ petition has no force and is hereby ***dismissed.*** Interim order, if any, stands vacated.

(2022)03ILR A700
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.03.2022

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Writ C No. 1002033 of 1995

Arshadullah & Ors. ...Petitioners
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioners:
Akhilesh Kalra, Shyam Mohan Pradhan

Counsel for the Respondents:
C.S.C., Arvind Kr. Mishra, Dhirendra Chaturvedi, Jitendra Prakash, Km. Pratima Devi, Savitra V. Singh

Administration of Evacuee Property Act, 1950 - Section 27 - Evacuee Interest (Separation) Act, 1951 - Powers of revision of Custodian General - Section 27 empowers the Custodian General to exercise the revisional jurisdiction at any time either on his own motion or on application made to him in this behalf against any order passed by the Custodian - Limitation - There is no limitation provided under the said section - He may exercise on his own motion or on an application made to him in this behalf - Rider - Custodian General should not pass an order prejudicial to any other person without giving him reasonable opportunity of being heard (Para 29)

Property in question was a "composite property" - one-third undivided share of one Mohammad Salamat Ullah Khan who migrated to Pakistan was declared evacuee property while remaining 2/3rd share belonged to the other two brothers who were non-evacuees - Competent Officer passed an order on August 31, 1955, u/s 11 of the Evacuee Interest (Separation) Act, 1951, vesting the property in the Custodian - Possession of Mohammad Salamat Ullah Khan's one-third share in the property was delivered to refugee Major Chandra Bhan Singh & he was given quasi-permanent allotment on 06.06.1958 - Assistant Custodian made a proposal dated 16.08.1983 to the Custodian for transfer of evacuee interest in favour of the petitioners - Custodian vide his order dated 11.10.1983 directed the transfer of evacuee interest in favour of the petitioners - Assistant Custodian on 28.08.1984 made a reference to the Assistant Custodian General praying for revision of his order on the ground that entire facts were not placed before him, therefore, proposal for sale of the land in favour of the petitioners was without jurisdiction and against the judgment of the Supreme Court in the case of Major Chandra Bhan Singh v. Latafat Ullah Khan - Assistant Custodian General vide order dated 18.1.1995 cancelled the orders dated 16.08.1983 and 03.11.1983, whereby the land was sold in favour of the petitioners on the basis of concealment of facts - *Held* - By concealment of facts petitioners in defiance of the judgment of the Supreme Court got the sale certificate issued in their favour in respect of 1/3rd evacuee interest - Once the proceedings got concluded by judgment of the Supreme Court any subsequent proceedings on the said issue was barred by principle of res judicata - petitioners' conduct had been such which completely disentitles them for a writ of certiorari (Para 69)

Dismissed. (E-5)

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

1. This writ petition was filed in the year 1995 praying for a writ of certiorari calling for records to quash judgment and orders dated 18.01.1995 and 24.02.1995 (Annexure Nos.14 and 17) passed by Additional Judge Small Cause Court-I in SMR No.21 of 1984.

2. This Court admitted the said writ petition on 27.10.1995 and stayed the operation of the orders dated 18.01.1995 and 24.02.1995. The respondents were directed not to disturb the possession of the petitioners from the land in question until further orders.

3. The order sheet of the case would show a very disturbing trend. After obtaining the interim order, the case has been dragged by the petitioners for 27 long years before this Court. Every time when the case got listed before the Court, either counsel for the petitioners was not present or adjournment was sought on one pretext or the other. Looking at the adjournments sought by the petitioners, this Court on 02.12.2015, when no-one remained present on behalf of the petitioners even in the revised call, directed the case to be listed in the next cause list peremptorily. On many dates when the case was listed peremptorily, adjournments had been sought by the counsel for the petitioners with numerous excuses. Some of the such adjournments sought by the counsels for the petitioners as mentioned in the order sheet are being given hereunder.

4. On 05.10.2016, counsel for the petitioners sought adjournment on the ground of his ill health.

5. On 13.10.2017, none was present for the petitioners to prosecute the case and, therefore, this writ petition was dismissed for non prosecution.

6. A recall application was filed to recall the order dated 13.10.2017 whereby the writ petition was dismissed for non prosecution, and this Court issued notice on the said application vide order dated 08.11.2017. Though the writ petition was not restored on 15.05.2018, counsel for the petitioners submitted that petitioner No.3 had expired and a substitution application would be required to be filed. This Court, looking at the numerous adjournments sought by the counsel for the petitioners, granted 3 days time to file substitution application and directed the case to be listed on 21.05.2018 as unlisted.

7. On 22.05.2018, learned counsel for the petitioners again sought adjournment and this Court directed the case to be listed on 24.05.2018.

8. On 24.05.2018 again a request was made for adjournment of the case, the Court directed the case to be listed on the next day i.e. 25.05.2018.

9. On 25.05.2018 again a request was made for adjournment of the case, and the case was directed to be listed on 02.07.2018.

10. On 02.07.2018 again no-one appeared on behalf of the petitioners to press this writ petition, and this Court was of the view that the writ petition had become infructuous by efflux of time, and dismissed the writ petition as infructuous. The case was consigned to record. However, it was observed that if the petitioners would think that the matter

survived, they would be at liberty to move an application for recall of the order within a month.

11. An application (C.M.Application No.76960 of 2018) was filed for recalling the order dated 02.07.2018, and on 24.07.2018, this Court directed that the application to be listed with previous papers.

12. On 06.09.2018, learned counsel for the petitioners sought adjournment on the said application on the ground of his ill health, and this Court directed the case to be listed in the next cause list peremptorily.

13. Application No.76960 of 2018 for recall of the order dated 02.07.2018 was listed before the Court on 22.10.2018. No-one was present to press the application on behalf of the petitioners and, therefore, recall application was dismissed for non prosecution.

14. Another application being C.M.Application No.139716 of 2018 for recall of the order dated 22.10.2018 was filed on behalf of the petitioners. This Court vide order dated 13.12.2018 gave liberty to the respondents to file objections to the said application within 15 days.

15. This Court on 16.01.2019 allowed the application No.76960 of 2018 and recalled the order dated 22.10.2018 and the application for recall of the order dated 02.07.2018 was restored to its original number and, thereafter recalled the order dated 02.07.2018 as well and restored the petition to its original number vide order dated 16.01.2019. This Court also allowed the application for substitution.

16. After showing so much leniency by the Court, again when the case was listed on 29.01.2019, one of the counsels for the petitioners sought adjournment on the ground that he was on sanctioned leave. The Court again showed leniency and condoned the delay in filing the substitution application to bring on record the legal heirs of petitioner No.6 and allowed the applications and condoned the delay vide order dated 27.08.2019.

17. The application for bringing on record legal heirs of petitioner No.4 was also allowed by the order of same day.

18. On 14.10.2019, the Court directed for listing of this writ petition in first week of November, 2019.

19. Again on 07.11.2019, learned counsel for the petitioners sought adjournment on account of personal difficulty, and the Court directed the case to be listed within next three weeks.

20. On 04.11.2020, when the case was listed, learned counsel for the petitioners sought adjournment on the ground of his ill health, and the case was directed to be listed again on 15.12.2020.

21. On 15.12.2020, this Court directed the case to be listed within 3 weeks and when the case was listed on 20.01.2021, the counsel for the petitioners again sought adjournment, and this Court directed the case to be listed after 4 weeks.

22. On 07.07.2021, counsel for the petitioners again sought adjournment of the case, and the case was directed to be listed within a period of 3 weeks.

23. On 31.08.2021, learned counsel for the petitioners again sought adjournment, and this Court directed the case to be listed within 3 weeks peremptorily.

24. On 09.09.2021, learned counsel for the petitioners sought adjournment of the case, and the case was directed to be listed within 4 weeks peremptorily. This Court made it clear that the case would not be adjourned on the next date.

25. On 23.09.2021, the Court directed the case to be listed in the next cause list peremptorily. On 30.09.2021, learned counsel for the petitioners sought adjournment, and this Court directed the case to be listed in the next cause list peremptorily.

26. On 07.10.2021, the case was again directed to be listed peremptorily in the next cause list.

27. On 09.11.2021, this Court passed following order:-

"The matter is of the year 1995 which is listed in the cause list, peremptorily, however, none has responded on behalf of the petitioners.

List this matter again on 18.11.2021, peremptorily.

In case if none appears to press the aforesaid petition on the next date, appropriate orders will be passed."

28. The case was again listed on 18.11.2021 and this Court passed following order:-

"1. On 31.08.2021 when the case was listed, Mr. Akhilesh Kala, learned counsel for petitioner has sent an illness slip. The case was directed to be listed peremptorily after three weeks. The same was directed to be listed on 09.09.2021 and on an adjournment slip of learned counsel for the respondent as well as request made on behalf of learned counsel for petitioner, the case was again directed to be listed peremptorily within four weeks. Again on 23.09.2021, the case was directed to be listed peremptorily in the next cause list. On 30.09.2021 again, on request of Sri Akhilesh Kalra, learned counsel for the petitioner, the case was directed to be listed peremptorily in the next cause list. A similar order was passed on 07.10.2021. On 09.11.2021 the Court again directed the matter to be listed peremptorily on 18.11.2021 and provided that in case none appears on the next date to press the petition, appropriate orders shall be passed.

2. Today on 18.11.2021 an out of station slip is sent by the office of Sri Akhilesh Kalra, learned counsel for petitioner.

3. In view of the aforesaid, put up case peremptorily on 24.11.2021 in additional cause list."

29. Again when the case was listed on 24.11.2021, counsel for the petitioners sought adjournment and the case was directed to be listed in the 2nd week of January, 2022, and on 25.01.2022, when the case was listed this Court issued card notices to respondent Nos.5 to 8 and directed the case to be listed on 28.02.2022.

30. On 02.03.2022, when the case was listed, learned counsel for the petitioners sought adjournment. The Court looking at the history of uncalled for adjournments sought by the counsel for the petitioners to drag the litigation for 27 long years,

directed the case to be listed on the next day i.e. 03.03.2022.

31. When the case was listed on 03.03.2022, counsel for the petitioners again sought adjournment. This Court passed following order:-

"On the request of learned counsel for the petitioners, list this petition on 8.3.2022 peremptorily.

It is made clear that the matter shall be taken up in the first round even if the counsel for the petitioners is not able to appear and the Court will proceed to decide the matter on its own."

32. On 08.03.2022 again the counsel for the petitioners sought adjournment and the case was directed to be listed on the next day i.e. 09.03.2022, and in this manner the Court could force the counsel for the petitioners to make his submissions on the writ petition.

33. Leniency shown by the Court has been thoroughly misused by the learned counsel(s) for the petitioners. This case was dismissed thrice for want of prosecution. No stone had been left unturned to see that hearing of the case should not take place before this Court for reasons which would be best known to the counsel(s) representing the petitioners.

34. This Court is at pain to note the conduct of the case of the counsels representing the petitioners. Adjournments are sought as a matter of course. The precious time of the court gets criminally wasted. Litigants suffer as there cases also get dragged on and not decided. This is the main reason for huge pendency/arrears of cases in this Court. The Bar and Bench are two wheels of the chariot of justice. If the Bar does not cooperate, it would be highly difficult and rather impossible to move the chariot of justice. Timely and effective justice to the litigants who come before this Court with a ray of hope would be impossibility. This Court hopes that Bar will rise to the occasion and counsels representing the parties in case should come to the Court fully prepared to argue the cases whenever, listed for arguments and should not seek adjournments unless so required under the compelling circumstances.

35. Be that as it may, the Court would like to proceed and decide the case on merit.

36. It is stated that Mohammad Salamat Ullah Khan, Mohammad Sharafat Ullah Khan and Mohammad Latafat Ullah Khan, three brothers were ex-proprietary tenants of Plot Nos.92, 98, 114, 1438, 1464, 1472, 1261, 1599, 1502, 1510, 1516, 1562, 1777/1, 1799, 1800, 1873, 1884, 1885, 1899, 1900, 1903, 1904, 1907 and 1908 and grove at Plot No.1791 in equal shares. Mohammad Salamat Ullah Khan died, and his four sons Karamat Ullah Khan, Dilawar Ullah Khan, Muzaffar Ullah Khan and Tahir Khan migrated to Pakistan in 1948. The remaining two brothers of Mohammad Salamat Ullah Khan, namely, Mohammad Sharafat Ullah Khan and Mohammad Latafat Ullah Khan, stayed in India, and had a two-third share in that property. Entire property was a composite property.

37. Major Chandra Bhan Singh was a refugee from Pakistan, and a temporary allotment of the one-third evacuee share in the property was made in his favour on April 4, 1955. As the property was listed as 'composite property', notices were issued in

April 1955, under Section 6 of the Evacuee Interest (Separation) Act, 1951. Notices were served upon Latafat Ullah Khan and Sharafat Ullah Khan. No claim was, however, filed by anyone, and the Competent Officer passed an order on August 31, 1955, under Section 11 of the Evacuee Interest (Separation) Act, 1951, vesting the property in the Custodian.

38. It so happened that the property was again reported to be 'composite property'. The earlier order dated August 31, 1955, was lost sight of, and fresh notices were issued to the co-sharers under Section 6 of the Evacuee Interest (Separation) Act, 1951. They were served personally on Mohammad Latafat Ullah Khan, and on Mohammad Sharafat Ullah Khan through his son Shaukat Ullah Khan, on February 25, 1956. But again no claim was filed under Section 7 of the Evacuee Interest (Separation) Act, 1951 by anyone, claiming any interest in the 'composite property'. An order was, therefore, again made on March 23, 1957, under Section 11 of the Evacuee Interest (Separation) Act, 1951, vesting the property in the Custodian.

39. The Assistant Custodian (L) sent a senior Inspector to take possession of the property which got vested in the Custodian as a result of the order passed by the competent officer. Shaukat Ullah Khan, the eldest son of Mohammad Sharafat Ullah Khan, took notice of that development and undertook to file his claim within 15 days. No claim was, however, filed even then. Possession of Mohammad Salamat Ullah Khan's one-third share in the property was delivered to Major Chandra Bhan Singh on March 7, 1958, under orders of the Assistant Custodian. Thereafter, an order was made on June 6, 1958 giving him quasi-permanent allotment along with his brother Raghubir Singh, father of petitioner Nos.6, 7 and 8.

40. In the meantime, an application was made by Mohammad Latafat Ullah Khan and the four sons of Mohammad Sharafat Ullah Khan on March 12, 1958, for restoration. It was stated in the accompanying affidavit of Arshad Ullah Khan, son of Mohammad Latafat Ullah Khan, that Mohammad Sharafat Ullah Khan had died in 1950, and no notice for separation of the evacuee interest in the property was ever served upon them.

41. It was further stated that they learnt of the vesting order only on March 6, 1958, when the Manager of the evacuee property went to the village to take possession. An order was quickly made on March 15, 1958, setting aside the vesting order and recalling the order made as far back as August 31, 1955. On May 12, 1958, Arshad Ullah Khan on oath stated that the only grove in the property was in plot 1791. The Competent Officer relied on that statement, and gathered the impression that the Assistant Custodian (L) had no objection to the transfer of the evacuee interest in the property to Mohammad Latafat Ullah Khan and the four sons of Mohammad Sharafat Ullah Khan for Rs. 5,000/-. An order was made to that effect on the same day. One of the items of the property (grove) was, however, left out of evaluation even at that time for subsequent decision.

42. The Assistant Custodian of Evacuee Property, however, made an application to the Competent Officer soon thereafter, on June 11, 1958, for a review of his order dated May 12, 1958, on the ground, inter alia, that certain grove plots were treated as agricultural plots. That was

followed by another application for review dated July 10, 1958, on the ground that the Competent Officer made his order dated May 12, 1958 under the incorrect impression that the Assistant Custodian (L) had no objection to the transfer of the evacuee share in the land to Mohammad Latafat Ullah Khan and the four sons of Mohammad Sharafat Ullah Khan for Rs.5,000/-. It was also pointed out that the evacuee interest in the property had already been allotted to Major Chandra Bhan Singh, who was a displaced person from Pakistan. It was, therefore, prayed that the order dated May 12, 1958, may be reviewed and the property be partitioned so as to separate the evacuee's one-third interest. The Competent Officer partly disposed of the review application dated July 10, 1958 on the same day. He corrected the mistaken impression that the Assistant Custodian had no objection to the transfer of the evacuee share in the property for Rs.5,000/- and modified the earlier order dated May 12, 1958, by deleting that statement from it.

43. Mohammad Shaukat Ullah Khan had made objections against the maintainability of the review applications. The Competent Officer took the view that as the Appellate Officer had held in Appeal No. 953 of 1957, that the Competent Officer could review his own order, there was no force in the objection to the contrary. He examined the petition in terms of the requirements of Order 47 Rule 1 of the Code of Civil Procedure, and held that a new and important matter regarding the allotment of the land to the refugees (Major Chandra Bhan Singh and his brother Raghubir Singh) had been discovered which justified reconsideration of the earlier decision dated May 12, 1958. He, therefore, reviewed that order, and set it aside by his order dated September 8, 1958. He gave his reasons for taking the view that the proper course was to partition the property, and allotted the plots mentioned in that order to the Custodian in lieu of the evacuee share of Karamat Ullah Khan, Dilawar Ullah Khan, Muzaffar Ullah Khan and Tahir Khan sons of Mohammad Salamat Ullah Khan and other plots were left to the share of the non-evacuee co-sharers, namely, Mohammad Latafat Ullah Khan, Shaukat Ullah Khan, Aman Ullah Khan, Habib Ullah Khan and Nasar Ullah Khan as their two-third share by way of non-evacuee interest. Plot 1791/1 was left out for separate decision after receipt of the report regarding its valuation. Mohammad Latafat Ullah Khan and the four sons of Mohammad Sharafat Ullah Khan felt aggrieved against that order of the Competent Officer, and moved this Court by a petition under Article 226 of the Constitution.

44. This Court in its judgment dated February 26, 1964 took a view that in the absence of any provision in the Evacuee Interest (Separation) Act, 1951 for review, it was not permissible for the Competent Officer to review his order dated May 12, 1958. It, therefore, allowed the writ petition, quashed the order of review dated September 8, 1958, and directed the opposite parties not to give effect to it and not to disturb the possession of the writ petitioners on the plots in dispute.

45. Major Chandra Bhan Singh challenged the said judgment of this Court before the Supreme Court by filing S.L.P. which was converted as **Civil Appeal No.2329 of 1969.** The said Civil Appeal was decided by the Supreme Court on 19th September, 1978 in **Major Chandra Bhan Singh vs Latafat Ullah Khan & Ors : (1979) 1 SCC 321.**

46. The Supreme Court noted the undisputed fact that the property in question was a "composite property" within

the meaning of Section 2(d) of the Evacuee Interest (Separation) Act, 1951 because the one-third undivided share of Mohammad Salamat Ullah Khan's sons Karamat Ullah Khan, Dilawar Ullah Khan, Muzaffar Ullah Khan and Tahir Khan, who had migrated to Pakistan in 1948, had been declared to be evacuee property and had vested in the Custodian under the Administration of Evacuee Property Act, 1950, while the remaining share belonged to the other two brothers of Mohammad Salamat Ullah Khan who were non-evacuees. The evacuee interest in the property was, therefore, confined to that one-third share in the entire property being the right, title and interest of the evacuees therein within the meaning of clause (e) of Section 2. It was further permissible for the non-evacuee shareholders having the remaining two-third share in the property to make a claim in respect of it within the meaning of clause (b) of Section 2 of the Evacuee Interest (Separation) Act, 1951 in their capacity as co-sharers of the evacuees in the property.

47. The Supreme Court noted scheme of the Evacuee Interest (Separation) Act, 1951 and said that Section 5 of the said Act gave jurisdiction to the Competent Officer to decide any claim relating to a composite property, and Section 6 requires that for the purpose of determining or separating the evacuee interest in a composite property, the Competent Officer may issue a general, and also an individual notice on every person who in his opinion may have a claim in that property to submit claim(s) in the prescribed form and manner. Since, the property was listed as "composite property", notices were issued under Section 6 of the Evacuee Interest (Separation) Act, 1951 and the individual notices were served on Latafat Ullah Khan and Sharafat Ullah Khan and their acknowledgments were placed on the record. No claim was, however, filed under Section 7 of the Evacuee Interest (Separation) Act, 1951 claiming any interest in the composite property. Section 8 of the Act provides that on receipt of a claim under Section 7, the Competent Officer shall hold an inquiry into the claim and give his decision thereon, while Sections 9 and 10 deal with reliefs in respect of mortgaged property of evacuees and separation of the interest of evacuees from those of the claimants in a 'composite property'. Section 11 provides for the vesting of evacuee interest in the Custodian where a notice under Section 6 was issued in respect of any property but no claim was filed. As no statement of claim was received by the Competent Officer, the evacuee interest in the "composite property" vested in the Custodian and the Competent Officer accordingly took a decision to that effect on August 31, 1955. The Supreme Court held that the order passed by the Competent Officer was a lawful order under Section 8 read with Section 11 of the Evacuee Interest (Separation) Act, 1951.

48. It was further said that Section 14 provides that any person aggrieved by an order of the Competent Officer made under Section 8 could prefer an appeal to the Appellate Officer within 60 days of that order, and it would then be for the Appellate Officer to confirm, vary or reverse the order appealed from and to pass such orders as he deems fit. Section 15 of the Evacuee Interest (Separation) Act, 1951 further provides that the Appellate Officer may at any time call for the record of any proceeding in which the Competent Officer has passed an order for the purpose of satisfying himself as to the legality or propriety thereof and to pass such order in

relation thereto as he thinks fit. This appellate and revisional jurisdiction was, therefore, available to the writ petitioners if they felt dissatisfied with the order of the Competent Officer dated August 31, 1955, but they did not avail of it. Section 18 of the Act provides that every order passed by the Appellate Officer or competent officer shall be final and shall not be called in question in any court by way of an appeal or revision or in any original suit, application or execution proceedings.

49. When the aggrieved persons did not invoke the appellate or revisional jurisdiction of the Appellate Officer, the order of the Competent Officer dated August 31, 1955, became final by virtue of Section 18 and could not be called in question thereafter.

50. The Supreme Court further noticed that after the order dated 31st August, 1955, the property in question was again reported to be a 'composite property' and four fresh notices were issued to the petitioners on 25.02.1996 but no claim was filed by anyone in spite of that second opportunity and a vesting order was once again made under Section 11 of the Evacuee Interest (Separation) Act, 1951 on March 23, 1957. No appeal or revision application was filed against the order also, under Sections 14 and 15 of the Evacuee Interest (Separation) Act, 1951. After a lapse of some 2½ years from the order dated August 31, 1955 and one year from March 23, 1957, Mohammad Latafat Ullah Khan and the four sons of Mohammad Sharafat Ullah Khan made an application for restoration of their claims on March 12, 1958. By then the order dated August 31, 1955 had become final and binding under Section 18. The Supreme Court held that it was not permissible for anyone to reopen it merely on the basis of a restoration application and to review the earlier order dated August 31, 1955 in disregard of the statutory bar of section 18. The Supreme Court held that the orders of the Competent Officer dated March 15, 1958 and May 12, 1958, were not of much consequence, and they also suffered from the same vice of lack of jurisdiction, and were equally void. The Supreme Court commented upon the conduct of the writ petitioners which would disentitle to them for a writ of certiorari. The Supreme Court allowed the appeal filed by Major Chandra Bhan Singh and set aside the order dated 26th February, 1964 passed by this Court and dismissed the writ petition of the petitioners.

51. The petitioners did not thereafter sit idly. They thereafter filed a review petition before the Supreme Court stating that as a consequence of revival of the order dated 31.08.1995 by virtue of which petitioners' whole property was ordered to have been vested in the Custodian was not in consonance with the earlier decision of the Supreme Court reported in AIR 1961 SC 1319. The Supreme Court, however, dismissed the review petition inasmuch as the petitioners had not raised such a ground in the writ petition.

52. After Supreme Court allowed the appeal of Major Chandra Bhan Singh in the case of Major Chandra Bhan Singh v. Latafat Ullah Khan (supra), the petitioners again filed an application under the executive instructions dated 25.03.1963 wherein a non evacuee co-sharers could purchase the evacuee interest in the 'composite property', if they so desired.

53. The Assistant Custodian, it appears did not have knowledge of the order passed by the Supreme Court. He

made a proposal dated 16.08.1983 to the Custodian for transfer of said evacuee interest under the provisions of Section 10(2)(o) of the Administration of Evacuee Property Act, 1950 in favour of the petitioners. The Custodian unaware of the judgment of the Supreme Court vide his order dated 11.10.1983 directed the transfer of evacuee interest in the aforesaid property in favour of the petitioners as proposed by the Assistant Custodian and accorded his approval to the proposal submitted by the Assistant Custodian.

54. In pursuance to the order dated 11.10.1983 passed by the Custodian, Assistant Custodian transferred the said evacuee interest to the extent of 1/3 share in favour of the petitioners on deposition of sale consideration and issued a sale certificate on 02.11.1983. Sale certificate also got registered before the Registrar, Meerut. Thus, the matter which was concluded up to Supreme Court, the petitioners got it reopened in their favour by misleading the Assistant Custodian and Custodian by concealing the judgment of the Supreme Court in the case of Major Chandra Bhan Singh v. Latafat Ullah Khan (supra).

55. The respondents believed that in pursuance of the order dated 31.08.1955 the entire property including 1/3 evacuee interest stood vested into Custodian and, therefore, they were entitled to delivery of possession of composite property (evacuee and non evacuee), moved an application for issuance of property sanad in respect of 2/3 share also. The Settlement Commissioner under the provisions of The Displaced Persons (Compensation And Rehabilitation) Act, 1954, however, dismissed the said application for issuance of sanad for 2/3rd share vide order dated 07.03.1984.

56. The Settlement Commissioner noted that the Assistant Custodian Evacuee Property, Meerut vide order dated 17.06.1958 allotted the evacuee property in favour of Major Chandra Bhan Singh, and he had obtained bhumidhari rights over the evacuee plots enumerated to Khatauni 1383 fasli to 1391 fasli. It was further said that question of granting sanad further for the same transferred Khasra plots to the applicant Major Chandra Bhan Singh was not necessary. Settlement Commissioner, Evacuee Property held that once the applicants' names got recorded as Bhumidhar, there was no requirement for issuing any sanad.

57. It appears that a case was filed before the competent Court for cancelling sale certificate dated 02.11.1983 in favour of the petitioners by the Custodian under Section 10(2)(o) of the Administration of Evacuee Property Act, 1950. Legal heirs of Major Chandra Bhan Singh filed an application on 25.05.1988 that there was no dispute in respect of 2/3 share of land of the 'composite property', which was allotted to them and, therefore, they should be put in possession of the said land. Pargana Adhikari, Marwana issued notice on 03.06.1988 to Late Latafatullah Khan and others. They filed their objection to the notice. However, Pargana Adhikari, Meerut vide order dated 03.08.1998 in Case No.558/1958 rejected the objections filed by the petitioners on the ground that in accordance with the judgment of the Supreme Court in the case of Major Chandra Bhan Singh v. Latafat Ullah Khan (supra), the applicants/respondents were entitled for possession of the land. He directed Tehsildar, Marwana that after enforcement of the entire land, the applicants/respondents be put in possession of 2/3rd land of the 'composite property'

and the Tehsildar may take assistance of local police, if they so required.

58. Against the said order passed by the Pargana Adhikari, the petitioners preferred a revision under Section 33 of The Displaced Persons (Compensation And Rehabilitation) Act, 1954 before the delegatee of the Central Government at Lucknow. The said revision was allowed vide order dated 4.02.1989. The Revisional Court held that entire property mainly disputed plots had not vested in the Custodian and the Managing Officer/Pargana Adhikari had misinterpreted the decision of the Supreme Court in the case of Major Chandra Bhan Singh v. Latafat Ullah Khan (supra).

59. The respondents thereafter filed a writ petition before this Court being Writ Petition No.6619 of 1989 challenging the order passed in the revision under Section 33 of The Displaced Persons (Compensation And Rehabilitation) Act, 1954.

60. It appears that after passing the order dated 11.10.1983 by the Custodian on the proposal of Assistant Custodian dated 16.08.1983, Assistant Custodian could come to know about the judgment passed by the Supreme Court in the case of Major Chandra Bhan Singh v. Latafat Ullah Khan (supra) and, therefore, Assistant Custodian on 28.08.1984 made a reference to the Assistant Custodian General praying for revision of his order dated 16.08.1983. In the reference order dated 28.08.1984, it was said that entire facts were not placed before the Assistant Custodian and, therefore, proposal for sale of the land in favour of the petitioners vide order dated 16.08.1983 was without jurisdiction and against the judgment of the Supreme Court in the case of Major Chandra Bhan Singh v. Latafat Ullah Khan (supra). It was also held that after the order dated 31.08.1955, Major Chandra Bhan Singh and his brother, Raghubir Singh were allotted the land on 06.06.1958 under Rule 68 of the Displaced Persons (Compensation And Rehabilitation) Act, 1954 and sanad was issued on 17.09.1962 in their favour. Bandobast of the aforesaid land had taken place and names of the allottees were also mutated in the revenue record. It was said that once the land was allotted in favour of Major Chandra Bhan Singh and his brother, Raghubir Singh, and said allotment was upheld by the Supreme Court in the case of Major Chandra Bhan Singh v. Latafat Ullah Khan (supra), it could not have been sold again in favour of the petitioners, and the Assistant Custodian General (Evacuee Property) was requested to pass an appropriate order on the reference. The Assistant Custodian General vide order dated 18.1.1995 cancelled the orders dated 16.08.1983 and 03.11.1983, whereby the land was sold in favour of the petitioners on the basis of concealment of facts.

61. An application was made by the respondents for correction of the date in the order dated 18.01.1995, and it was said that instead of 03.11.1983, it should be 02.11.1983. The petitioners filed objection to the said application for correction in which it was said that on 03.11.1983, it was directed by the Assistant Custodian to the Sub Registrar, Meerut to register sale certificate dated 02.11.1983 issued in favour of the petitioners, and the registration having already taken place, order dated 02.11.1983 had already taken effect and, therefore, could not be set aside. However, the said application was rejected and, it was held that both the orders dated 03.11.1983 as well as 02.11.1983 were

passed by the same officer, and the effect would be that order dated 2.11.1983 would be deemed to be set aside by implication. This order is dated 24.02.1995 which is also impugned in the present writ petition.

62. Mr. Akhilesh Kalra, learned counsel for the petitioners has submitted that reference made by the Assistant Custodian vide order dated 28.08.1984 on which impugned orders dated 18.01.1995 and 24.02.1995 were passed, was without jurisdiction. The petitioners had again tried to reopen the issue regarding the allotment of the land in favour of Major Chandra Bhan Singh and Raghuveer Singh. It was said that the sale certificate in favour of the petitioners on the basis of order dated 16.08.1993 passed by the Assistant Custodian was validly issued. The Assistant Custodian General misinterpreted the judgment of the Supreme Court in the case of Major Chandra Bhan Singh v. Latafat Ullah Khan (supra), and assumed certain facts for which there was no material either on record or in the judgment of the Supreme Court.

63. On the other hand, Mr. Raj Kumar Singh, learned counsel appearing for the Union of India and official respondents has submitted that the writ petition is not only misuse of the process of the Court but relief sought by the petitioners is against the judgment of the Supreme Court in the case of Major Chandra Bhan Singh v. Latafat Ullah Khan (supra), which was rendered between the parties, in which it was conclusively held that order dated 31.08.1955 vesting the property in the Custodian had attained finality under Section 8 of Evacuee Interest (Separation) Act, 1951 and the whole property vested in the Custodian under Section 11 of the Evacuee Interest (Separation) Act, 1951 free from all encumbrances and liabilities for the reasons that any evacuee co-sharers did not file any objection despite personal service of notice. The petitioners' conduct is such which dis-entitles them to any relief from this Court. They misled the Assistant Custodian for passing the order dated 16.08.1983 on which the proposal was put by the Assistant Custodian before the Custodian for sale of the 1/3 evacuee interest in favour of the petitioners despite the judgment of the Supreme Court between the parties in the case of Major Chandra Bhan Singh v. Latafat Ullah Khan (supra). They obtained the sale certificate dated 02/03.11.1983. The Supreme Court also held that allotment of the land in favour of the respondents was valid and no interference was called for in the allotment of the land in favour of the respondents by sanad. It has also been submitted that allotment of land in favour of Major Chandra Bhan Singh and Raghubir Singh was made on 04.04.1955. Even order dated 31.08.1955 was passed vesting the entire property in favour of the Custodian. It has been further submitted that the Competent Officer in his order dated 31.08.1955 has specifically said as under:-

" The whole property shall vest in the Custodian under Section 11 of the Evacuee Interest (Separation) Act, 1951 free from all encumbrances and liabilities."

64. In the counter affidavit filed on behalf of the respondents, certificate for filing the Review Petition No.24 of 1979 was issued by the Advocate K.C. Dua has been mentioned which is to the effect:-

"That the Review is being sought on the ground that the order passed by this Hon'ble Court in a way reviewed the order of vesting dated 31.08.1955 passed by the

Competent Officer. There will be miscarriage of justice if the order of the Competent Officer dated 31.08.55 stands as the order tantamounts to vest in the custodian the property of the Non-evacuees which the custodian himself is not competent to take over under the provisions of Administration of Evacuee Property Act"

I the undersigned do hereby certify that the above mentioned matter is fit one for review on the ground mentioned above and also on the ground and circumstances mentioned in the accompanying Review Petition."

65. Said review petition was, however, dismissed vide order dated 24.08.1982 findings no merit in the review petition.

66. Thus, it is submitted that the petitioners themselves were clear that vide order dated 31.08.1955 entire property was vested in the Custodian under Section 11 of the Evacuee Interest (Separation) Act, 1951, and any other interpretation would run contrary to the judgment passed by the Supreme Court in the case of Major Chandra Bhan Singh v. Latafat Ullah Khan (supra) and Review Petition No.24 of 1979. It has been submitted that a person who approaches Court with unclean hands is not entitled for any relief. The matter once got finalized up to highest Court, could not be reopened by undertaking subsequent non maintainable proceedings, and the petitioners got the matter reopened by misleading the Assistant Custodian who made a proposal for sale of the 1/3 evacuee share in favour of the petitioners vide order dated 16.08.1983 on which sale certificate was issued by the Custodian on 2/3.11.1983.

67. I have given my due consideration to the facts of the case and submissions advanced on behalf of counsels for the parties and perused the judgment in the case of Major Chandra Bhan Singh v. Latafat Ullah Khan (supra).

68. The Supreme Court in the said judgment has commented upon the conduct of the petitioners, which is evident from para 14 of the said judgment. This did not deter the petitioners, and they again misled the Assistant Custodian and got the order by concealing the aforesaid judgment between the parties and got the proposal in their favour for sale of 1/3 of the evacuee property on which custodian issued sale certificate dated 2/3.11.1983. I do not find any substance in the submission of learned counsel for the petitioners that the reference made by the Assistant Custodian before Assistant Custodian General was without jurisdiction or it was belated. Section 27 of the Administration of Evacuee Property Act, 1950 clothes the custodian with revisional power which reads as under:-

"27. Powers of revision of Custodian General- The Custodian-General may at any time either on his own motion or on application made to him in this behalf call for the record of any proceedings in which any Custodian has passed an order for the purspose of satisfying himself as to the legality or properiety of any such order and may pass such order in relation thereto as he thinks fit:- Provided that the Custodian-General shall not pass an order under the sub-section prejudicial to any person without giving him a reasonable opportunity or being heard.

Explanation:- The power conferred on the Custodian-General

under the this section may be exercised by him in relation to any property, notwithstanding that such property has been acquired under section 12 of the Displaced Persons (Compensation and Rehabilitation) Act (44 of 1954)."

69. Section 27 of the the Administration of Evacuee Property Act, 1950 itself empowers the Custodian General to exercise the revisional jurisdiction at any time either on his own motion or on application made to him in this behalf against any order passed by the Custodian. There is no limitation provided under the said section. He may exercise on his own motion or on an application made to him in this behalf. The only rider is that Custodian General should not pass an order prejudicial to any other person without giving him reasonable opportunity of being heard. It is not the case of the petitioners that they were not given notice to be heard before passing the impugned order. The order itself discloses that they were fully heard and reasonable opportunity was given to them before passing the impugned orders. Impugned orders have been passed because of the concealment by the petitioners, who in defiance of the judgment of the Supreme Court in the case of Major Chandra Bhan Singh v. Latafat Ullah Khan (supra), got the sale certificate issued in their favour in respect of 1/3rd evacuee interest by misleading and concealing the material facts.

70. Once the proceedings got concluded by judgment of the Supreme Court in the case of Major Chandra Bhan Singh v. Latafat Ullah Khan (supra), any subsequent proceedings on the said issue was barred by principle of res judicata. Moreover, the petitioners' conduct had been such which completely disentitles them for a writ of certiorari by this Court.

71. In view thereof, this Court has no hesitation in dismissing the writ petition.

72. This Court cannot believe that learned counsels representing the petitioners would not know the implication of the judgment in the case of Major Chandra Bhan Singh v. Latafat Ullah Khan (supra) and despite the issue having been got settled by the Supreme Court, learned counsels for the petitioners have been able to drag this writ petition for almost 27 long years before this Court. Initially, interim order was also passed. However, once the writ petition was dismissed for non prosecution, interim order was not extended when the order dismissing the writ petition was recalled. A displaced person who was allotted the land in the year 1955, has been prevented for all these years to enjoy the fruits of allotment by indulging in protracted litigation by the petitioners. Thus, this Court finds it appropriate to not only dismiss the writ petition but also impose cost on the petitioners of Rs.25,000/- to be deposited by them within 4 weeks from today in the account of "Army Battle Casualty Welfare Fund, New Delhi". If the petitioners fail to deposit the cost as directed, District Magistrate, Meerut shall proceed to recover cost as arrears of land revenue and deposit the same in the account of "Army Battle Casualty Welfare Fund, New Delhi".

73. Ordered accordingly.

(2022)03ILR A714
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.03.2022

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Writ C No. 3000016 of 1994

Ram Krishna Math & Ors. ...Petitioners
Versus
State Of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Ankit Pande, Dr. Ramsurat Pande, Virendra Bhatt

Counsel for the Respondents:

A. U.P. Imposition of Ceiling on Land Holdings Act, 1960 - Section 11(2) - U. P. Imposition of Ceiling on Land Holdings Rules, 1961, Rule 8, proviso - Unrecorded tenure holder is also entitled to file an objection u/s 11(2) of the Act, 1960 if they are in possession of the land and have interest in land holding which was declared as surplus

B. Under proviso of Rule 8 Prescribed Authority shall cause to be served a notice to the person in whose name the land included in CLH Form 3 is ostensibly held - If a person has acquired right, title and interest by a legal and valid instrument of sale-deed, will or dedication, then he would be required to be issued notice even if his name is not recorded as tenure holder in the revenue record and, if the land of such a person is treated to be land holding of the tenure holder to whom notice under Section 10(2) of the Act, 1960 was issued - such a person would be entitled to file an objection under Section 11(2) of the Act, 1960 and the Prescribed Authority should decide the objection after giving opportunity for adducing evidence by such person in respect of the land, which has been declared surplus and which is claimed to be of such an unrecorded tenure holder (Para 24, 25, 26)

C. Prescribed Authority (Ceiling), rejected petitioner's objections u/s 11(2) of the Act, 1960 - petitioners filed an objection and claimed that most of the land in possession of noticee was the tenancy of the petitioners through the various deeds against - petitioners claimed themselves to be owners and tenure holders of the land in question and prayed for an opportunity of hearing – In the impugned order it was held that since notice u/s 10(2) of the Act had already been given to the recorded tenure holders and the petitioners being not the recorded tenure holders, they were not entitled for any notice under the Act, 1960 & they were not entitled to file and maintain objections under Section 11(2) of the Act, 1960 - Held - petitioners have been in possession of the land and they have interest in land holding which was declared as surplus, therefore, they could not have been thrown out on the ground of maintainability - ground on which the objections of the petitioners were rejected are untenable (Para 27)

Allowed. (E-5)

List of Cases cited:

1. Gurumukh Singh & ors. Vs St. of U.P. & ors. C.M. Writ Petition No.4859 of 1986

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

1. The present petition has been filed, impugning the orders dated 29.07.1992 and 20.01.1994 passed by the Prescribed Authority and the Appellate Authority under the provisions of the U.P. Imposition of Ceiling on Land Holdings Act, 1960 (for short "the Act, 1960").

2. The Prescribed Authority (Ceiling), Lucknow rejected the objections filed by the petitioners under Section 11(2) of the Act, 1960 against which the appeal got

dismissed by the Appellate Authority. The orders passed to the said effect are under challenge in this petition.

3. One Tej Narain Dar was exclusive owner in possession of agricultural land, consisting of several plots in village Katarabakkash, Pargana and Tehsil Mohanlalganj, District Lucknow. He became owner and got possession of the said land as a result of partition decree of the year 1976 passed under Section 176 of the U.P. Z.A. and L.R. Act.

4. Parents of Tej Narain Dar, namely, Anand Swaroop Narain Dar and Smt. Mohan Rani Dar had three more sons, namely, Jagdish Narain Dar, Ishwar Narain Dar and Rajendra Narain Dar. It is said that wife of Tej Narain Dar also owned and exclusively possessed agricultural land holding in her name as Bhumidhar with transferable rights.

5. A notice under Section 10(2) of the Act, 1960 was issued to Tej Narain Dar, clubbing his land-holding and land holding of his wife, treating them to be one unit. After contest, the ceiling area of husband and wife was determined and surplus area was declared by the Prescribed Authority vide order dated 26.09.1974.

6. In the year 1976, Smt. Mohan Rani Dar, mother of Tej Narain Dar and his three brothers, died. She was in possession of separate bhumidhari agricultural land holding. Her land holding got devolved amongst her sons, namely, Tej Narain Dar, Rajendra Narain Dar and Smt. Urmila Dar, widow of Ishwar Narain Dar, and Smt. Nirmala Dar, wife of Late Jagdish Narain Dar to the extent of 1/4th share to each through sale-deed dated 20.07.1966. As a result of bequest 1/4th share of his mother by virtue of the will dated 20.07.1966. The total land holding in possession of Tej Narain Dar, after the first ceiling proceedings crossed the ceiling limits and, in view of increase in his land holding, Tej Narain Dar informed the Ceiling Authority himself about his land holding having got increased. A fresh notice under Section 10(2) of the Act, 1960 for the second time was issued to him. He voluntarily surrendered his specified plots of land for declaring the surplus area. The Prescribed Authority (Ceiling), Lucknow passed the final order dated 03.12.1981, declaring for the second time the surplus land of Tej Narain Dar.

7. Against the said order dated 03.12.1981, Rajendra Narain Dar preferred an appeal before the District Judge, Lucknow and also filed objection before the Prescribed Authority, alleging that while declaring surplus land of Tej Narain Dar and his wife, some of his own plots had been declared as surplus land by including them in the holding of Tej Narain Dar. In view of the objection filed by Rajendra Narain Dar, the appeal filed by him got abated. The ceiling proceedings against Tej Narain Dar, which was initially decided on 03.12.1981, was re-opened after recalling the order dated 03.12.1981.

8. The petitioners filed an objection in the said proceedings on 02.09.1987 through which the reopening of the ceiling proceedings of Tej Narain Dar was opposed and, in the alternate, it was claimed that most of the land in possession of Tej Narain Dar and his wife was the tenancy of the petitioners through the various deeds.

9. The Prescribed Authority, after hearing the parties, vide order dated

28.11.1987 determined the surplus area of Tej Narain Dar and his wife, treating them to be one unit. Plot nos. 1643/1, area 19 Biswas and 15 Biswansis, 1744/1, area 2 Biswas, 14 Biswansis and 10 Kachhwansis besides other plots were declared surplus which had been given by Taj Narain Dar to the petitioners.

10. It may be noted here that Tej Narain Dar and his wife were issue less and, were great devotees of the Ram Krishna Math and its sister organization Ram Krishana Mission. They had dedicated almost their entire properties, including the plots, mentioned as agricultural land, to the petitioner nos. 1 and 2. A separate trust was created by the Ram Krishna Math and Ram Krishna Mission and, Tej Narain Dar and Smt. Urmila Dar, widow of Late Ishwar Narain Dar in the memory of late Smt. Mohan Rani Dar, mother of Tej Narain Dar, named as 'Mohan Rani Dar Religious and Charitable Endowment Trust. Tej Narain Dar and his wife dedicated their 1/4th share each in the mango groves, being plot nos. 2493, 2494/1, 2494/2, 2495, 2496, 2499, 2402/1, 2516, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2561/1, 2562/1, 2588, 2589, 2592 and 2593. Subsequently, Smt. Nirmala Dar, wife of Jagdish Narain Dar, also sold her 1/4th share in the above mentioned mango groves received by her under the bequest from her mother-in-law, Smt. Mohan Rani Dar to Charitable Trust. Thus, Smt. Mohan Rani Dar Religious and Charitable Endowment Trust came to own and posses 3/4th share in the above mentioned groves and, the remaining 1/4th share in the said grove remained to be owned by Rajendra Narain Dar jointly with the said Trust.

11. The above mentioned dedications of the properties, included the agricultural holding of Tej Narain Dar and his wife, Smt. Sarala Dar, which was made by Tej Narain Dar, acting for himself and, as the general agent of his wife in favour of the Math and Mission. The above mentioned dedications of properties, including the agricultural holding of Tej Narain Dar and his wife, Smt. Sarala Dar, were made by Tej Narain Dar acting for himself and as the general agent of his wife in favour of petitioner nos. 1 and 2 through different registered deeds, will and trust deeds executed by Smt. Urmila Dar.

12. On the basis of the aforesaid deeds and dedications, title and possession, the mutation report proceedings were made under Section 34 of the U.P. Land Revenue Act before the Tehsildar Mohanlalganj by the petitioners. The mutation proceedings were opposed by Rajendra Narain Dar by filing objections, challenging to the dedication made by his brother, Tej Narain Dar, his wife, Smt. Sarala Dar and Smt. Urmila Dar, widow of Ishwar Narain Dar.

13. During the pendency of mutation proceedings, Tej Narain Dar died on 22.08.1985. Rajendra Narain Dar managed to obtain mutation of his name as well name of his brother Jagdish Narain Dar (since deceased, husband of Smt. Nirmala Dar) in Khatauni through PA-11 in place of recorded tenure holders, Tej Narain Dar and his wife Smt. Sarala Dar.

14. Applications under Section 34 of the U.P. Land Revenue Act were dismissed on 24.09.1988 on the ground that the land was involved in ceiling proceedings.

15. A fresh notice was issued to Rajendra Narain Dar, who was Village Pradhan, as well as to Jagdish Narain Dar (since deceased, husband of Smt. Nirmala Dar). Pursuance to the said notice under

Section 10(2) of the Act, 1960, the Additional District Magistrate (Executive)/Prescribed Authority, Rural Ceiling, Lucknow in Ceiling Case No.14 of 1988-89 passed the order on 16.12.1989, declaring the very land as surplus which consisted of the plots which were subject matter of the dedications and the said mutation proceedings initiated at the instance of the petitioners.

16. When the petitioners came to know about the aforesaid order dated 16.12.1989, an application dated 20.03.1990 was moved before the Additional District Magistrate (Executive)/Prescribed Authority, Rural Ceiling who stayed the implementation of the order dated 16.12.1989 and also passed an order for issuing notice to Naib Tehsildar (Ceiling). Thereafter, on 17.04.1990, the petitioners moved a detailed regular objection under Section 11(2) of the Act, 1960, claiming themselves respectively to be owners and tenure holders of the land in question and prayed for an opportunity of hearing.

17. On 29.07.1992, the Prescribed Authority rejected the objection and prayer of the petitioners and, maintained the order dated 16.12.1989, holding that the objection was not maintainable.

18. Having aggrieved from the said order passed by the Prescribed Authority, the petitioners filed Appeal Nos. 40 and 41. Both the appeals were dismissed by common judgment dated 20.01.1994 passed by the Additional Commissioner (Judicial), Lucknow.

19. Heard Dr. Ram Surat Pandey, learned Senior Advocate, assisted by Mr. Ankit Pandey, Advocate, representing the petitioners, as well as Mr. J.P. Maurya, learned Additional Chief Standing Counsel, representing respondents-State, and gone through the entire record.

20. On behalf of the petitioners, learned Senior Counsel has submitted that the Prescribed Authority and the Appellate Authority have passed non-speaking orders, dismissing the appeals. It was held that since the notice under Section 10(2) of the Act, 1960 had already been given to the recorded tenure holders and the petitioners being not the recorded tenure holders, they were not entitled for any notice under the Act, 1960 and, they were not entitled to file and maintain objections under Section 11(2) of the Act, 1960.

21. The question, which is involved in the present case, is whether an objection filed under Section 11(2) of the Act, 1960 by an unrecorded tenure holder would be legally maintainable and whether such an unrecorded tenure holder is entitled to be heard by the Prescribed Authority in respect of the land, which has been declared surplus and, which is claimed to be of such an unrecorded tenure holder.

22. It has been submitted that the petitioners have been in possession of the land and they have interest in land holding which was declared as surplus, therefore, in spite of the fact that the ceiling proceedings were drawn and two orders were passed in respect of the same land against the recorded tenure holders, the objection under Section 11(2) of the Act, 1960 on behalf of the petitioners claiming to have interest and right over the said land could not have been thrown out on the ground of maintainability.

23. On behalf of the petitioners, learned Senior Advocate has further

submitted that the two authorities below have wrongly recorded the finding that the petitioners did not file any evidence in support of their case, whereas they had filed documentary evidence in support of their claim.

24. The notice requiring the tenure holder to show cause why the statement prepared by the Prescribed Authority be not taken as correct is to be issued to the tenure holder in respect of whose holding the statement has been prepared under CLH Form-3 by the Prescribed Authority. Under the proviso, of rule-8 of The U. P. Imposition of Ceiling on Land Holdings Rules, 1961, the Prescribed Authority shall cause to be served a notice to the person in whose name the land included in CLH Form 3 is ostensibly held. The Prescribed Authority prepares the statement on the basis of the revenue records. If from the revenue records or other information, the Prescribed Authority comes to know that the land included in the statement in CLH Form 3 includes land ostensibly held in the name of any other person, the Prescribed Authority is bound to serve a notice on such a person.

25. This Court in **C.M. Writ Petition No.4859 of 1986 (Gurumukh Singh and others Vs. State of U.P. and others)** vide judgment dated 24th July, 1989 held that from a bare reading of Section 9(2) and rule-8 it is manifest that notice under Section 9(2) is mandatory to the recorded tenure holder and in case tenure holder is not recorded, or if another tenure holder has purchased the land, but is not recorded then the notice must be issued to him as well. Under rule-8 it has been provided that CLH Form-3 also includes the land ostensibly held in the name of any other person, the Prescribed Authority shall cause to be served upon such a person a notice in CLH Form-4 together with a copy of the statement in CLH Form-3 calling upon him to show cause within a period of fifteen days from the date of service of the notice, why the aforesaid statement be not taken as correct. Relevant part of the said judgment is extracted herein below:-

"Having heard the learned counsel for the parties, I am of the view that the impugned orders cannot be sustained. A bare reading of Section 9(2) and Rule 8 makes it manifest that the notice under Section 9(2) is mandatory to the recorded tenure-holder and in case tenure-holder is not recorded, or if another tenure-holder has purchased the land but is not recorded, then the notice must be issued to him as well. Under Rule 8 of the Rules it has been provided that C.L.H. form 3 also includes the land ostensibly held in the name of any other person, the prescribed authority shall cause to be served upon such a person a notice in C.L.H. form 4 together with a copy of the statement of C.L.H. form No. 3 calling upon him to show cause within a period of fifteen days from the date of service of the notice, why the aforesaid statement be not taken as correct. In the present case, no such notice was given to petitioners, who were purchasers from the recorded tenure-holder under the aforesaid sale-deed. The provisos of Rule 8 were mandatory in nature. These4 provisions are set out as follows:

"As soon as may, after expiry of the thirty days from the date of publication of the general notice in C.L.H. Form 1 in the official gazette, the prescribed authority shall cause to be served upon every tenure holder, who have failed to submit the statement in C.L.H. Form 2 or has

submitted an incomplete or incorrect statement, a notice in C.L.H. Form 4 together with the copy of statement in C.L.H. Form 3 prepared under Rule calling upon him to show cause within a period of fifteen days from the date of the service of the notice, why the aforesaid statement be not taken as correct."

Rule 8 provides two types of tenure-holders, First is the recorded tenure holder and the proviso provides notice to be served on any other tenure holder other than provided in the 1st part of the Rule. Section 3 (17) defines tenure holder, which means holder of a holding. After execution of the sale-deed, the vendees the petitioners in the present case, become holders of a holding even though they might not be recorded in the revenue papers as Bhumidhars. A bare reading of Section 9 and Rule 8 would make it evidence that notice is statutorily required to be served on the Vendees, even though they might not have been entered in the revenue papers.

Apart from the statutory requirement under the general principles of law or the conman law also, in the exercise of judicial or quasi judicial power the rules of natural justice should be observed. It should not only be done but should manifestly and undoubtedly be seen to be done. The primary rule of natural justice is that no one may be condemned unheard or no citizen must be deprived of his legal rights or property without first affording him reasonable opportunity of hearing by serving a notice on him or them.

Lake Distt. Special Planning Board v. Secretary of State for Environment (3), R.V. Working JJ. Ex-parte Gassage (4), Civil Judge (supra) the Full Bench (on para 36; page 142) rules as follows;

"The fact that a tenure holder is not recorded as such in the revenue records is not relevant for determining whether he is etitled to file an objection to the statement prepared under Section 10 (1) of the Act and issued notice to another person under Section 10 (2) of the Act and the above fact does not disentitle him to file an objection if he is otherwise entitled to do so."

26. If a person has acquired right, title and interest by a legal and valid instrument of sale-deed, will or dedication, then he would be required to be issued notice even if his name is not recorded as tenure holder in the revenue record and, if the land of such a person is treated to be land holding of the tenure holder to whom notice under Section 10(2) of the Act, 1960 was issued and proceedings got finalized, such a person would be entitled to file an objection under Section 11(2) of the Act, 1960 and the Prescribed Authority should decide the objection after giving opportunity for adducing evidence by such person and other affected persons.

27. In the present case, the objections of the petitioners filed under Section 11(2) of the Act, 1960 have been dismissed on the ground being not maintainable and also on the ground that the petitioners did not produce evidence. I find that the ground on which the objections of the petitioners were rejected are untenable. In view thereof, the writ petition is **allowed**. Consequently, the impugned orders dated 29.07.1992 and 20.01.1994 passed by the Additional Collector (Administration), Prescribed Authority, Ceiling, Lucknow and the

Additional Commissioner (Judicial), Lucknow Division, Lucknow, copies of which are contained in Annexure No. 1 and 2 to the writ petition respectively, are hereby set-aside. The matter is remitted back to the Prescribed Authority to decide a fresh the objections filed by the petitioners under Section 11(2) of the Act, 1960 after affording them opportunity for leading evidence and, pass a fresh order expeditiously.

(2022)03ILR A720
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.02.2022

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Writ C No. 3000024 of 1998

Sita Ram & Ors. ...Petitioners
Versus
State Of U.P. & Ors. ....Respondents

Counsel for the Petitioners:
Sri R.P.Singh

Counsel for the Respondents:
C.S.C.

U.P. Imposition of Ceiling on Land Holdings Act, 1960 - Section 4A - Determination of irrigated land - To determine whether the land is irrigated or un-irrigated, prescribed authority shall examine the relevant Khasras for the years 1378 Fasli, 1979 Fasli and 1380 Fasli, the latest village map and such other records as it may consider necessary, and may also make local inspection and, thereafter, the prescribed authority may proceed to determine the nature of land whether it is un-irrigated or irrigated

Notice u/s 10(2) was issued & in CLH Form-3 an area of 7.25 acres in terms of the irrigated land was proposed to be declared as surplus - petitioner filed objection that land was wrongly shown as irrigated land & In relevant khasra for the Fasli Years 1378, 1379 and 1380 petitioners' land has been shown as un-irrigated and single crop land - Held - neither the prescribed authority nor the appellate authority has considered the khasras of relevant years i.e. 1378 to 1380 Fasli, which is required to be considered - Impugned order quashed

Allowed. (E-5)

List of Cases cited:

Ram Autar Singh Vs Addl. Commissioner (Administration) & anr., 1995 (2) AWC 1115

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

1. The present writ petition has been filed by the petitioners, who are the sons of Lodhey Ram, the original tenure holder, impugning the order dated 31.8.1995 and 30.9.1997 passed by the prescribed authority and the appellate authority under the provisions of the U.P. Imposition of Ceiling on Land Holdings Act, 1960 (For short 'the Act, 1960').

2. Notice under Section 10(2) of the Act, 1960 was issued to the father of the petitioners. In CLH Form-3 annexed with the notice, area of 7.25 acres in terms of the irrigated land was proposed to be declared as surplus. Father of the petitioners filed objection against the said notice. One of the prime objection was that land of the father of the petitioners was un-irrigated and it was not an irrigated land and in respect of Plot Nos.306, 307, 308, 321, 328 and 329, it was wrongly shown as irrigated land.

3. During the pendency of the proceedings before the prescribed authority, father of the petitioners died.

Thereafter, the petitioners entered into the proceedings and filed other documentary evidence and also adduced oral evidence to prove their contention that land in Plot Nos.306, 307, 308, 321, 328 and 329 was an un-irrigated land.

4. The prescribed authority, however, vide order dated 7.2.1975 declared the area of 7.25 acres land of the petitioners in terms of irrigated land as surplus. Feeling aggrieved by the said order passed by the prescribed authority dated 7.2.1975, petitioners filed an appeal in the court of the District Judge. However, the appeal was allowed vide order dated 7.8.1975 and the matter was remanded back to the prescribed authority for deciding the case of the petitioners afresh.

5. The prescribed authority again vide order dated 31.3.1976, on remand, declared area of 7.25 acres land in terms of irrigated land as surplus. Against the said order passed by the prescribed authority, petitioners preferred an appeal. The appellate court, however, vide order dated 27.9.1976 again directed the prescribed authority to declare the surplus land taking account the choice given by the petitioners under Section 11(C) of the Act, 1960 and dismissed the appeal on merit.

6. The petitioners again filed objection 11(2) of the Act, 1960 before the prescribed authority and the same was rejected vide order dated 21.5.1980. Against the said order, the petitioners again preferred an appeal before the District Judge. However, the appellate court dismissed the appeal vide order dated 30.8.1980.

7. Aggrieved by the said order dated 30.8.1990 passed by the appellate court, petitioners filed Writ Petition No.3359 of 1980 before this Court. This Court vide order dated 4.9.1984 allowed the writ petition and remanded the matter back to the appellate court with certain directions.

8. From perusal of the order dated 4.9.1984 passed by this Court in Writ Petition no.3359 of 1980, the only point, which was to be considered by the appellate court, was about the nature of the land, whether the land in question was within the provisions of the Act, 1960 and whether it was un-irrigated land. The appellate court vide order dated 23.2.1995, on remand, remanded the matter back to the prescribed authority for decision in the matter in accordance with law keeping in view the observation/directions of this Court in the order dated 4.9.1984 passed in Writ Petition No.3359 of 1980.

9. The prescribed authority himself made spot inspection on 8.1.1990. It was said that no notice was given to the petitioners regarding spot inspection and the report was prepared by the prescribed authority behind the back of the petitioners. On the basis of the spot inspection, the prescribed authority decided the petitioners' objection vide order dated 31.8.1995 and rejected the claim of the petitioners for the land being un-irrigated. Against the said order passed by the prescribed authority, the petitioners have preferred an appeal before the appellate court. However, the appellate authority dismissed the appeal vide impugned order dated 30.9.1997.

10. Sri R.P. Singh, Learned counsel for the petitioners submits that provision for determining the nature of the land (irrigated and un-irrigated) is provided in Section 4(A) of the Act, 1960. He further submits that to determine whether the land

is irrigated or un-irrigated, the relevant khasra for the Fasli Years 1378, 1379 and 1380 were required to be seen. He also submits that in all the above Fasli years, the petitioners' land has been shown as un-irrigated and single crop land. It is submitted that when the documentary evidence provides that the land was un-irrigated, which is the mandate of the statute under Section 4(A) of the Act, 1960 to determine the nature of the land, the prescribed authority was not well within the power to make spot inspection to determine the nature of the land. If there was no documentary evidence in respect of the three Fasli years i.e. 1378, 1379 and 1380, then only the prescribed authority could have made spot inspection or appointed a commission for determining the nature of the land. He, therefore, submits that the prescribed authority and the appellate authority have grossly erred in dismissing the objection of the petitioners so far the determination of the nature of the land of the petitioners in Gata Nos.306, 307, 308, 321, 328 and 329 is concerned.

11. On the other hand, Sri J.P. Maurya, learned Additional Chief Standing Counsel, has submitted that there is no bar for the prescribed authority to make spot inspection even if there is entry in the khasra of 1378 to 1380 Fasli for determining nature of the land being un-irrigated and single crop land. He further submits that the land of two villages, which is the subject matter of the proceedings, comes within the command area and irrigation facility was provided by the State. Therefore, neither the appellate authority nor the prescribed authority has committed any error of law.

12. I have considered the submissions advanced by the learned counsel for the petitioners as well as by the learned Additional Chief Standing Counsel for the State-opposite parties.

13. The Legislature has amended the Act, 1960 by U.P. Act No.2 of 1975 with retrospective effect w.e.f. 8.6.1973. Section 4(A) has been inserted in the said legislation for determination of the irrigated land, which reads as under:-

"4A. Determination of irrigated land. *- The prescribed authority shall examine the relevant Khasras for the years 1378 Fasli, 1979 Fasli and 1380 Fasli, the latest village map and such other records as it may consider necessary, and may also make local inspection where it considers necessary and thereupon if the prescribed authority is of opinion :-*

firstly, (a) that, irrigation facility was available for any land in respect of any crop in any one of the aforesaid years; by -

(i) any canal included in Schedule NO. 1 of irrigation rates notified in Notification No. 1579-W/XXIII-62-W-1946, dated March 31, 1953, as amended from time to time; or

(ii) any lift irrigation canal; or

(iii) any State tube-well or a private irrigation work; and

(b) that at least two crops were grown in such land in any one of the aforesaid years; or

secondly, that irrigation facility became available to any land by a State Irrigation Work coming into operation subsequent to the enforcement of the Uttar Pradesh Imposition of Ceiling on Land

Holdings (Amendment) Act, 1972, and at least two crops were grown in such land in any agricultural year between the date of such work coming into operation and the date of issue of notice under Section 10; or

thirdly, (a) that any land is situated within the effective command area of a lift irrigation canal or a State tube-well or a private irrigation work; and

(b) that the class and composition of its soil is such that it is capable of growing at least two crops in an agricultural year; then the Prescribed Authority shall determine such land to be irrigated land for the purposes of this Act.

Explanation I.- For the purposes of this section the expression' effective command area' means an area, the farthest field whereof in any direction was irrigated -

(a) in any of the years 1378 Fasli, 1379 Fasli and 1380 Fasli; or

(b) in any agricultural year referred to in the clause 'secondly'."

14. From perusal of Section 4(A) of the Act, 1960, it is clear that besides examining khasras of 1378 to 1380 Fasli, the prescribed authority is required to examine the latest village map and such other records which may be considered necessary for the purpose and, may also make local inspection, if it considers necessary and, thereafter, the prescribed authority may proceed to determine the nature of land whether it is un-irrigated or irrigated considering the factors as mentioned in the sub-sections.

15. In view of the aforesaid, I find substance in the submission of Sri J.P. Maurya, learned Additional Chief Standing Counsel that the prescribed authority was well within the power to make spot inspection besides considering the khasras of 1378-1380 Fasli, as it is provided in the Act, 1960 itself.

16. This Court in the case of ***Ram Autar Singh vs. Addl. Commissioner (Administration) and another,*** 1995 (2) AWC 1115 has held that under the provisions of Section 4(A) of the Act, 1960, the onus of burden of proof not only lies with the tenure holder, but at the same time, it also lies with the prescribed authority, when such dispute is raised by the tenure holder in respect of the nature of the land. The prescribed authority is required to examine the relevant khasras of respective years. If the prescribed authority does not discharge such duty of examining the relevant khasras, the order passed by the prescribed authority is bad in law. Paragraphs 16 to 18 of the aforesaid judgement are extracted herein below:-

"16. I have carefully gone through the facts of the writ petition, respective submissions of the learned counsel for the parties, and, meticulously to the provisions of Section 4A of the Act, and, am of the opinion that the onus of burden of proof not only lies with the writ petitioners, but, at the same time, it also lies with the prescribed authority, when such dispute has been raised by the petitioners to examine the relevant khasras of respective years, which has not been discharged, either by the prescribed authority, or, by the appellate authority.

17. That being the factual and legal position, this Court is of the view that the impugned orders passed by the prescribed authority dated February 29,

1988 and of the appellate authority dated July 28, 1988 contained in Annexures 1 and 2, respectively to the writ petition are liable to be set aside.

18. Accordingly, in view of what has been stated above, the impugned orders dated February 29, 1988 passed by the prescribed authority and dated July 28, 1988 passed by the appellate authority are quashed. The entire matter is remanded back to the prescribed authority for taking afresh decision, after examining the relevant khasras (referred to above). Such determination has to be made as quickly as possible, preferably within a period of two months from the date of production of a certified copy of this order. Petitioner is also entitled to produce any evidence, and, or, fact available with him, in support of his case, at the resume hearing of the matter after remand of the case. Petitioner is further detected to take note of the next date of hearing so that there may not be any communication gap. Pending fresh decision before the prescribed authority, regarding possession of land, as on today, parties are directed to maintain status quo."

17. From perusal of the orders passed by the prescribed authority and the appellate authority, it is apparent that neither the prescribed authority nor the appellate authority has considered the khasras of relevant years i.e. 1378 to 1380 Fasli, which is required to be considered under the provisions of the Act, 1960 and as has been held by this Court in the case of Ram Autar Singh (supra).

18. In view thereof, the present writ petition is ***allowed*** and the impugned orders dated 31.8.1995 and 30.9.1997 passed by opposite party nos.2 and 3 are hereby quashed. The matter is remanded back to the prescribed authority to take a fresh decision regarding nature of the land after considering the khasras of 1378 to 1380 Fasli. The prescribed authority should proceed with the matter and determine the said question regarding nature of the land, preferably, within a period of four months. Petitioners are directed to fully cooperate in the proceedings.

19. Let a copy of this order be submitted by the learned counsel for the petitioners before the prescribed authority within a period of fifteen days from today for compliance.

(2022)03ILR A724
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.02.2022

BEFORE

THE HON'BLE MANISH MATHUR, J.

Writ C No. 3000172 of 1995

Prabhawati ...Petitioner
Versus
Addl. Commisioner Lucknow Division & Ors. ...Respondents

Counsel for the Petitioner:
Sri V,K, Pandey

Counsel for the Respondents:
C.S.C.

A. Civil Law – U.P. Imposition of Ceiling on Land Holdings Act, 1960: Section 5(6)(b), 37, 38 - Certain portion of petitioner's holdings have been held to be surplus in view of the provisions of U.P. Imposition of Ceiling on Land Holdings Act, 1960. The authorities have drawn an adverse inference against the petitioner on the twin grounds that neither the plaintiff presented herself nor was the sale deed on the

basis of which she was claiming proved in evidence. (Para 2, 15)

B. Evidence Law – Indian Evidence Act,1872 - Section 68 – A registered document not being a Will does not require to be proved by an attesting witness unless its execution by the executor is specifically denied. (Para 17)

In the present case, although no attesting witness was produced by petitioner for purposes of proving registered sale deed dated 02.04.1971 but **in terms of the proviso to Section 68 of Evidence Act, there was no such requirement since execution of the registered instrument was not specifically denied by the executor. As such, no adverse inference could have been drawn by authorities w.r.t. non-presence of petitioner since the registered sale-deed itself was not required to be proved.** (Para 18)

There is no law requiring the plaintiff to come in the witness box and therefore, it was not at all necessary for plaintiff to enter into the witness box and there could not have been adverse inference on that account. (Para 18)

There is no cogent evidence recorded by the authorities concerned to disbelieve possession of petitioner over the property in question in pursuance to execution of registered instrument of transfer. **The mere fact that petitioner's name was not mutated in the revenue record cannot be held to be a conclusive evidence for disbelieving registered instrument of transfer particularly when it is settled law that revenue entries do not pertain to proof of title and are merely a document to indicate possession of the property and that too only for the purposes of payment of revenue to State.** (Para 22)

Writ petition allowed. (E-4)

<u>Precedent followed</u>:

1. Jaswant Singh Vs St. of U.P. & ors., 1981 ALL.L.J. 431 (Para 12)

2. U.O.I. & anr. Vs Sri Sudershan Lal Talwar, (2002) 20 LCD 891 (Para 18)

3. Yadunath Vs State, 1979 AWC 187 (Para 21)

4. Gouni Satya Reddi Vs Govt. of A.P. & ors., (2004) 7 SCC 398 (Para 18)

Present petition challenges order dated 09.12.1991, passed by the Prescribed Authority Ceiling and order dated 31.10.1995, passed by the Appellate Court.

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

1. Heard Mr. V.K.Pandey, learned counsel for petitioner and learned State Counsel appearing on behalf of opposite parties.

2. Petition has been filed assailing the order dated 09.12.1991 passed by the Prescribed Authority Ceiling as well as Appellate Court Order dated 31.10.1995, whereby certain portion of petitioner's holdings have been held to be surplus in view of provisions of U.P. Imposition of Ceiling on Land Holdings Act, 1960.

3. Learned counsel for petitioner submits that petitioner had purchased the property in question recorded as Gata No.277/39, measuring area 4.51, total area 12.50 of village Gajraura, Pargana Palia, Tahsil Nighasan, District Kheri by means of registered sale-deed dated 02.04.1971 and has been continuously in possession of the aforesaid land till passing of the impugned orders. It is submitted that although the said sale-deed is subsequent to the cut off date of 24.01.1971 as amended to 08.06.1973 by means of amending Act, 1972 but the authorities below have failed to consider the specific provisions of Section 5(6)(b) of the Act, 1960 and have reached incorrect conclusion regarding the

sale-deed having been executed in good faith and for adequate consideration under an irrevocable deed for consideration which was not Benami transaction. It is submitted that the authorities have misdirected themselves by disbelieving the registered sale-deed only on the basis that petitioner's name was not mutated in the revenue records in pursuance to the sale-deed. Learned counsel has further submitted that during proceedings petitioner had produced witnesses not only to prove the sale-deed but also to prove her possession over the property in question but the same was wrongly disbelieved merely on the ground that petitioner did not produce herself in the proceedings to prove either the sale-deed or her possession over the property.

4. Learned counsel has placed reliance on certain judgments of this Court in order to buttress his submissions.

5. Learned State Counsel appearing on behalf of opposite parties, on the basis of counter affidavit filed, submits that subjective satisfaction has been recorded by the authorities below for disbelieving the sale-deed on which petitioner has placed reliance. It is submitted that the authorities have correctly recorded the finding that petitioner is not in possession over the property in question particularly in view of the subsequent power of attorney executed by petitioner in favour of one Chandrika Prasad. It is submitted that the order clearly records the fact that the witnesses produced on behalf of petitioner were also unaware with regard to the place of residence of petitioner's husband. It is further submitted that in terms of Section 5(6)(b) of the Act, it is the satisfaction of Prescribed Authority to believe or disbelieve the sale-deed executed after the cut off date and such a discretion of the authority does not warrant any interference in writ petition.

6. Considering the submissions advanced by learned counsel for parties and upon perusal of material on record, it is apparent and admitted that the sale-deed said to have been executed in favour of petitioner is subsequent to the cut off date indicated in the Act as 24.01.1971. The Prescribed Authority as well as the Appellate Authority have placed considerable emphasis on the fact that that petitioner did not appear before the authorities either in order to prove the sale-deed or even her possession over the property in question. The witnesses produced on behalf of petitioner have also been disbelieved primarily on the ground that they were not witnesses to the sale-deed and even otherwise were unaware of the place of residence of petitioner's husband. As such it has been held that the sale-deed which forms the basis of petitioner's claim was not a bonafide document executed in good faith.

7. With regard to aforesaid factors regarding deed of transfer executed after the cut off date of 24.01.1971, the provisions of Section 5(6)(b) are relevant. The said provision specifically provides as follows:

"(6) In determining the ceiling area applicable to a tenure-holder, any transfer of land made after the twenty-fourth 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).....

(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 ..... Explanation II.- The burden of proving that a case falls within clause (b) of the proviso shall rest with the party claiming its benefit."

8. Upon perusal of the said provision, it is apparent that for a transfer deed to be ignored for the purposes of the determination of the surplus area after the cut off date of 24.01.1971, the satisfaction of prescribed authority is compulsorily required that the said deed of transfer was not in good faith or for an adequate consideration under irrevocable instrument and was not benami transaction or for immediate or deferred benefit to the tenure holder or her members of family.

9. As such, it is imperative as per statutory provision that the prescribed authority is required to consider all the conditions indicated in the said provision of the Act and not only a part.

10. In the present case, the sale-deed which forms the basis of petitioner's claim has been held not to come within the provisions of Section 5(6)(b), primarily on the ground that petitioner failed to produce herself before the concerned authority in order to prove the sale-deed and her possession over the said property. The Prescribed Authority has specifically disbelieved bonafide of petitioner on the ground that she is a resident of Jaipur and therefore, it was not possible for her to cultivate lands situated in District Kheri in the State of Uttar Pradesh. Much emphasis has also been laid upon the power of attorney dated 24.01.1971 executed by the petitioner in favour of one Chandrika Prasad Mishra to conclude that petitioner was not in possession of the property in question. As such, the prescribed authority has disbelieved the execution of sale-deed. The Appellate Authority has also rejected the appeal primarily on the said basis.

11. Upon applicability of provisions of Section 5 (6)(b) of the Act, it was imperative for the authority concerned to have recorded a satisfaction that the deed of transfer was not executed in good faith or for adequate consideration under an irrevocable instrument not being benami transaction or for immediate or deferred benefit of tenure holder or her members of family. Upon perusal of both the impugned orders, no such subjective satisfaction has been indicated. The deed admittedly is irrevocable in nature. There is no avernment in either of the impugned orders that it is benami transaction or for immediate or deferred benefit of tenure holder or her members of family. Even the fact that the sale-deed has not been executed for adequate consideration skips a mention. The only reason for disbelieving the registered instrument of transfer is based mainly on conjectures and surmises that petitioner is belonging to City of Jaipur in Rajasthan would not be able to cultivate property situated in District Kheri, Uttar Pradesh. Disbelieving the registered instrument of transfer on such a ground is not contemplated under the provision of Act. The authorities concerned have also not indicated any reason for disbelieving the power of attorney dated 28.01.1987 which was subsequently registered in 1990.

There is no other finding recorded by the authority concerned for disbelieving the registered instrument of transfer in terms of Section 5(6)(b) of the Act.

12. This Court in the case of ***Jaswant Singh versus State of U.P. and others reported in 1981 ALL. L.J. 431*** has held as follows:

"3. In this case the appellate authority found that transfer was by irrevocable instrument to an outsider for considera tion. He did not find it to be benami or for immediate or deferred benefit of the tenure-holder or other members of his family. He has not referred to any evi dence or circumstance except the omis sion to mention the necessity in the sale deed itself. It has been repeatedly held by this court that such omission by itself does not establish lack of good faith, The appellate authority was conscious of this fact but it held that, recital in the sale compelling necessities under which the land was sold shows the bona fides of the vendor, True, but it is not conclusive. In-absence of any other evidence or circum-stance this by itself could not result in a finding that sale deed was executed without good faith."

It is well nigh-settled that a finding based on no evidence is not a finding of fact and can be set aside in exercise of writ jurisdiction. Apart from it good faith in the proviso is a legal con clusion to be drawn from the evidence and finding on it. An inference in law if erroneous cannot be considered to be a finding of fact."

13. The aforesaid pronouncement by this Court is clearly applicable in the present case since reasoning resorted to by the authorities does not conclusively prove that the transfer by registered instrument was not in good faith or for adequate consideration.

14. An adverse presumption has been recorded in the impugned orders regarding non-presence of petitioner to prove either the registered sale-deed or her possession over the property in question. In this regard, it is necessary to clear that as per Sections 37 3and 38 of the Act of 1960, the Prescribed Authority holding an inquiry or hearing on objections shall have all the powers and privileges of the civil court and is required to follow procedure laid down in the Code of Civil Procedure for trial and disposal of suits relating to immovable property. The same power has been conferred upon the appellate court as well. As such it is clear that the Prescribed Authority and the Appellate Court have the power to call for evidence pertaining to dispute of immovable property. Resultantly, the evidence act would clearly be applicable in such proceedings.

15. In the present case, the authorities have drawn an adverse inference against petitioner on the twin grounds that neither the plaintiff presented herself nor was the sale deed on the basis of which she was claiming, proved in evidence.

16. Since provisions of Evidence Act would be applicable while disposing of objections filed under the Act, necessarily Section 68 of Evidence Act would also be applicable. While the said provision pertains to proof of execution of document required by law to be attested by at least one attesting witness for the purpose of proving its execution but proviso to Section 68 of Evidence Act clearly stipulates as follows:

"68. Proof of execution of document required by law to be attested.?If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence: 1[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.]"

17. In view of the proviso to Section 68 of Evidence Act, it is clear that a registered document not being a Will does not require to be proved by an attesting witness unless its execution by the executor is specifically denied.

18. In the present case, although no attesting witness was produced by petitioner for purposes of proving registered sale deed dated 2.4.1971 but in terms of proviso to Section 68 of Evidence Act, there was no such requirement since execution of the registered instrument was not specifically denied by the executor. As such, no adverse inference could have been drawn by authorities with regard to non-presence of petitioner since the registered sale-deed itself was not required to be proved. This Court in the case of ***Union of India and another versus Sri Sudershan Lal Talwar*** reported in ***(2002) 20 LCD 891*** has clearly held that there is no law requiring the plaintiff to come in the witness box and therefore, it was not at all necessary for plaintiff to enter into the witness box and there could not have been adverse inference on that account. Decision of Hon'ble Supreme Court in the Case of ***Gouni Satya Reddi versus Govt. of A.P. and others*** reported ***(2004) 7 Supreme Court Cases 398*** is also to the same effect.

19. Considering the aforesaid, it is held that the authorities clearly fell in error in recording adverse inference due to non-presence of petitioner.

20. The finding by the authority is not based on any cogent evidence as such would not amount to reasonable finding of fact.

21. A Division Bench of this Court in the case of ***Yadunath versus State*** reported in ***1979 AWC 187*** has held as under:-

"In case there is no evidence either to show that the possession in pursuance of the gift deed was actually not transferred to the donees or that there are no such circumstances to show that the gift deed in question was a sham transaction in the sense that the real title to the property never passed to the donees and continued to be retained by the donor, the Ceiling Authorities would not be justified in ignoring the same or to treat the land covered by the deed as still continuing to belong to Brij Bhushan Rathi"

22. The aforesaid pronouncement of this Court is also clearly applicable in the present case since there is no cogent evidence recorded by the authorities concerned to disbelieve possession of petitioner over the property in question in pursuance to execution of registered instrument of transfer. The mere fact that petitioner's name was not mutated in the revenue record cannot be held to be a

conclusive evidence for disbelieving registered instrument of transfer particularly when it is settled law that revenue entries do not pertain to proof of title and are merely a document to indicate possession of the property and that too only for the purposes of payment of revenue to State.

23. Upon consideration of aforesaid facts, the impugned orders dated 09.12.1991 as well as 31.10.1995 passed by the Prescribed Authority Ceiling and the Appellate Court, respectively being clearly against statutory provisions of the Act, 1970 and dictum of this court are unsustainable and are therefore, quashed by issuing the writ in the nature of certiorari.

24. Consequently, the writ petition succeeds and is **allowed**. Parties to bear their own cost.

(2022)03ILR A730
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.01.2022

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE PRAKASH PADIA, J.

Special Appeal No. 33 of 2022

Vinay Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vinod Kumar Singh, Sri Manoj Kumar Singh, Sri Birendra Prasad Maurya

Counsel for the Respondents:
Sri Ankit Gaur, State Law Officer, Sri Anil Kumar Singh

Civil Law – Constitution of India, 1950 - Article 226 - Appointment - through Competitive Examination – writ petition for - evaluation of OMR Sheet on the account of minor error – permission for correction would lead to chaos – hence petition dismissed – Special Appeal – once the instructions were clear and applied universally to all candidates – evaluation of OMR sheet cannot be permitted physically either – if an error as per the instruction is fatal, a hands-off approached of the writ court is justified – Appeal dismissed.(Para – 15, 31, 32)

Special Appeal dismissed. (E-11)

List of Cases cited: -

1. Karnataka Public Service Commission & ors. Vs BM Vijaya Shankar & ors. (AIR 1992 SC 952),

2. St. of Tamil Nadu & ors. Vs G. Hemalathaa & anr.(2019 SCC online SC 1113),

3. Jyoti Yadav & anr.Vs St. UP & ors. (WP No. 322/2021 order Dt. 08.04.2021),

4. Ram Manohar Yadav Vs St. of UP & others (Special Appeal No. 834/2013 Judgment & order Dt. 30.05.2013),

5. Arti Verma Vs St. of UP & ors. (Special Appeal No. 123/2014 Decided on Dt. 05.02.2014),

6. Km. Richa Pandey Vs Examination Regulatory Authority & anr.(Special Appeal No. 117/2014 Decided on Dt. 18.02.2014),

7. Jai Kiran Singh & ors. Vs St. of UP & ors. (Special Appeal No. 90/2018 Decided on Dt. 25.04.2018),

8. Ramesh Chandra & ors. Vs St. of UP & ors. decided on Dt. 09.06.2020),

9. Arvind Kumar Yadav Vs St. of UP & ors. (Special Appeal No. 988/2020 decided on Dt. 24.11.2020).

10. Chairman Madhyamic Shiksha Sewa Chayan Board & anr.Vs Jhallar & anr.(Special Appeal No. 1187/2020 Decided on 13.01.2021),

11. Shiv Prasad Duvey & ors. Vs St. of Uttar Pradesh - (Special Appeal Defective No. 494/2020 Decided on Dt. 08.04.22021),

12. Jitendra Sharma & anr.Vs St. of Rajasthan & ors. (DB Civil Special Appeal (W) No. 73/2021 Decided on Dt. 02.02.2021).

(Delivered by Hon'ble Prakash Padia, J.)

1. The order dated December 17, 2021 passed by the Single Judge has been challenged by filing present intra court appeal.

2. The facts giving rise to this appeal in a nutshell are that the writ-petitioner had preferred the writ petition in question stating therein that being fully eligible and qualified, he applied for vacancies advertised by the respondents-Uttar Pradesh Madhyamik Shiksha Sewa Chayan Board, Prayagraj (for short 'the Board') for the post of Trained Graduate Teacher being advertisement no. 01/2021 in the month of March, 2021. The appellant filled his application form in respect of the vacancies in the subject of Social Science under O.B.C. category. Result of the aforesaid examination was declared on October 26, 2021 wherein the cut off mark of the petitioner's category was 462.82500. The name of the appellant was not included in the select list while he had answered 87 questions correctly and got 350.804 marks, which are above than the cut off declared by the respondents.

3. Aggrieved against the aforesaid, a representation was submitted by the appellant but since no response was given, the petitioner-appellant preferred the writ petition. When the writ petition was taken up on November 26, 2021 the following order was passed:-

"According to the petitioner, he had appeared in T.G.T. examination pursuant to advertisement no.1 of 2021.According to final key answer published by the respondents, the petitioner would secure 350.804 marks which is more than the cut off marks in OBC category.

Sri A.K. Singh, learned counsel for the petitioner prays for and is granted ten days time to seek instructions in the matter and apprise the Court as to why the result of the petitioner has not been declared.

Put up as fresh on 17.12.2021."

4. Pursuant to the aforesaid, counsel for the respondent-board placed instructions before the learned Single Judge alongwith the photocopy of the OMR sheet of the writ-petitioner/appellant. The writ-petitioner/appellant had to answer only two subjects, namely History and Civics, whereas besides the said two subjects he had also answered the question of Economics, due to which OMR Sheet of the writ-petitioner/appellant could not be evaluated.

5. Taking into consideration the instructions alongwith OMR Sheet placed before the learned Single Judge, he was pleased to dismiss the writ petition.

6. Aggrieved against the aforesaid, the writ-petitioner/appellant has preferred the present appeal.

7. It is argued by the counsel for the appellant that the order passed by the learned Single Judge dated December 17,

2021 is unsustainable in the eyes of law. It is further argued that the appellant had attempted only two subjects, i.e., History and Civics, copy of which is annexed as Annexure-1 to the affidavit, but this fact has not been considered by the learned Single Judge and merely relying upon the ex-parte averments of the respondents, the writ petition filed by the writ-petitioner/appellant was dismissed. It is further argued that though on the basis of the instructions placed by the respondents counsel before the learned Single Judge, the writ petition was dismissed but no liberty was given to the counsel for the appellant to meet the above version of the respondents. It is further argued that no opportunity of hearing was given to the counsel for the writ-petitioner/appellant to reply the incorrect version of the respondent.

8. On the other hand, it is argued by Shri Anil Kumar Singh, learned counsel for the respondent-Board that in the OMR Sheet of the writ-petitioner/appellant apart from the subjects namely History and Civics, he had also answered the question of Economics, due to which OMR Sheet of the writ-petitioner/appellant could not be evaluated. It is further argued by him that as per Clause-2 of the instructions, condition nos. 6, 9 & 12 of the advertisement have not been followed by the writ-petitioner/appellant, due to which his OMR Sheet was not evaluated.

9. It is further argued by the learned counsel for the respondents that there were clear instructions that if any of the fields, including the roll number, is incorrectly filled then the OMR sheet would not be evaluated. He submits that OMR sheets have been universally adopted by examining bodies that conduct public examinations at a large-scale with a view to expedite the process of evaluation. Data, including answers rendered by darkening the circles or bubbles appearing on an OMR sheet is scanned by scanners and the scanned data is evaluated with the aid of software. In case, there is mistake or mismatch of the data furnished, the software rejects the OMR sheet. Therefore, a candidate has to take complete care not only in reading the instructions, but also in following them because it is not feasible for an examining body in an examination of such magnitude to manually evaluate each answer sheet. He submitted that where mistakes occur in filling of OMR sheets, the mistakes are not condonable.

10. Copy of the instructions alongwith the photocopy of OMR Sheet of the writ-petitioner/appellant were placed before us by the counsel for the respondent-board.

11. Heard counsel for the parties and perused the record.

12. On perusal of photocopy of OMR Sheet of writ-petitioner/appellant, it is clear that apart from two subjects namely History and Civics, the writ-petitioner/appellant has answered question no.2 of 3rd subject namely Economics. Thus the writ- petitioner has attempted/answered 3 subjects instead of 2 subjects. As per instructions provided by the learned Counsel for the respondent-Board, on OMR sheet specific instructions has been mentioned that incomplete or wrongly filed up OMR Sheet will not be accepted. The instructions No. 6, 9 and 12 of OMR sheet are as under:-

"6. उत्तर पत्रक में दिये गये स्थान को ही भरें अन्यत्र कोई चिन्ह न लगायें।

9ण उत्तर पत्रक को इलेक्ट्रानिक माध्यम से संसाधित किया जाएगा। अपूर्ण अथवा गलत तरीके से भरा गया उत्तर पत्रक अमान्य होगा और इसका उत्तरदायित्व पूर्णतया अभ्यर्थी का होगा।

12ण इस उत्तर पत्रक पर उचित स्थान के अतिरिक्त कुछ न लिखें अन्यथा उत्तर पत्रक अमान्य कर दिया जयेगा।"

13. From the above instructions, it is more than clear that the candidates were repeatedly forewarned about taking care while filling up the OMR answer sheet and indicating their particulars. The reasons are not far to understand, inasmuch as, the OMR answer sheets are electronically checked for the purpose of ensuring minimum human intervention so as to ensure secrecy and credibility of the entire examination process. When the OMR answer sheets are evaluated electronically, any mistake committed by the candidate would be detected and its treatment is electronically fed, i.e., in case of any discrepancy in the particulars of the candidates indicated in the OMR answer sheet, same are not to be evaluated.

14. The plea raised that the mistake committed by the appellant was minor and technical, which on the face of it may appear to be so, however, in case the correction of said mistake is permitted, the same would surely compromise the secrecy of the OMR answer sheet and the evaluation process, inasmuch as, on a request being made to permit correction, the OMR answer sheet would have to be taken out from the entire lot, the same would be corrected, resulting in identification of the OMR answer sheet with respect to a particular candidate and a possibility of further tinkering with the OMR answer sheet cannot be ruled out.

15. In the present case, the appellant may be one candidate, however, in a given examination there may be several such candidates, who may claim to have committed some mistakes in indicating the particulars and if it is held as a matter of principle that such mistakes in OMR sheets must be permitted to be corrected, the same would lead to chaos, inasmuch as, all such candidates then would be required to be permitted to make corrections, exposing the entire lot of OMR answer sheets, which consequence cannot be permitted.

16. The Hon'ble Supreme Court way back in the year 1992 in the case of **Karnataka Public Service Commission and others v. B.M. Vijaya Shankar and others, AIR 1992 SC 952**, held that the Competitive examinations are required to be conducted by the Commission for public service in strict secrecy to get the best brain and that the instructions contained in the answer-sheet should be complied with in their letter and spirit. The relevant portion of the judgment of Hon'ble Supreme Court in the case of Karnataka Public Service Commission (Supra), is reproduced below:-

"Competitive examinations are required to be conducted by the Commission for public service in strict secrecy to get the best brain. Public interest requires no compromise on it. Any violation of it should be visited strictly. Absence of any expectation of hearing in matters which do not affect any interest and call for immediate action, such as the present one, where it would have delayed declaration of list of other candidates which would have been more unfair and unjust are rare but well recognised exceptions to the rule of natural justice. It cannot be equated with where a student is found copying in the examination or an inference arises against him for copying due to similarity in answers of number of other candidates or

he is charged with misconduct or misbehavior. Direction not to write roll number was clear and explicit. It was printed on the first page of every answer book. Once it was violated the issue of bonafide and honest mistake did not arise. Its consequences, even, if not provided did not make any difference in law. The action could not be characterised as arbitrary. It was not denial of equal opportunity. The reverse may be true."

17. The sanctity of the instructions issued for the conduct of examination and consequence of their violation has been dealt with by Hon'ble Supreme Court in the case of **State of Tamil Nadu and others Vs. G.Hemalathaa and Another, reported as 2019 SCC online SC 1113**, wherein, it was inter alia laid down as under:

"7.We have given our anxious consideration to the submissions made by the learned Senior Counsel for the Respondent. The Instructions issued by the Commission are mandatory, having the force of law and they have to be strictly complied with. Strict adherence to the terms and conditions of the Instructions is of paramount importance. The High Court in exercise of powers under Article 226 the Constitution cannot modify/relax the Instructions issued by the Commission.

8. The High Court after summoning and perusing the answer sheet of the Respondent was convinced that there was infraction of the Instructions. However, the High Court granted the relief to the Respondent on a sympathetic consideration on humanitarian ground. The judgments cited by the learned Senior Counsel for the Respondent in in Taherakhatoon (D) By LRs vs. Salambin Mohammad and Chandra Singh and Others vs. State of Rajasthan and Another in support of her arguments that we should not entertain this appeal in the absence of any substantial questions of law are not applicable to the facts of this case.

9. In spite of the finding that there was no adherence to the Instructions, the High Court granted the relief, ignoring the mandatory nature of the Instructions. It cannot be said that such exercise of discretion should be affirmed by us, especially when such direction is in the teeth of the Instructions which are binding on the candidates taking the examinations.

10. In her persuasive appeal, Ms. Mohana sought to persuade us to dismiss the appeal which would enable the Respondent to compete in the selection to the post of Civil Judge. It is a well-known adage that, hard cases make bad law. In Umesh Chandra Shukla v. Union of India (1985) 3 SCC 721, Venkataramiah, J., held that:

"13.... exercise of such power of moderation is likely to create a feeling of distrust in the process of selection to public appointments which is intended to be fair and impartial. It may also result in the violation of the principle of equality and may lead to arbitrariness. The cases pointed out by the High Court are no doubt hard cases, but hard cases cannot be allowed to make bad law. In the circumstances, we lean in favour of a strict construction of the Rules and hold that the High Court had no such power under the Rules."

11. Roberts, CJ. in Caperton v. A.T. Massey [556 U.S. 868 (2009)] held that:

"Extreme cases often test the bounds of established legal principles. There is a cost to (9 of 14) [CW-

12323/2020] yielding to the desire to correct the extreme case, rather than adhering to the legal principle. That cost has been demonstrated so often that it is captured in a legal aphorism: "Hard cases make bad law."

12. After giving a thoughtful consideration, we are afraid that we cannot approve the judgment of the High Court as any order in favour of the candidate who has violated the mandatory Instructions would be laying down bad law. The other submission made by Ms. Mohana that an order can be passed by us under Article 142 of the Constitution which shall not be treated as a precedent also does not appeal to us.

13. In view of the aforementioned, the judgment of the High Court is set aside and the appeal is allowed."

18. The Hon'ble Supreme Court laid down that the instructions issued are mandatory and have to be strictly complied with, as strict adherence to the terms and conditions of the instructions is of paramount importance. Reference was also made to the well known adage that 'hard cases make bad law' and that any order in favour of the candidate, who has violated the mandatory instructions would be laying down bad law.

19. The above emphasis laid by the Hon'ble Supreme Court for strict adherence to the instructions clearly applies to the present case as well.

20. Apart from the same a clarification was issued by the Government on March 5, 2021 with reference to the recruitment process. It was mentioned therein that in case any discrepancy is found in the on-line application, the candidature is liable to be rejected. The aforesaid clarification was subject matter of challenge before the Hon'ble Supreme Court in **Writ Petition (Civil) No. 322 of 2021 (Jyoti Yadav and another Vs. State of U.P. and others),** whereby bunch of petitions were dismissed vide order dated April 8, 2021. The clarification dated March 5, 2021 was upheld. It is observed in the aforesaid order that for the mistakes committed by individual candidates, the entire process of selection may not be delayed and put to prejudice. The norms prescribed to have definiteness in the process cannot be held to be arbitrary or irrational. Paragraph 15 of the aforesaid judgement is reproduced below:-

"If, at every juncture, any mistakes by the candidates were to be addressed and considered at individual level, the entire process of selection may stand delayed and put to prejudice. In order to have definiteness in the matter, certain norms had to be prescribed and prescription of such stipulations cannot be termed to be arbitrary or irrational. Every candidate was put to notice twice over, by the Guidelines and the Advertisement."

21. This issue has also been examined by the Courts time and again.

22. In **Special Appeal No. 834 of 2013 (Ram Manohar Yadav v. State of U.P. and others) decided on May 30, 2013,** the Division Bench of this Court observed as follows:-

"We are not inclined to interfere in this special appeal because interference in such matters would result in thoroughly incompetent or utterly negligent persons

becoming teachers and spoiling the future of the children whom they will teach.

If prospective teacher can not even correctly fill up the simple on line application form for his employment, it is obvious what he is going to teach if appointed. There are certain decisions cited on this issue. But none of them deal with this aspect whether under the discretionary jurisdiction of the Court under Article 226 of the Constitution of India such incompetent persons should be allowed to play with the future of the next generation.

Therefore, we are of the opinion that the petitioner/appellant should wait till he attains sufficient maturity and learns to be more careful in filling up the applications for jobs. The appeal is therefore, dismissed."

23. In **Special Appeal Defective No. 123 of 2014 (Arti Verma vs. State of U.P. and others) decided on February 05, 2014**, the Division Bench of this Court observed as follows:-

"The appellant made an on-line application for engagement as Shiksha Anudeshak (Arts) for 2012-13 on a contract basis. In the application, the appellant claimed to have belonged to the Freedom Fighters' category, which was admittedly not the category to which the appellant could have claimed. The name of the appellant was shown in the select list of candidates belonging to the Freedom Fighters' Category. The Secretary to the State Government rejected the representation filed by the appellant for correcting the error in the on line application. The learned Single Judge dismissed the petition filed by the appellant under Article 226 of the Constitution for setting aside the order passed by the Secretary noting that under the declaration given by the appellant while filling up the application, it was stated that the candidature could be rejected if any discrepancy was found. The learned Single Judge has also relied upon a judgment of the Division Bench rendered in Ram Manohar Yadav Vs. State of U.P. & three Ors., (Special Appeal-834 of 2013).

In the judgment of the Division Bench in Ram Manohar Yadav (supra) it was observed that where an applicant has shown his incompetence or negligence in not not even correctly filling up a simple on line application form for employment, interference of the High Court under Article 226 of the Constitution was not warranted.

However, learned counsel appearing on behalf of the appellant relied upon a judgment of a Division Bench in Puspraj Singh Vs. State of U.P. & Ors., (Special Appeal-75 of 2013). That is a case where the appellant had wrongly described himself as a female candidate. On these facts, the Division Bench accepted the contention that human error had caused an incorrect on line entry, since there was no reason for the appellant to make such a declaration and that he did not stand to gain anything by making such an incorrect entry. In the present case, the appellant claimed the benefit of Freedom Fighters category. The contention that this was as a result of an error committed by the Computer Operator cannot simply be accepted for the reason that the appellant would necessarily be responsible for any statement which he made on line. If the Courts were to accept such a plea of the appellant, that would result in a situation where the appellant would get the benefit

of a wrong category if the wrong claim went unnoticed and if noticed, the appellant could always turn around and claim that this was as a result of human error. Each candidate necessarily must bear the consequences of his failure to fill up the application form correctly. No fault can, therefore, be found in rejecting the application for correction when the candidate himself has failed to make a proper disclosure or where, as in the present case, the application is submitted under a wrong category. Interference of the High Court under Article 226 of the Constitution is clearly not warranted in such matters as it creates grave uncertainty since the selection process cannot be finally completed. Moreover, in the present case, the appointment was of a contractual nature for a period of eleven months. Hence, considering the matter from any perspective, the learned Single Judge was not in error in dismissing the petition under Article 226 of the Constitution.

The Special Appeal is, accordingly, dismissed."

24. **In Special Appeal Defective No. 117 of 2014 (Km. Richa Pandey vs. Examination Regulatory Authority and another) decided on February 18, 2014,** the Division Bench of this Court observed as follows:-

"The OMR sheets are provided to the candidates to speed up evaluation through help of computer. In case we accept the argument of learned counsel for the petitioner that the language in which the petitioner had written essay could be checked up by the examiner before feeding answer book into computer, the entire process of expediting the results will be lost. Where OMR sheets are to be examined with aid of the computer, it is not advisable and practical to direct that each OMR sheet should be checked by the examiners and the columns, which have not been filled up may be filled up by the examiner himself with the aid of the language used by the candidates for writing essay. We are informed by Standing Counsel that about seven lacs candidates had appeared in the test.

With such large number of candidates appearing in TET Examination 2013 it would not have been possible nor it was feasible for examiners to look into the answer sheets individually before feeding them into computer for correcting any mistakes.

We agree with the reasoning given by the learned Single Judge that where the applicant is not capable of correctly filling up the form, she is not entitled to any discretionary relief from the Court.

The special appeal is dismissed."

25. **A similar controversy has also been dealt by this Court in Special Appeal No. 90 of 2018 decided on April 25, 2018 (Jai Karan Singh and 52 others v. State of U.P. and others).** The relevant portion of the aforesaid judgment reads as follows:-

"The writ petitioners had admittedly given incorrect information in the OMR Answer sheet relating to either the Registration Number, the Roll Number or Question Booklet Series and the Language attempted and that is why their results have not been declared. The manual check can be conducted but the larger issue before the Court is whether such a direction should be given at all. In our opinion, it is

for the examining body to work out a method for the recruitment process and the manner in which Answer Sheets is evaluated and once clear instructions have been given to the candidates that incorrect information relating to Registration Number, Roll Number, Question Booklet Series and Language attempted would lead to non- declaration of the result, the examining body should not be directed to conduct a manual check 72, 876 OMR answer-sheets. This would take substantial time and ultimately result in causing delay in the declaration of the result. It is this delay that was sought to be eliminated by requiring the candidates to give reasons in the OMR Answer Sheet so that they could be scanned by electronic means.

The error committed by the candidates cannot be said to be minor in nature. It is the Registration Number, Roll Number that determines identity of the candidates. The candidates who appeared in the examination were mature students and were to be appointed as Assistant Teachers in institution. They should have read the instructions that was issued time and again and should have correctly filled the entries relating to Roll Number, Registration Number, Question Booklet Series and Language attempted. The entries were, however, inaccurately filled as a result of which the scanner has not been able to process the result."

26. Similar view has also been taken by the another Division Bench in **Special Appeal No.247 of 2020 decided on June 09, 2020 (Ramesh Chandra and others vs. The State of U.P. and others).** The following was observed:-

"if this Court permits the appellants and persons alike to have manual corrections in the OMR sheet, then that will frustrate the entire purpose of using technology for expeditious completion of the process of selection."

27. In **Arvind Kumar Yadav Vs. The State of U.P. and another** passed in **Special Appeal Defective No. 988 of 2020 decided on November 24, 2020,** the Division Bench of this Court observed as follows:-

"Factual matrix of the case is that the appellant-petitioner faced a process of selection by appearing in TGT Examination-2016. The examination aforesaid was conducted by use of Optical Mark Recognition (OMR) sheet. The appellant-petitioner failed to fill in the sheet concerned properly. He therefore, made a request to cure the deficiency manually. The respondents refused for the same and, therefore, a petition for writ was filed that came to be dismissed under the order impugned.

Learned single Bench held that the instructions contained in OMR sheet are to be adhered strictly and no deficiency could have been satisfied manually.

In appeal, the argument advanced by learned counsel appearing on behalf of the appellant-petitioner is that the appellant-petitioner inadvertently caused an error and that deserves to be rectified. The appellant-petitioner should have been allowed to cure the deficiency manually. We do not find any merit in the argument advanced.

The OMR sheet is to be examined electronically by using artificial intelligence and in that no deficiency could have been satisfied manually.

In view of it, we do not find any just reason to interfere in the matter. The appeal is dismissed."

28. In **Special Appeal Defective No. 1187 of 2020 (Chirman Madhyamic Shiksha Sewa Chayan Board and another Vs. Jhallar and another) decided on January 13, 2021,** the Division Bench of this Court observed as follows:-

"For selection to the post of Trained Graduate Teacher or Post Graduate Teachers, the seriousness needs to be attached in case, subject code is not marked in the OMR sheet. Such errors cannot be ignored to extend the benefit to defaulting candidates. It is more so when now the process involve technology to complete it expeditiously. The acceptance of the prayer of the petitioner/ non-appellant would have delayed the selection. It is more so when with declaration of result, the process for appointment has been carried out and would be effected if the plea of the petitioner/ non-appellant is accepted. It is not that petitioner/ non-appellant is not educated enough to read the instruction. It is when the selection was for the post of P.G.T. "

29. While deciding the aforesaid Special Appeal, judgment given in the case of Jai Karan Singh's case (Supra) was also taken into consideration.

30. A similar controversy has also been raised before the Division Bench of this Court in the case of **Shiv Prasad Duvey and others vs. State of U.P. and another, decided on April 08, 2021**, **Special Appeal Defective No.494 of 2020.** The arguments raised before the Division Bench was that there was a mistake with regard to the circles darkened/filling up the bubbles/circles relating to their Roll number in the OMR sheet. The aforesaid argument was dealt in paragraph 11 of the aforesaid order which is quoted below:-

"11. No doubt, it does appear to be a hard case, at least for the appellants 2, 3 and 4. But the issue here is whether the writ court should interfere in such matters, particularly when instructions are clear and categorical that an erroneous entry in the OMR sheet in respect of certain fields of information sought, including Roll number, would render the answer sheet invalid. The said issue is no longer res integra.

31. A Division Bench of the Rajasthan High Court (Jodhpur Bench) has also taken similar view in the case of **Jitendra Sharma and Another Vs. State of Rajasthan and Others. : D.B.Civil Special Appeal (W) No. 73/2021 decided on February 2, 2021,** the relevant portion of the aforesaid judgment reads as follows:-

"3. Precisely, the case set out by the appellants before the learned Single Judge was that it was only a bonafide mistake on their part that the column meant for corresponding question booklet remained unfilled and therefore, on that account, the refusal of the respondents to evaluate the OMR answer sheets, is absolutely unjustified. It was contended that when the provision has been made for evaluating the answer sheets while deducting 5 marks in case of wrong mentioning of roll number, it was incumbent upon the respondents to evaluate the answer sheets while permitting the appellants to rectify the error crept in.

4. Learned counsel appearing for the appellants contended that the appellants were not aware about issuance of two sets

of question booklet inasmuch as, they were issued set 'B' of question booklet. Reiterating the contention raised before the learned Single Judge, learned counsel submitted that in case of mentioning of wrong roll number, the mistake is permitted to be rectified by deducting 5 marks, there was no reason not to permit the appellants to rectify the mistake of non indication of the set of question booklet opted.

5. Indisputably, before attempting the question paper, the candidates were expected to read the instructions carefully. Unless question booklet 'A' or 'B' opted by the appellants is reflected in the OMR sheets, the answers given could not have been evaluated by OMR software application. The appellants, who were negligent in not reading the instructions properly and not filling the column meant for corresponding question booklet set, could not have been granted indulgence to fill up the column in the OMR sheets subsequently. If the OMR sheets are permitted to be opened and corrected in this manner, it may result in making fairness and transparency in the examination process questionable. For the parity of reasons, the OMR sheet cannot be permitted to be evaluated physically either.

6. For the aforementioned reasons, we are in agreement with the view taken by the learned Single Judge."

32. In view of the discussion, the fact remains that once the instructions were clear and were to apply universally to all candidates, if the error as per the instructions is fatal, a hands-off approach by the Writ Court is justified, hence we find no good reason to interfere in the matter. Consequently, the appeal is **dismissed.**

(2022)03ILR A740
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.02.2022

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE JASPREET SINGH, J.

Special Appeal No. 45 of 2022
arising out of Writ -A No. 377 of 2022

Kanhaiya Bux Singh ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Suresh Sharma

Counsel for the Respondents:
Sri H.P. Srivastava, A.C.G.C., Sri Rahul Shukla

(A) Civil Law – Constitution of India, 1950 - Article 14, 226 - - Appellant moved belated claim – for arrears of salary – for a particular period of time after retirement of 6 years – rejected being not entitled – writ petition - dismissed on the ground of delay & laches - Special Appeal – keeping in view of the authoritative enunciation of law & a disputed question of fact cannot be gone into writ jurisdiction - appeal accordingly, dismissed.(Para - 4, 20, 21)

Special Appeal d**ismissed.** (E-11)

List of Cases cited:-

1. St. of Uttaranchal & anr.Vs Sri Shiv Charan Singh Bhandari & ors. (2013 (6) SLR 629),

2. U.O.I. & ors. Vs M. K. Sarkar, (2010) 2 SCC 59

3. St. of Orissa Vs Arun Kumar Patnaik, (1976) 3 SCC 579

4. Bharat Sanchar Nigam Ltd. Vs Ghanshyam Dass & ors., (2011) 4 SCC 374

5. St. of T. N. Vs Seshachalam, (2007) 10 SCC 137

6. Ghulam Rasool Lone VsSt. of J&K & anr., (2009) 15 SCC 321

7. New Delhi Municipal Council Vs Pan Singh & ors., (2007) 9 SCC 278

8. P. S. Sadasivasway Vs St. of T.N., (1975) 1 SCC 152

9. Chennai Metropolitan Water Supply and Sewerage Board & ors. Vs T. T. Murali Babu, 2014 (4) SCC 108

10. Bal Krishan Vs St. of Punjab & ors. 2013(2) RSJ 18, (P&H)

11. U.O.I. & ors. Vs M K Sarkar (2010 Vol. 2 SCC 59),

12. Vijay Kumar Kaul & ors. Vs U.O.I. & ors., 2012 (7) SCC 610

13. Prabhakar Vs Joint Director Sericulture Department & anr., (2015) 15 SCC 1

14. St. of Jammu & Kashmir Vs R. K. Zalpuri & ors., 2015 (15) SCC 602

15. U.O.I. & ors. Vs Chaman Rana, 2018 (5) SCC 798

16. Senior Divisional Manager, L.I.C. Vs Shree Lal Meena (2019) 4 SCC 479

17. Bharat Coking Coal Ltd. & ors. Vs Shyam Kishore Singh (Civil Appeal No.1009 of 2020) Dated 5.2.2020

18. St. of J&K & ors. Vs S. Bhupinder Singh, (LPASW No.192 of 2017) Dated 30.12.2017

19. Farooq Ahmad Vs St. of J&K & ors., (LPA No.210 of 2019) Dated 21.8.2019

20. St. of Mah. Vs Digambar, (1995 4 SCC 683)

21. St. of M. P. & ors. etc. etc. Vs Nandlal Jaiswal & ors. etc.(AIR 1987 SC 251)

(Delivered by Hon'ble Rajesh Bindal, C.J.
&
Hon'ble Jaspreet Singh, J.)

1. The order dated January 28, 2022 passed by learned Single Judge has been impugned by filing present intra-Court appeal.

2. The claim made before the learned Single Judge was that the appellant has not been paid salary for the period from July 1, 2015 to September 25, 2015. He retired from service on attaining the age of superannuation on March 31, 2016. The writ petition was dismissed on account of delay and laches and also noticing the fact that for the period from July 1, 2015 to September 25, 2015, petitioner, in fact, had not worked, hence was not entitled to any payment of salary.

3. Learned counsel for the appellant submitted that there was no delay in filing the writ petition as the appellant had been pursuing his remedy before the department and further that he handed over the matter to Mr. Sunil Kumar Bajpai, Advocate, but he did not file the writ petition.

4. After hearing the learned counsel for the appellant, we do not find that any case is made out for interference in the present appeal. Law on the principles of delay and laches is well settled. It is a case in which salary for the period from July 1, 2015 to September 25, 2015 has been sought by filing a petition in the year 2022, i.e., more than six years thereafter. The appellant had attained the age of superannuation on March 31, 2016.

Thereafter relationship of master and servant ceased and no issue with regard to any service dispute could have been raised more than six years after the retirement. Even repeated representations filed by an employee will not take care of the period of limitation or the principle of delay and laches on which the writ petition filed in this Court has to be examined.

5. Different facets of issue regarding delay and laches in filing the petition had been subject matter of consideration before Hon'ble the Supreme Court on number of occasions, wherein it has been consistently opined that the party can be denied relief if he sleeps over the matter.

6. In **State of Uttaranchal and another v. Sri Shiv Charan Singh Bhandari and others 2013 (6) SLR 629**, Hon'ble the Supreme Court, while considering the issue regarding delay and laches and referring to earlier judgments on the issue, opined that repeated representations made will not keep the issues alive. A stale or a dead issue/dispute cannot be got revived even if such a representation has either been decided by the authority or got decided by getting a direction from the court as the issue regarding delay and laches is to be decided with reference to original cause of action and not with reference to any such order passed. Delay and laches on the part of a government servant may even deprive him of the benefit which had been given to others. Article 14 of the Constitution of India, in a situation of that nature, will not be attracted as it is well known that law leans in favour of those who are alert and vigilant. Even equality has to be claimed at the right juncture and not on expiry of reasonable time. Even if there is no period prescribed for filing the writ petition under Article 226 of the Constitution of India, yet it should be filed within a reasonable time. Such an order promoting a junior should normally be challenged within a period of six months or at the most in a year of such promotion. Though it is not a strict rule, the courts can always interfere even subsequent thereto, but relief to a person, who allows things to happen and then approach the court and puts forward a stale claim and try to unsettle settled matters, can certainly be refused relief on account of delay and laches. Anyone who sleeps over his rights is bound to suffer. An employee who sleeps like Rip Van Winkle and got up from slumber at his own leisure, deserves to be denied the relief on account of delay and laches. Relevant paragraphs from the aforesaid judgment are extracted below:-

"13. We have no trace of doubt that the respondents could have challenged the ad hoc promotion conferred on the junior employee at the relevant time. They chose not to do so for six years and the junior employee held the promotional post for six years till regular promotion took place. The submission of the learned counsel for the respondents is that they had given representations at the relevant time but the same fell in deaf ears. It is interesting to note that when the regular selection took place, they accepted the position solely because the seniority was maintained and, thereafter, they knocked at the doors of the tribunal only in 2003. It is clear as noon day that the cause of action had arisen for assailing the order when the junior employee was promoted on ad hoc basis on 15.11.1983. In C. Jacob v. Director of Geology and Mining and another, (2008) 10 SCC 115, a two-Judge Bench was dealing with the concept of representations and the directions issued by

the court or tribunal to consider the representations and the challenge to the said rejection thereafter. In that context, the court has expressed thus:-

"Every representation to the Government for relief, may not be replied on merits.

Representations relating to matters which have become stale or barred by limitation, can be rejected on that ground alone, without examining the merits of the claim. In regard to representations unrelated to the Department, the reply may be only to inform that the matter did not concern the Department or to inform the appropriate Department. Representations with incomplete particulars may be replied by seeking relevant particulars. The replies to such representations, cannot furnish a fresh cause of action or revive a stale or dead claim."

14. In Union of India and others v. M. K. Sarkar, (2010) 2 SCC 59, this Court, after referring to C. Jacob (supra) has ruled that when a belated representation in regard to a "stale" or "dead" issue/dispute is considered and decided, in compliance with a direction by the court/tribunal to do so, the date of such decision cannot be considered as furnishing a fresh cause of action for reviving the "dead" issue or time- barred dispute. The issue of limitation or delay and laches should be considered with reference to the original cause of action and not with reference to the date on which an order is passed in compliance with a Court's direction. Neither a court's direction to consider a representation issued without examining the merits, nor a decision given in compliance with such direction, will extend the limitation, or erase the delay and laches.

15. From the aforesaid authorities it is clear as crystal that even if the court or tribunal directs for consideration of representations relating to a stale claim or dead grievance it does not give rise to a fresh cause of action. The dead cause of action cannot rise like a phoenix. Similarly, a mere submission of representation to the competent authority does not arrest time. In Karnataka Power Corpn. Ltd. through its Chairman & Managing Director v. K. Thangappan and another, (2006) 4 SCC 322, the Court took note of the factual position and laid down that when nearly for two decades the respondent-workmen therein had remained silent mere making of representations could not justify a belated approach.

16. In State of Orissa v. Pyarimohan Samantaray, (1977) 3 SCC 396, it has been opined that making of repeated representations is not a satisfactory explanation of delay. The said principle was reiterated in State of Orissa v. Arun Kumar Patnaik, (1976) 3 SCC 579.

17. In Bharat Sanchar Nigam Limited v. Ghanshyam Dass (2) and others, (2011) 4 SCC 374, a three-Judge Bench of this Court reiterated the principle stated in Jagdish Lal v. State of Haryana, (1977) 6 SCC 538 and proceeded to observe that as the respondents therein preferred to sleep over their rights and approached the tribunal in 1997, they would not get the benefit of the order dated 7.7.1992.

18. In State of T. N. v. Seshachalam, (2007) 10 SCC 137, this Court, testing the equality clause on the

bedrock of delay and laches pertaining to grant of service benefit, has ruled thus:-

"... filing of representations alone would not save the period of limitation. Delay or laches is a relevant factor for a court of law to determine the question as to whether the claim made by an applicant deserves consideration. Delay and/or laches on the part of a government servant may deprive him of the benefit which had been given to others. Article 14 of the Constitution of India would not, in a situation of that nature, be attracted as it is well known that law leans in favour of those who are alert and vigilant."

19. There can be no cavil over the fact that the claim of promotion is based on the concept of equality and equitability, but the said relief has to be claimed within a reasonable time. The said principle has been stated in Ghulam Rasool Lone v.State of Jammu and Kashmir and another, (2009) 15 SCC 321.

20. In New Delhi Municipal Council v. Pan Singh and others, (2007) 9 SCC 278, the Court has opined that though there is no period of limitation provided for filing a writ petition under Article 226 of the Constitution of India, yet ordinarily a writ petition should be filed within a reasonable time. In the said case the respondents had filed the writ petition after seventeen years and the court, as stated earlier, took note of the delay and laches as relevant factors and set aside the order passed by the High Court which had exercised the discretionary jurisdiction.

21. Presently, sitting in a time machine, we may refer to a two Judge Bench decision in P. S. Sadasivasway v. State of Tamil Nadu, (1975) 1 SCC 152, wherein it has been laid down that a person aggrieved by an order of promoting a junior over his head should approach the court at least within six months or at the most a year of such promotion. It is not that there is any period of limitation for the Courts to exercise their powers under Article 226 nor is it that there can never be a case where the Courts cannot interfere in a matter after the passage of a certain length of time, but it would be a sound and wise exercise of discretion for the Courts to refuse to exercise their extraordinary powers under Article 226 in the case of persons who do not approach it expeditiously for the relief and who stand by and allow things to happen and then approach the court to put forward stale claims and try to unsettle settled matters.

22. We are absolutely conscious that in the case at hand the seniority has not been disturbed in the promotional cadre and no promotions may be unsettled. There may not be unsettlement of the settled position but, a pregnant one, the respondents chose to sleep like Rip Van Winkle and got up from their slumber at their own leisure, for some reason which is fathomable to them only. But such fathoming of reasons by oneself is not countenanced in law. Anyone who sleeps over his right is bound to suffer. As we perceive neither the tribunal nor the High Court has appreciated these aspects in proper perspective and proceeded on the base that a junior was promoted and, therefore, the seniors cannot be denied the promotion. Remaining oblivious to the factum of delay and laches and granting relief is contrary to all settled principles and even would not remotely attract the concept of discretion. We may hasten to add that the same may not be applicable in all circumstances where certain categories of fundamental rights are infringed. But, a stale claim of getting promotional benefits

definitely should not have been entertained by the tribunal and accepted by the High Court. True it is, notional promotional benefits have been granted but the same is likely to affect the State exchequer regard being had to the fixation of pay and the pension. These aspects have not been taken into consideration. What is urged before us by the learned counsel for the respondents is that they should have been equally treated with Madhav Singh Tadagi. But equality has to be claimed at the right juncture and not after expiry of two decades. Not for nothing, it has been said that everything may stop but not the time, for all are in a way slaves of time. There may not be any provision providing for limitation but a grievance relating to promotion cannot be given a new lease of life at any point of time."

7. The aforesaid view was followed by Hon'ble the Supreme Court in **Union of India and others vs Chaman Rana 2018(5) SCC 798** and **Union of India and others vs. C. Girija and others 2019 (3) SCALE 527.**

8. In **Chennai Metropolitan Water Supply and Sewerage Board and others v. T. T. Murali Babu 2014 (4) SCC 108**, Hon'ble the Supreme Court opined as under:-

"13. First, we shall deal with the facet of delay. In Maharashtra State Road Transport Corporation v. Balwant Regular Motor Service, Amravati and others, AIR 1969 SC 329, the Court referred to the principle that has been stated by Sir Barnes Peacock in Lindsay Petroleum Co. v. Prosper Armstrong Hurd, Abram Farewall, and John Kemp, (1874) 5 PC 221, which is as follows:-

"Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

14. In State of Mahrashtra v. Digambar, (1995) 4 SCC 683, while dealing with exercise of power of the High Court under Article 226 of the Constitution, the Court observed that power of the High Court to be exercised under Article 226 of the Constitution, if is discretionary, its exercise must be judicious and reasonable, admits of no controversy. It is for that reason, a person's entitlement for relief from a High Court under Article 226 of the Constitution, be it against the State or anybody else, even if is founded on the allegation of infringement of his legal right, has to necessarily depend upon unblameworthy conduct of the person seeking relief, and the court refuses to grant the discretionary relief to such person in exercise of such power, when he approaches it with unclean hands or blameworthy conduct.

15. In State of M. P. and others etc. etc. vs. Nandlal Jaiswal and others etc. etc., AIR 1987 SC 251, the Court observed that it is well settled that power of the High Court to issue an appropriate writ underArticle 226 of the Constitution is discretionary and the High Court in exercise of its discretion does not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic. It has been further stated therein that if there is inordinate delay on the part of the petitioner in filing a petition and such delay is not satisfactorily explained, the High Court may decline to intervene and grant relief in the exercise of its writ jurisdiction. Emphasis was laid on the principle of delay and laches stating that resort to the extraordinary remedy under the writ jurisdiction at a belated stage is likely to cause confusion and public inconvenience and bring in injustice.

16. Thus, the doctrine of delay and laches should not be lightly brushed aside. A writ court is required to weigh the explanation offered and the acceptability of the same. The court should bear in mind that it is exercising an extraordinary and equitable jurisdiction. As a constitutional court it has a duty to protect the rights of the citizens but simultaneously it is to keep itself alive to the primary principle that when an aggrieved person, without adequate reason, approaches the court at his own leisure or pleasure, the court would be under legal obligation to scrutinize whether the lis at a belated stage should be entertained or not. Be it noted, delay comes in the way of equity. In certain circumstances delay and laches may not be fatal but in most circumstances inordinate delay would only invite disaster for the litigant who knocks at the doors of the court. Delay reflects inactivity and inaction on the part of a litigant "a litigant who has forgotten the basic norms, namely, "procrastination is the greatest thief of time" and second, law does not permit one to sleep and rise like a phoenix. Delay does bring in hazard and causes injury to the lis. In the case at hand, though there has been four years' delay in approaching the court, yet the writ court chose not to address the same. It is the duty of the court to scrutinize whether such enormous delay is to be ignored without any justification. That apart, in the present case, such belated approach gains more significance as the respondent employee being absolutely careless to his duty and nurturing a lackadaisical attitude to the responsibility had remained unauthorisedly absent on the pretext of some kind of ill health. We repeat at the cost of repetition that remaining innocuously oblivious to such delay does not foster the cause of justice. On the contrary, it brings in injustice, for it is likely to affect others. Such delay may have impact on others' ripened rights and may unnecessarily drag others into litigation which in acceptable realm of probability, may have been treated to have attained finality. A court is not expected to give indulgence to such indolent persons-who compete with `Kumbhakarna' or for that matter 'Rip Van Winkle'. In our considered opinion, such delay does not deserve any indulgence and on the said ground alone the writ court should have thrown the petition overboard at the very threshold."

9. In **Bal Krishan vs. State of Punjab and others 2013(2) RSJ 18, (P&H),** wherein the petitioner, after rendering about 34 years of service, sought refixation of his pay from the date he joined service by filing a petition more than three years after his retirement, the court

dismissed the writ petition on account of delay and laches only.

10. The issue regarding decision of a claim on a direction by the Court on the representation filed by a writ petitioner was also considered in **Union of India and others vs. M.K. Sarkar 2010(2) SCC 59**, wherein it was held that the issue of limitation or delay and laches is to be considered with reference to original cause of action and not with reference to an order passed in compliance to Court's direction. The Court's direction to consider representation or a decision given in compliance thereof, will not extend the limitation or erase the delay and laches.

11. In **Vijay Kumar Kaul and others vs. Union of India and others 2012 (7) SCC 610**, Hon'ble the Supreme Court declined relief to the petitioners who were fence sitters as they had approached the Court after the issues raised by other employees were decided. Relief was declined on account of delay and laches.

12. The issue was further examined in **Prabhakar vs. Joint Director Sericulture Department and another (2015) 15 SCC 1**. It was a case under the Industrial Disputes Act. In the aforesaid case the matter in dispute was regarding delay in raising the industrial dispute. The opinion expressed by the Court was that right not exercised for a long time is non-existent even if there is no limitation period prescribed. The litigant was non-suited on the doctrine of delay and laches as well as doctrine of acquiescence. Paragraph 38 of the judgment is extracted below:-

"38. Likewise, if a party having a right stands by and sees another acting in a manner inconsistent with that right and makes no objection while the act is in progress he cannot afterwards complain. This principle is based on the doctrine of acquiescence implying that in such a case party who did not make any objection acquiesced into the alleged wrongful act of the other party and, therefore, has no right to complain against that alleged wrong."

13. The Halsbury's Laws of England explains delay, latches and acquiescence as under:

"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."

14. In **State of Jammu & Kashmir vs. R. K. Zalpuri and others 2015 (15) SCC 602,** Hon'ble the Supreme Court considered the issue regarding delay and laches in raising the dispute before the

Court. It was opined that the issue sought to be raised by the petitioners therein was not required to be addressed on merits on account of delay and laches. The relevant paras thereof are extracted below:-

"27. The grievance agitated by the respondent did not deserve to be addressed on merits, for doctrine of delay and laches had already visited his claim like the chill of death which does not spare anyone even the one who fosters the idea and nurtures the attitude that he can sleep to avoid death and eventually proclaim "Deo gratias - thanks to God".

28. Another aspect needs to be stated. A writ court while deciding a writ petition is required to remain alive to the nature of the claim and the unexplained delay on the part of the writ petitioner. Stale claims are not to be adjudicated unless non-interference would cause grave injustice. The present case, need less to emphasise, did not justify adjudication. It deserves to be thrown overboard at the very threshold, for the writ petitioner had accepted the order of dismissal for half a decade and cultivated the feeling that he could freeze time and forever remain in the realm of constant present."

15. The aforesaid view was followed by Hon'ble the Supreme Court in **Union of India and others v. Chaman Rana 2018 (5) SCC 798.**

16. Subsequently, a Constitution Bench of Hon'ble the Supreme Court in **Senior Divisional Manager, Life Insurance Corporation v. Shree Lal Meena (2019) 4 SCC 479,** considering the principle of delay and laches, opined as under:-

"36. We may also find that the appellant remained silent for years together and that this Court, taking a particular view subsequently, in Sheel Kumar Jain v. New India Assurance Company Limited, (2011)12 SCC 197 would not entitle stale claims to be raised on this behalf, like that of the appellant. In fact the appellant slept over the matter for almost a little over two years even after the pronouncemtn of the judgment.

37. Thus, the endeavour of the appellant, to approach this Copurt seeking the relief, as prayed for, is clearly a misadventure, which is liable to be rejected, and the appeal is dismissed."

17. Recently, in **Bharat Coking Coal Ltd. And othyers v. Shyam Kishore Singh (Civil Appeal No.1009 of 2020) decided on 5.2.2020**, the issue regarding the delay and laches, was considered by Hon'ble the Supreme Court and a petition filed belatedly, seeking change in the date of birth in the service record, was dismissed.

18. Reference can also be made to the Division Bench judgments of the Jammu and Kashmir High Court in **State of J&K and others v. S. Bhupinder Singh (LPASW No.192 of 2017)** decided on 30.12.2017 and in **Farooq Ahmad v. State of J&K and others (LPA No.210 of 2019)** decided on 21.8.2019.

19. Though in the present appeal, it is sought to be argued that the documents were handed over to Mr. Sunil Kumar Bajpai, Advocate, who did not file the writ petition, however, there is no such pleading or stand taken by the appellant before any of the authority or before the learned Single Judge.

20. Keeping in view the authoritative enunciation of law, as referred to above, the present appeal, challenging the judgment and order passed by the learned Single Judge dismissing appellant's writ petition on the ground of delay and laches, deserves to be dismissed.

21. Besides this, it is a disputed question of fact as to whether the appellant had worked for the period for which he is claiming the salary. The aforesaid factual aspect cannot be gone into writ jurisdiction.

22. For the reasons mentioned above, we do not find any reason to interfere in the present appeal. The appeal is, accordingly, dismissed.

(2022)03ILR A749
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 08.03.2022

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE MOHD. FAIZ ALAM KHAN, J.

Special Appeal No. 69 of 2022

Secy. Basic Edu. Board, Prayagraj & Ors. ...Petitioners

Versus

Jubeda Bano ...Respondents

Counsel for the Petitioners:
C.S.C.

Counsel for the Respondents:
Piyush Mishra

(A) Civil Law - Constitution of India, 1950 - Article 226 – UP Basic Education (Teachers) Service Rules, Rule 14(3) : - **Appointment – Assistant Teacher Recruitment Examination – Rejection of Candidature - on the ground that no candidate should be permitted to rectify any mistake committed in On-line application form - Error in online application form relating to total marks in high school examination - writ petition – direction issued to consider the claim of applicant - Error attributable to absence of any clear guidelines for indicating marks in the educational qualification examination where marks-sheets are issued indicating therein grades based on C.G.P.A. system - Petitioner did not put herself in any advantaged situation - Order rejecting candidature rightly set aside – thus appeal liable to be dismissed.** (Para - 21, 28, 29)

Special Appeal dismissed. (E-11)

List of Cases cited: -

1. Richa Tripathi Vs St. of U.P. & ors. (Special Appeal (D) No. 716/2021, Decided on Dt. 27.10.2021),

2. Jyoti Yadav & anr.Vs St. of U.P. & ors. (Writ Petition (Civil) No. 322/2021 Decided on Dt. 08.04.2021),

3. Rahul Kumar Vs St. of U.P. & ors., (Writ Petition (Civil) No. 378/2021 Decided on Dt. 29.06.2021)

(Delivered by Hon'ble Devendra Kumar Updhyaya, J.
&
Hon'ble Mohd. Faiz Alam Khan, J.)

(Order on application for Condonation of Delay)

1. Heard learned counsel for the appellant-State authorities and learned counsel representing the respondent.

2. Having regard to the averments made in the affidavit filed in support of the application seeking condonation of delay,

we find that the delay has sufficiently been explained.

3. Accordingly, the application is allowed and the delay in preferring the special is hereby condoned.

(Order on Special Appeal)

4. Heard Shri Ran Vijay Singh, learned Additional Chief Standing Counsel for the appellants-State authorities and Mohd. Ali and Shri Piyush Mishra for the sole respondent. We have also perused the record available before us on this special appeal.

5. This special appeal filed under Chapter VIII Rule 5 of the Rules of the Court impeaches the judgment and order dated 16.08.2021 passed by the learned Single Judge whereby the writ petition filed by the respondent-petitioner, namely, Writ Petition No.17495 (S/S) of 2021 was allowed. Learned Single Judge quashing the order dated 14.07.2021 which was under challenge therein and simultaneously issued a direction to the appellant-State authorities to consider the candidature of the respondent-petitioner for appointment on the post of Assistant Teacher in primary school run by U.P. Basic Education Board by passing an appropriate order within three weeks.

6. At this juncture, we may note that by means of the order dated 14.07.2021 which has been quashed by the learned Single Judge by means of the judgment and order under appeal herein, the claim of the respondent-petitioner for appointment against the post of Assistant Teacher was rejected and accordingly the representation made by her in that regard was also rejected.

7. Submission on behalf of the appellants-State authorities is that the learned Single Judge while passing the judgment and order under appeal has erred in law inasmuch as the provisions contained in the Government Order dated 05.03.2021, the Government Order dated 04.12.2020 and the guidelines issued by means of the Government Order dated 01.12.2018 for considering the candidature/appointment of candidates against the post of Assistant Teacher have completely been ignored. It has been stated that the said guidelines and the Government Orders clearly provide that no candidate would be given any opportunity to rectify the mistake which may have crept in the on-line application form. It has also been argued that in such a situation the only option left with the authorities was to cancel the candidature of the respondent-petitioner.

8. Learned State Counsel has relied upon a judgment dated 27.10.2021 rendered by a Coordinate Bench of this Court in **Special Appeal (D) No.716 of 2021, Richa Tripathi vs. State of U.P. and others,** and it has, thus, been argued that in the said case of Richa Tripathi (supra) the candidate had furnished separate marks claiming that against the letter "T" and "P" it should be taken as "Total" and" Practical" and the same cannot be termed as "Theory" and "Practical" as in the column the only information sought was total marks. Referring to the Government Order dated 05.03.2021 the Division Bench in the said case of **Richa Tripathi (supra)** has observed that the said Government Order provided that in case any discrepancy is found in on-line application the candidature is liable to be rejected. The judgment and order in the case of **Rich Tripathi (supra)** further

refers to a judgment of Hon'ble Supreme Court in the case of **Jyoti Yadav and another vs. State of U.P. and others, Writ Petition (Civil) No.322 of 2021**, whereby a bunch of Writ Petitions were dismissed by means of the order dated 08.04.2021 and the validity of the Government Order dated 05.03.2021 was upheld. Learned State Counsel has thus, submitted that the learned Single Judge while passing the judgment under appeal has not appreciated that the validity of the Government Order dated 05.03.2021 having been upheld, it will have its application in full strength in the present case as well and accordingly no illegality was committed by the State authorities by rejecting the candidature of the respondent-petitioner and by not offering her appointment for the reason that certain disclosures made by her in her on-line application form suffered from discrepancies. In the aforesaid view, the submission on behalf of the appellants-State authorities is that the instant special appeal is liable to be allowed and the judgment and order under appeal ought to be set aside.

9. On the other hand, learned counsel representing the respondent-petitioner has argued that so far as the validity of the Government Order dated 05.03.2021 is concerned, there can not be any dispute, however, the said Government Order will have no application in the facts situation of the present case as on account of the error relating to total marks in her high school examination conducted by Central Board of Secondary Education (hereinafter referred to as "C.B.S.E"), the respondent-petitioner did not put her in any advantageous position. Referring to the judgment rendered by Hon'ble Supreme Court in the case of **Rahul Kumar vs. State of Uttar Pradesh & others, Writ Petition(s) (Civil) No(s).378 of 2021** decided by means of the judgment and order dated 29.06.2021, it has been argued that the Government Order dated 05.03.2021 envisages cancellation of candidature of a candidate who puts himself/herself in an advantaged position if certain error crept in the on-line application form.

10. We have given our anxious consideration to the rival submissions made by the learned counsel representing the respective parties.

11. So far as the facts of the present case are concerned, there is no dispute amongst the parties. It is only the question of applicability of the Government Orders dated 05.03.2021 and 04.12.2020 to the facts of the present case which is a bone of contention. However, for appropriately adjudicating the controversy and issues involved in this case, we may briefly refer to the facts of the case.

12. The State Government with a view to make appointment against 69,000 vacancies of Assistant Teachers in the Primary Schools run by U.P. Basic Education Board, Prayagraj, issued a Government Order on 01.12.2018. The said Government Order contains certain guidelines. According to the scheme of recruitment prevalent in the State of U.P. against the post of Assistant Teacher in the Primary Schools, the eligible candidates are required to fill up their on-line form disclosing their marks obtained in their High School, Intermediate, Graduation and other educational qualification. Based on the marks obtained by such candidates in terms of the provisions contained in the Appendix appended to U.P. Basic Education (Teachers) Service Rules, 1981,

quality point marks of all the candidates are computed and based on such quality point marks the appointments are offered depending on the availability of number of vacancies. The Appendix of the aforesaid Service Rules, 1981 is referable to Rule 14 (3) of the Rules, according to which for the purposes of calculating the quality point marks for selection of a candidate, percentage of marks obtained by the candidates in his/her High School, Intermediate, Graduation Degree and Bachelor of Education/B.Ed etc. are to be divided by 10 and then they are added. Thus, the formula for computing the quality point marks can be found in the statutory rules according to which percentage of marks obtained by the candidate in each examination is to be divided by 10 and then same are added. Apart from the quality point marks obtained by the candidate in terms of the Appendix appended to the service rules, the marks obtained by a candidate in written examination, which is known as Assistant Teacher Recruitment Examination, are also taken into account for the purposes of preparing the final merit list. Based on such merit, appointments are offered and process of recruitment is thus concluded.

13. In the instant case, the petitioner being fully eligible in terms of the requirement as per Service Rules as also in terms of the Government Order dated 01.12.2018 made on-line application seeking appointment against the post of Assistant Teacher. The respondent-petitioner also appeared in the written examination held on 06.01.2019. The petitioner secured 91 marks in this written examination and based on her total marks which were computed by taking into account the quality point marks and the marks of the written examination, the respondent-petitioner stood selected for the post in question when the result was declared and her name was mentioned at serial no.35676. Accordingly, the respondent-petitioner was allocated Maharajganj District.

14. The quality point marks calculated in terms of the marks obtained by the petitioner in her educational qualification examinations were 68.32%. However, when she appeared for councelling which was held on 04.12.2020 she was denied appointment. Such an action on the part of the appellants-State authorities impelled the petitioner to file Writ Petition No.3723 (S/S) of 2021 before this Court. The Court considering the case of the rival parties, finally decided the aforesaid writ petition by means of the order dated 09.02.2021 with the liberty to the respondent-petitioner to file an application before the Secretary, District Education Board, Prayagraj, who was directed to consider and pass reasoned and speaking order in accordance with the Government Order dated 04.12.2020. The Court while delivering the said judgment dated 09.02.2021 extensively quoted the relevant portion of the Government Order dated 04.12.2020 and accordingly clearly directed the Secretary, Basic Education Board, Prayagraj to consider the claim of the petitioner in the light of what has been provided in the said Government Order.

15. However, the representation made by the respondent-petitioner pursuant to the said order passed by the Court on 09.02.2021 was rejected by means of the order dated 14.07.2021 which was passed by the Secretary, Basic Education Board. It is this order dated 14.07.2021 that became the subject matter of challenge before the learned Single Judge who while passing the judgment and order under appeal herein

allowed the writ petition and quashed the order dated 14.07.2021 with a further direction to the Secretary, Basic Education Board, Prayagraj to consider the candidature of the petitioner-respondent for appointment on the post in question.

16. Before considering the reasoning given by the learned Single Judge while allowing the writ petition, we may advert to three documents on which great emphasis has been laid by the learned State Counsel while arguing the instant special appeal. The first document referred by the learned State Counsel is the Government Order dated 01.12.2020 whereby the directions were issued to initiate the process of recruitment against 69,000/- vacancies of Assistant Teachers. Along with the said Government Order, detailed guidelines have been enclosed. According to clause 17(3) of the said guidelines, the candidates were not to be provided any opportunity to rectify the mistake in their on-line application form and accordingly it is provided therein that the candidate should compare the entries made by them in the application form with the original documents before finally submitting/finally saving the same. Sub clause 4 of clause 17 of the said guidelines also provides that immediately before finally submitting/finally saving on-line application, the candidate has to make a declaration that he/she has taken out print out of the entries made in the application form and has also compared the same with the entries in the original documents and further that the candidate consents that once the application form is finally saved, he/she will have no opportunity to make any rectification in the application form. Learned State Counsel has also referred to sub clause 6 of clause 17 of the said guidelines, according to which no request for making any rectification in the application form shall be entertained after the application form is finally submitted/finally saved on-line. It also provides that examination conducting body will not be responsible for any such mistake in the form.

17. The Government Order dated 04.12.2020 has also been referred to by the learned State Counsel. Referring to sub clause 3 point no.2, it has been submitted on behalf of the appellants-State authorities that in case any candidate has furnished wrong information about the marks in his/her educational qualification, the same would lead to change in the merit of the candidate which will ultimately lead to alteration in the final select list and accordingly in the light of this it will not be justified to permit any change in the select list/merit list and accordingly in a case where a candidate fails to give correct disclosure of marks, he/she shall make himself/herself liable for cancellation of his/her candidature. Reference has also been made to the Government Order dated 05.03.2021. Learned State Counsel has referred to sub clause 1 of clause 2 of the said Government Order and has stated that it provides that in case any candidate gives incorrect information about the marks obtained/total marks in the education qualification examinations his/her candidature shall be cancelled. Based on the aforesaid guidelines/Government Orders, it has thus, been argued by the learned State Counsel that on account of error relating to total marks and marks obtained by the respondent-petitioner in her high school examination her candidature was liable to be cancelled and accordingly her candidate has rightly been rejected and she has rightly been denied appointment.

18. We will now weigh the submissions made by the learned State Counsel. As observed above, so far as the facts of this case are concerned, there is no dispute between the parties. The error which had crept in the application form of the respondent-petitioner is to the effect that in her on-line application form in column relating to educational qualification against the high school examination she indicated 600 as total marks and 536 as the marks obtained by her, whereas in fact the total marks in her high school examination conducted by C.B.S.E. were 500 and the marks obtained by her were 446.5. Thus, the allegation is that in stead of indicating 446.5/500 as her marks in her high school examination she indicated 536/600. The State Counsel has thus submitted that because of this error/mistake in the marks in her high school examination as furnished by her in the application form, the respondent-petitioner committed a mistake and according to the Government Orders dated 05.03.2021, 04.12.2020 and the guidelines issued along with the Government Order dated 01.12.2018 her candidature has rightly been rejected.

19. The case set up by the respondent-petitioner is that she had passed her high school examination conducted by Central Board of Secondary Education (hereinafter referred to as 'C.B.S.E.') where the marks-sheet does not disclose either marks obtained or the total marks in numerals; rather the marks-sheet discloses grades based on the system known as CGPA (Cumulative Grade Point Average). It is the case of the respondent-petitioner that she converted the grade awarded to her by the C.B.S.E. in her high school examination into percentage of the marks which is 89.3%, however, instead of indicating the marks obtained by her out of total marks of 500 she indicated her marks out of total marks 600 and the said error had crept in the application form for the reason that the Board of High School and Intermediate Education U.P. awards marks to the high school examinees out of total marks of 600, whereas C.B.S.E. awards the marks to its candidate out of total marks of 500. It is also the case of the respondent-petitioner that the high school marks-sheet issued by the C.B.S.E. neither contains any description of the total marks nor does it contain any description about the marks obtained by the candidate in numerals. Our attention has been drawn to point no.13 contained in the Government Order dated 04.12.2020 according to which it was decided by the appellants-State authorities that where quality point marks are to be calculated on the basis of CGPA, the same shall be done in terms of the formula/guidelines issued by the Board/University concerned. Calculation of quality point marks of a candidate is to be done by the State authorities in terms of the said provision contained in point no.13 of the Government Order dated 04.12.2020.

20. We have carefully perused the guidelines contained in the Government Orders dated 01.12.2018, 04.12.2020 and the Government Order dated 05.03.2021, however, we do not find any clarity as to how details of the marks obtained and the total marks by a candidate in case he/she passed his/her high school examination from a Board or University where marks-sheet are issued on the basis of CGPA system, are to be disclosed while filling the application form on-line.

21. Admittedly, the petitioner passed her high school examination conducted by C.B.S.E. where marks-sheet indicates only the grade based on C.G.P.A. system. Thus

the respondent-petitioner calculated the percentage of marks in terms of the formula evolved by the C.B.S.E. and found to have secured 89.3%. There is no dispute by the appellants-State authorities that the respondent-petitioner in her high school examination had secured 89.3% marks. It is only that instead of writing 446.3/500 she indicated 536/600 in her application form against the column of marks obtained/total marks in High School. The details thus furnished by the respondent-petitioner in respect of the high school examination in her on-line application form does not in any manner have any impact on calculation of quality point marks which may disturb her merit which is based on quality point marks and the written examination. As indicated above, in terms of the appendix appended to the Service Rules, the quality point marks are to be calculated based on the percentage of the marks obtained in each educational qualification examination which is divided by 10. The percentage of marks in this case obtained by the respondent-petitioner is not being disputed which is 89.3%. Thus, from these facts, it is apparent and explicit that by indicating 536/600 in place of 446.3/500 the respondent-petitioner did not make any attempt to put herself in any advantaged situation. The manner in which she furnished these details may be attributed to absence of any clear guidelines for indicating marks in the educational qualification examination where marks-sheets are issued indicating therein grades based on C.G.P.A. system.

22. In our opinion, when we examine the Government Orders dated 05.03.2021 and 04.12.2020 what we find is that the said Government Orders have been issued with a purpose. The purpose, in our view, is that no candidate should be permitted to rectify any mistake committed by him/her while filling up online application form so as to avoid have ultimate impact on smooth conduct of the selection process and to avoid any alternation or change in the inter se merit of the candidates which would lead to any alternation/change in the final merit/select list. If a candidate furnishes some information in his/her online application form which, as is a present case, does not put him/her in any advantaged situation, in our considered opinion, such effors are not liable to be treated as the basis for rejecting the candidature of such a candidate.

23. In a case where a candidate indicates more marks than he/she has actually obtained, he/she puts himself/herself in an advantaged position. Similarly in a case where a candidate indicates less marks then total marks prescribed in an examination conducted by the Examining Body then in this situation as well the candidate puts himself/herself in an advantaged position. In both these situations, if the application form contains such mistake, it will not only impede the smooth selection process but such mistake will have the potential of altering or changing the inter se merit of the candidates as also the entire final merit/select list.

24. In our opinion, the guidelines issued by means of the Government Order dated 01.12.2018 and the provisions contained in the Government Orders dated 05.03.2021 and 04.12.2020 are meant to check and prevent any such situation where the selection process gets impeded or such mistake has the potential of altering inter-se merit of the candidate as also the final list/select list. The judgment rendered by Hon'ble Supreme Court in the case of

Rahul Kumar (supra) is very relevant to be referred to at this juncture itself. Hon'ble Supreme Court in the said case of **Rahul Kumar (supra)** has clearly considered point no.2 of the Government Order dated 04.12.2020. The reference of the said Government Order has been made in para 3 of the said judgment which is extracted herein below:

" Government Order dated 04.12.2020 (the G.O., for short) dealt with as many as 21 points of discrepancies which could possibly have crept in while filling up online application forms by the candidates. Point No.2 of said G.O. is of some relevance and is being quoted hereunder for facility.

Point No.2: Discrepancy in the Marks obtained and Total marks of High School, Intermediate, Graduation, Training and to the total marks and marks obtained received from the excel sheet of the candidate. In relation to the above type of discrepancies following action to be taken has been decided."

25. Their Lordships of Hon'ble Supreme Court have clearly interpreted the said provision contained in point no.2 of the Government Order dated 04.12.2020 in para 7 of the said judgment which is also extracted hereunder;

"We need not consider individual fact situation as the reading of the G.O. and the Circular as stated above is quite clear that wherever a candidate had put himself in a disadvantaged oposition as stated above, his candidature shall not be cancelled but will be reckoned with such disadvantage as projected; but if the candidate had projected an advantaged position which was beyond his rightful due or entitlement, his candidature will stand cancelled. The rigour of the G.O. and the Circular is clear that wherever undue advantage can ensure to the candidate if the discrepancy were to go unnoticed, regardless whether the percentage of advantage was greater or lesser, the candidature of such candidate must stand cancelled. However, wherever the candidate was not claiming any advantage and as a matter of fact, had put himself in a disadvantaged position, his candidature will not stand cancelled but the candidate will have to remain satisfied with what was quoted or projected in the application form."

26. From the aforequoted portion of the judgment in the case of **Rahul Kumar (supra)** rendered by Hon'ble Supreme Court, it is abundantly manifest that rigor of the Government Order is clear according to which whenever any undue advantage ensues to the candidate on account of the discrepancy committed by him/her while filling up online application form, then the candidature of such a candidate must be cancelled. However, if by the discrepancy committed while filling up online application form the candidate concerned puts herself in a disadvantaged situation his/her candidature need not be cancelled but such a candidature will be reckoned with such disadvantage as projected in the application form.

27. In the present case, the facts as discussed above, which are not in dispute, clearly establish that on account of error while indicating the high school marks in her online application form due to inadvertent mistake, the respondent-petitioner neither put herself in disadvantaged position nor in an advantaged position. The percentage of the

marks of the respondent-petitioner in her high school examination is 89.3% and it is this percentage which was taken into account by the appellants-State authorities while reckoning the quality point marks. In such a situation it cannot be said by any stretch of imagination that by mistakenly indicating the High School marks in her on-line application form the respondent-petitioner put herself in any advantaged position so as to make her candidature liable for cancellation.

28. We have already observed that the Government Orders dated 05.03.2021 and 04.12.2020 as also the guidelines contained in the Government Order dated 01.12.2018 are to be given effect to. However, any mindless application of the provisions contained in the said Government Orders has the potential of denying rightful claim of a deserving candidate who not only qualified in the written examination but also was ultimately selected in the final select list. The validity of the Government Order dated 05.03.2021 has already been upheld by this Court in the case of **Jyoti Yadav and another (supra)** but so far as its application is concerned, Hon'ble Supreme Court in the case of **Rahul Kumar (supra)** has made it absolute clear that the candidature of a candidate is liable to be cancelled only in case such a candidate puts himself/herself in an advantaged position by committing some mistake while submitting the on-line application form.

29. In the light of the discussions made and for the reasons given above, this Court finds itself in agreement with the conclusion drawn by the learned Single Judge and hence any interference in the judgement and order under appeal herein will be unwarranted.

30. The Special Appeal, thus, lacks merit which is hereby dismissed.

31. However, there will be no order as to costs.

(2022)03ILR A757
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 16.03.2022

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
HON'BLE SUBHASH VIDYARTHI, J.

Special Appeal Defective No. 185 of 2020
with
Special Appeal No. 340 of 2019

State of U.P. ...Appellant
Versus
Manager C/M Islamia Inter College & Ors. ...Respondent

Counsel for the Appellant:
C.S.C.

Counsel for the Respondent:
Dwijendra Mishra, Mohammad Danish, Mohd. Mansoor

Civil Law - Constitution of India,1950 - Article 226, 30(1) - Intermediate Education Act, 1921 - Sections 16-F F, 16-FF (3) (b) & 16-FF (4) - Committee of Management of a minority Institution - issued an advertisement inviting applications for making appointments on post of Assistant Teacher in four subject Mathematics, General, Hindi and Art - Respondent no. 2 & 3 whom are graduate in History and Political Science and with Mathematics as a subject respectively - both of them applied - & get selected finally amongst the candidates for the post of Assistant Teacher (General) and (Math) respectively in interview held – C/M published a merit list & sent for approval before DIOS – being receiving complaints toward said selection, DIOS refused

to approved the said result with direction to conduct the interviews afresh in supervision of an observer – respondent nos. 2 & 3 filed Writ Petition – Allowed -holding no provision in the Act, to hold afresh interviews by DIOS – two special Appeals – settled law that validity of any order has to be judged on the basis of reasons mentioned in the order itself and reasons to support an order cannot be afterwards – no interference warrants .(Para – 18, 21, 22)

Both Special Appeals dismissed. (E-11)

List of Cases cited: -

1. Writ Petition No. 4972/2009 (Mueez Ahmad & anr.Vs St. of UP & Another) decided on Dated. 28.05.2019.

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

1. Since both the aforesaid appeals have been filed challenging the order dated 28.05.2019 passed by the Hon'ble Single Judge allowing Writ Petition No.4972 (S/S) of 2009 (Mueez Ahmad and another vs. State of U.P. and another), they have been heard together and are being decided by a common judgment and order, which is being passed in Special Appeal Defective No. 185 of 2020, treating it as the leading case.

2. Briefly stated, facts of the case are that Islamia Inter College, Lakhimpur Kheri is a minority educational institution. On 14.01.2009, the Appellant - Committee Of Management Islamia Inter College, Lakhimpur Kheri, had issued an advertisement inviting applications for making appointments on the post of Assistant Teacher in four subjects i.e. Mathematics, General, Hindi and Art. The respondent no.2 - Mueez Ahmad was a graduate in History and Political Science and the respondent no.3 - Mohd. Suhaib Hasan is a graduate with Mathematics as a subject and they were eligible for applying for the posts advertised. Both of them applied in response to the aforesaid advertisement. Several candidates participated in the interview held on 28.07.2009 including the respondents no. 2 and 3 and afterwards the Appellant published a merit list of the candidates, in which the respondent no. 2 was shown at serial no. 1 amongst the candidates for the post of Assistant Teacher (General) and the respondent no. 3 was shown at serial no. 1 amongst the candidates for the post of Assistant Teacher (Maths).

3. The list of selected candidates was sent to the District Inspector of Schools (hereinafter referred to as "D.I.O.S.") for his approval under Section 16-FF of the Intermediate Education Act, 1921 (hereinafter referred to as "the Act of 1921").

4. On 07.08.2009, the D.I.O.S. wrote a letter to the Appellant returning the files relating to selection proceedings directing the Appellant to conduct the interviews afresh in supervision of an Observer appointed by the D.I.O.S.

5. The respondents no. 2 and 3 filed Writ Petition No.4972 (S/S) of 2009 challenging the aforesaid order dated 07.08.2009 passed by the D.I.O.S. mainly on the ground that there is no provision in the Act of 1921 or any other law to hold the selection/interview under supervision of any Observer and that the D.I.O.S. had no power to pass an order for holding interviews afresh in supervision of an Observer appointed by him.

6. The D.I.O.S., Lakhimpur Kheri filed a counter affidavit in reply to the Writ Petition, stating that the Institution in question, namely, Islamia Inter College, Lakhimpur Kheri is a minority institution and is recognized and aided up to the level of High School and recognized and unaided at the Intermediate level. Salary of the teaching staff of the institution up to the level of High School is paid from the State exchequer. Four posts of Assistant Teachers in LT grade were lying vacant in the institution. The Manager of the institution sought permission to issue an advertisement to fill up the vacancies and the D.I.O.S. granted the permission vide order dated 12.01.2009. Thereafter the Committee of Management held interviews on 28.07.2009, selected three candidates and sent the requisite papers to the D.I.O.S. for approval of their appointment vide letter dated 29.07.2009. Thereafter, various complaints were received in the office of the D.I.O.S. alleging various irregularities and illegalities in the selection process and certain newspapers published reports to this effect. Keeping in view the seriousness of the complaints, the file was returned to the institution for holding interviews afresh in supervision of an Observer appointed by the D.I.O.S.

7. A counter affidavit was filed on behalf of the private respondents no.4 and 5 stating that the selection process adopted by the Committee of Management was not in accordance with the provisions of the regulations framed under the Act of 1921 and in the event of any illegality committed during the selection, the D.I.O.S. has a power to withhold the approval to the said illegal selections.

8. By means of the judgment and order dated 28.05.2019, Hon'ble Single Judge of this Court has allowed the Writ Petition holding that the process of selection and grant of approval would be governed by Section 16-FF of the Act of 1921 and there is no provision in the Act for returning the select list with a direction to hold interviews afresh in supervision of an Observer appointed by the D.I.O.S. The order dated 07.08.2009 has been passed without holding an enquiry into the complaints of the alleged bungling and without giving an opportunity of hearing, in an ex parte and arbitrary manner, without recording any reason with regard to any bungling alleged to have taken place. Therefore, the order dated 07.08.2009 was found to be unsustainable.

9. The Hon'ble Single Judge also took note of the fact that vide order dated 19.02.2010, the Director had approved selection of Sri. Moddassir Khan who was selected along with the respondents no. 2 and 3 in the selections held in the year 2009. The order dated 19.02.2010 indicates that the Director accorded approval to the entire select list and not merely to the appointment of Sri. Moddassir Khan. The selections having taken place in a combined manner, the doctrine of severability would be inapplicable in such a case and it can be said that the entire selections held in the year 2009 had been approved by the Director. The Hon'ble Single Judge rejected the contention of the Committee of Management that the selections were not held in accordance with Regulation-20 and Section 16-FF (3) (b) of the Act of 1921.

10. On the aforesaid reasoning, the Hon'ble Single Judge allowed the Writ Petition and quashed the order dated 07.08.2009 passed by the D.I.O.S. directing to hold interviews afresh in supervision of

an Observer appointed by him and the opposite parties were directed to consider the petitioners (the respondent nos. 2 and 3 in the Special Appeal) as regularly selected Assistant Teachers for the subject of Mathematics and General in the institution in question, with consequential service benefits. The Committee of Management of the Institution has challenged the aforesaid order through Special Appeal No. 340 of 2019 and the State of U.P. has also challenged the aforesaid order by filing Special Appeal No. 185 of 2020.

11. We have heard the submissions of Sri Dwijendra Mishra, the learned counsel for the Appellant in Special Appeal No. 340 of 2019, Sri Anil Kumar Singh Vishen, the learned Standing Counsel appearing for the Appellant-State of U.P. in Special Appeal No. 185 of 2020 and Sri. Mohd. Mansoor, Advocate appearing for the private respondents.

12. The undisputed facts which appear from the records, are that on 19.11.2008, the Committee of Management of the Institution had sent a letter to the D.I.O.S. seeking permission for issuing an advertisement for making selectionsfor appointments on four vacant posts of Assistant Teachers in the institution. By means of a letter dated 12.01.2009, the D.I.O.S. Lakhimpur Kheri called for a report regarding existence of the vacancies from the Assistant Accounts Officer and after examining the report submitted by him, the D.I.O.S. granted permission for issuing an advertisement for making appointments to the aforesaid four posts of Assistant Teachers.

13. In furtherance of the aforesaid permission granted by the D.I.O.S., the Committee of Management held interviews of candidates on 28.07.2009, in which various candidates appeared. In the subject Mathematics, the respondent no. 2 was placed at serial no. 1 of the merit list prepared after interviews and in subject General, the respondent no. 3 was placed at serial no. 1 of the merit list. Thereafter, the Committee of Management sent the requisite papers to the D.I.O.S. for approval of their appointment vide letter dated 29.07.2009.

14. Selection to the posts of Assistant Teachers in minority instituions/colleges are governed by Section 16-FF of the Act of 1921, which provides as follows:

*"**16FF. Savings as to minority institutions.** - (1) Notwithstanding anything in sub-section (4) of Section 16-E, and Section 16-F, the Selection Committee for the appointment of a Head of Institution or a teacher of an institution established and administered by a minority referred to in clause (1) of Article 30 of the Constitution shall consist of five members (including its Chairman) nominated by the Committee of Management : Provided 'hat one of the members of the Selection Committee shall, -*

(a) in the case of appointment of the Head of an Institution, be an expert selected by the Committee of Management from a panel of experts prepared by the Director;

(b) in the case of appointment of a teacher, be the Head of the Institution concerned.

(2) The procedure to be followed by the Selection Committee referred to in sub-section (1) shall be such as may be prescribed.

(3) No person selected under this section shall be appointed, unless, -

(a) in the case of the Head of an Institution the proposal of appointment has

been approved by the Regional Deputy Director of Education; and

(b) in the case of a teacher such proposal has been approved by the Inspector.

(4) The Regional Deputy Director of Education or the Inspector, as the case may be, shall not withhold approval for the selection made under this section where the person selected possesses the minimum qualifications prescribed and is otherwise eligible.

(5) Where the Regional Deputy Director of Education or the Inspector, as the case may be. does not approve of a candidate selected under this section, the Committee of Management may, within three weeks from the date of receipt of such disapproval, make a representation to the Director in the case of the Head of Institution, and to the Regional Deputy Director of Education in the case of a teacher.

(6) Every order passed by the Director or the Regional Deputy Director of Education on a representation under sub-section (5) shall be final."

15. A perusal of Sub-section (4) of Section 16-FF of the Act of 1921 indicates that the Inspector is prohibited from withholding approval of selection made under Section 16-FF where the persons selected possess the minimum qualification prescribed and are otherwise eligible. Thus the only ground on which the Inspector could withheld the approval for the selection, is that the person selected does not possess the minimum qualification prescribed or is otherwise ineligible.

16. Both the respondents no. 2 and 3 had categorically pleaded in the Writ Petition that they possess the requisite qualification and they are otherwise also eligible for appointment on the posts in question and this fact has not been disputed by any party. In view of this factual backdrop and the statutory provision contained in Section 16-FF(4), the Inspector is clearly forbidden from withholding approval of their selections. The Hon'ble Single Judge has rightly recorded a finding that there is no provision for passing a direction to hold interviews again in supervision of an Observer appointed by him. The aforesaid order dated 07.08.2009 has been passed on the basis of some allegations of bungling in the selection process but neither any enquiry was conducted in the said allegations of bungling nor was any categorical finding recorded by the D.I.O.S. that any bungling had actually taken place in the selection process. Any selection held in accordance with law cannot be interfered with on mere allegations of bungling in absence of any proof.

17. The learned counsel for the appellant has pressed another ground of challenge to the judgment of the Hon'ble Single Judge, that the posts in question were lying vacant since long and as per the provision contained in Regulation 20 in Chapter-II of the Regulations under the Act of 1921, that the post shall be deemed to have been surrendered and it could not be filled up unless its creation was sanctioned by the Director.

18. The D.I.O.S. had passed the order dated 07.08.2009 returning the files of selection files of selection of candidates on the ground that he had received complaints regarding irregularities committed in the selection process and newspapers have published news against the selection process due to which the candidates are dissatisfied. The D.I.O.S. has not passed the order dated 07.08.2009 on the

ground that the posts in question were lying vacant since long and had to be deemed to have been surrendered under Regulation-20 in Chapter-II of the Regulations under the Act of 1921. It is well settled law that the validity of any order has to be judged on the basis of the reasons mentioned in the order itself and reasons to support an order cannot be afterwards. As the order dated 07.08.2009 does not make any mention of the posts in question not being available to be filled up as per the provision contained in Regulation-20 in Chapter-II of Regulations under the Act of 1921, the aforesaid provision cannot be pressed into service for validity of the order dated 07.08.2009.

19. The Hon'ble Single Judge has dealt with this ground and has held that an unsuccessful candidate Mohd. Nazeem Khan had given a representation to the Director and in the order dated 19.02.2010 passed on the representation of Sri. Nazeem Khan, the Director has recorded his satisfaction that the selections were held by a duly constituted selection committee after due approval of the competent authority, and he accorded approval to the selection of Sri. Nazeem Khan.

20. Along with the counter affidavit filed by the D.I.O.S. Copy of a letter dated 12.01.2009 issued by the D.I.O.S. has been annexed which states that he had got an enquiry conducted by the Assistants Accounts Officer regarding the existence of the aforesaid vacant posts and after obtaining a report from him regarding availability of vacant posts, permission was granted to publish an advertisement for conducting selection for appointment to the aforesaid posts. Therefore, from the record produced by the D.I.O.S. himself, it appears that he had recorded satisfaction about existence of the vacant post after getting an enquiry conducted in this regard. Morever, the order dated 19.02.2010 passed by the Director puts a seal of approval upon the entire selection process.

21. In these circumstances, refusal of the D.I.O.S. to accord approval to the selection of respondent nos. 2 and 3 namely, Sri. Mueez Ahmad and Sri. Mohd. Suhaib Hasan who were also selected in the same selection process, is apparently arbitrary and unreasonable.

22. We find that the judgment and order dated 28.05.2019 passed by the Hon'ble Single Judge is based on an appropriate appreciation of facts of case as well as the law applicable to it and there is no error or illegality in it so as to warrant any interference with the same in this intra-Court Appeal.

23. Both the appeals bearing Special Appeal No. 185 of 2020 and Special Appeal No. 340 of 2019 challenging the aforesaid judgment and order dated 28.05.2019 passed by the Hon'ble Single Judge in Writ Petition No. 4972 (S/S) of 2009 (Mueez Ahmad and another vs. State of U.P. and another), lack merit and are. accordingly, dismissed.

24. No order as to costs.

(2022)03ILR A762
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.02.2022

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE JASPREET SINGH, J.

Special Appeal Defective No. 23 of 2019
(In Writ Petition No. 1966 (Writ-A) of 2017)

State of U.P. & Ors. ...Appellants
Versus
Harikesh Singh ...Respondent

Counsel for the Appellants:

Sri H.Q. Rizvi, Standing Counsel, Advocate

Counsel for the Respondent:
Sri Amit Bose, Senior Advocate assisted by Sri Abhishek Bose and Sankalp Dewari, Advocates.

(A) Civil Law – Constitution of India, 1950 - Article 226, - High Court Rules Chapter VIII Rule 5 - Intra Court Appeal – being aggrieved order of writ court – imposing cost upon appellant/respondents – Appeal filed after beyond limitation period - the Govt. Machinery being impersonal, caused delay about 287 days - it is settled law that delay in filing of appeal should be genuine, bonafide & unintentional – thus, instant appeal deserves to be dismissed on the ground of delay and latches. (Para – 14, 15, 16)

(B) Civil Law – Constitution of India, 1950 - Article 226, - High Court Rules Chapter VIII Rule 5 - Intra Court Appeal – Delay caused due to casualness of St. officers whom are paid salaries from the St.-Exchequers - in getting certified copy of the order of writ court – applied in April, laying pending till December, thereafter after seeking permission filed appeal after 287 days - at every stage casual approach has been done by the St. authorities and they cannot be allowed to sit idle or sleep over the files - responsibility needs to be fixed against whom are fails to perform their duties - they should accountable for their inactions – as such direction issued - whatever amount is to be paid to the respondent in terms of the order of writ court, same shall be recovered from the guilty officials by holding a proper inquiry - file a compliance affidavit also by the next date. (Para – 15, 16)

(C) Civil Law – Constitution of India,1950 - Article 226, - High Court Rules Chapter VIII Rule 5 - Intra Court Appeal – while dismissing the defective appeal – direction issued to the Ld. Advocate General, Chief Secretary & Home Secretary of Govt. of UP – in every case which decided by court, against St. - certified copy thereof, should be applied for, immediately and it should be sent to the department along with opinion as to whether the case is fit for filing of Appeal or not, with clear instruction about expiry of limitation period - not on the request made by the Department – process could be done online by using advance technology. (Para – 17)

Appeal dismissed. (E-11)

List of Cases cited: -

1. Postmaster General & ors. Vs Living Media India Ltd. & anr. (2012 Vol. 3 SCC 563),

2. St. of M.P. & ors. Vs Bherulal (2020 vol. 10 SCC 654),

(Delivered by Hon'ble Rajesh Bindal, C.J.)

1. The present intra court appeal has been filed against the order dated February 5, 2018 passed by the learned Single Judge by which the writ petition was allowed.

2. The appeal is accompanied by an application seeking condonation of delay. The period of delay has not been mentioned in the application, however, as calculated by the Registry, the period is 287 days.

3. The learned counsel for the applicant/appellant submitted that after the copy of the order was received, the file had to be dealt with at number of stages before the final decision is taken and the appeal was filed. The Government Machinery being impersonal, the delay has occurred. The case otherwise is quite meritorious and the order passed by the learned Single Judge deserves to be set aside.

4. On the other hand, learned counsel for the respondent no. 1 submitted that there is hardly any explanation given for

seeking the condonation of delay. Similar grounds have already been discarded by the Hon'ble Court Supreme Court in the case of **Postmaster General and Others Vs. Living Media India Limited and Another, (2012) 3 SCC 563.** Hence, condonation of delay on such grounds is not permissible. He also referred to an order passed by the Hon'ble Supreme Court in the case of **State of Madhya Pradesh and Others Vs. Bherulal (2020) 10 SCC 654** whereby relying on the aforesaid judgment of the Hon'ble Supreme Court in **Postmaster General and other's case** (supra), while dismissing the application seeking condonation of delay, even cost was imposed.

5. Heard learned counsel for the parties on the application seeking condonation of delay.

6. In the case in hand, the order passed by the learned Single Judge is dated 05 February, 2018. A period of 30 days has been provided for filing a Special Appeal against the order passed by the learned Single Bench, in case any of the party is aggrieved. Casualness on the part of the applicant/appellant is apparent as even the application for supply of certified copy of the order was filed on 28.04.2018 i.e. after expiry of period of limitation to file appeal and the same was not pursued thereafter as it remained pending till December, 2018.

7. If the facts stated in the affidavit filed in support of the application seeking condonation of delay are considered, in paragraph no. 2 thereof, it is stated that after receipt of the copy of the order dated 05.02.2018, as impugned in the present appeal, the Senior Superintendent of Police, Lucknow vide letter dated 27.02.2018 requested the learned Chief Standing Counsel for applying for the certified copy thereof. But the fact as is evident from the certified copy placed on record is that it was applied on 28.04.2018 i.e. more than two months after the order was passed. Subsequent thereto, vide letter dated 14.03.2018, learned Chief Standing Counsel was requested for his legal opinion on the matter.

8. The fact remains that the copy of the order dated 05.02.2018 was with the Department and a request was made to the learned Chief Standing Counsel for applying for the certified copy thereof, however, still in that letter, request was not made for seeking opinion of the learned Chief Standing Counsel. The communication was made two weeks' thereafter. Reminders were sent to the office of the Chief Standing Counsel on 04.04.2018, 20.04.2018, 10.05.2018, 11.06.2018 and 13.07.2018. Meaning thereby for a period of four months, the matter remained pending with the office of Chief Standing Counsel. Thereafter opinion was given for filing a Special Leave to Appeal against the order passed by the learned Single Judge.

9. On 27.04.2018, Senior Superintendent of Police, Lucknow requested learned Chief Standing Counsel to re-examine the legal opinion rendered on 06.08.2018. The learned Chief Standing Counsel opined that the case is fit for filing the Special Appeal. Thereafter vide letter dated 11.08.2018, the matter was referred to the Government for permission to file appeal. Reminder was sent on 20.08.2018. Thereafter vide communication dated 31.08.2018, permission was granted by the Government to file Special Appeal against the order dated 05.02.2018 passed by the learned Single Judge.

10. Vide letter dated 29.09.2018, the Senior Superintendent of Police, Lucknow requested the learned Chief Standing Counsel to take steps for filing the Special Appeal.

11. From a perusal of the aforesaid facts stated by the applicant/appellant in the affidavit filed in support of the application seeking condonation of delay, it is evident that the appellant/State-Authorities were casual at different levels in dealing with the matter. As to how an application filed by the State seeking condonation of delay has to be dealt with has invited attention of the Courts on a number of occasions. Initially, the view was that the State Machinery being impersonal, the Courts should be liberal in granting condonation of delay, however, seeing the repeated inaction and casualness in approach on the part of the Authorities in filing the appeals after a huge delay, the view had to be re-visited.

12. In **Postmaster General and others's case** (Supra) considering the facts of that case, which were similar to the case in hand, the Hon'ble Supreme Court opined that the claim on account of impersonal machinery and inherited bureaucratic methodology of making several notes cannot be accepted in view of the modern technologies being used and available. The aforesaid observation was made about a decade back and there is lot of technological advancements thereafter. But apparently, the matters here are being dealt with in the old fashion. Separate period of limitation has not been provided for filing appeals by the State. The relevant paragraphs from the aforesaid judgment are extracted below:-

"27. It is not in dispute that the person(s) concerned were well aware or conversant with the issues involved including the prescribed period of limitation for taking up the matter by way of filing a special leave petition in this Court. They cannot claim that they have a separate period of limitation when the Department was possessed with competent persons familiar with court proceedings. In the absence of plausible and acceptable explanation, we are posing a question why the delay is to be condoned mechanically merely because the Government or a wing of the Government is a party before us.

28. Though we are conscious of the fact that in a matter of condonation of delay when there was no gross negligence or deliberate inaction or lack of bona fides, a liberal concession has to be adopted to advance substantial justice, we are of the view that in the facts and circumstances, the Department cannot take advantage of various earlier decisions. The claim on account of impersonal machinery and inherited bureaucratic methodology of making several notes cannot be accepted in view of the modern technologies being used and available. The law of limitation undoubtedly binds everybody, including the Government.

29. In our view, it is the right time to inform all the government bodies, their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bona fide effort, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red tape in the process. The government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for the government departments. The law shelters

everyone under the same light and should not be swirled for the benefit of a few.

30. Considering the fact that there was no proper explanation offered by the Department for the delay except mentioning of various dates, according to us, the Department has miserably failed to give any acceptable and cogent reasons sufficient to condone such a huge delay. Accordingly, the appeals are liable to be dismissed on the ground of delay."

13. Recently, the Hon'ble Supreme Court in **Bherulal's case** (Supra) again considered the application filed by the State seeking condonation of delay in filing the Special Leave Petition. Similar arguments were made in support of the application, however, the same were rejected. Such type of cases were termed as "certificate cases". The application seeking condonation of delay was dismissed subject to costs of ₹ 25,000/-. Relevant paras nos. 4 to 8 thereof are extracted below:-

"4. A reading of the aforesaid application shows that the reason for such an inordinate delay is stated to be only "due to unavailability of the documents and the process of arranging the documents". In para 4, a reference has been made to "bureaucratic process works, it is inadvertent that delay occurs".

5. A preposterous proposition is sought to be propounded that if there is some merit in the case, the period of delay is to be given a go-by. If a case is good on merits, it will succeed in any case. It is really a bar of limitation which can even shut out good cases. This does not, of course, take away the jurisdiction of the Court in an appropriate case to condone the delay.

6. We are also of the view that the aforesaid approach is being adopted in what we have categorised earlier as "certificate cases". The object appears to be to obtain a certificate of dismissal from the Supreme Court to put a quietus to the issue and thus, say that nothing could be done because the highest Court has dismissed the appeal. It is to complete this formality and save the skin of officers who may be at default that such a process is followed. We have on earlier occasions also strongly deprecated such a practice and process. There seems to be no improvement. The purpose of coming to this Court is not to obtain such certificates and if the Government suffers losses, it is time when the officer concerned responsible for the same bears the consequences. The irony is that in none of the cases any action is taken against the officers, who sit on the files and do nothing. It is presumed that this Court will condone the delay and even in making submissions, straightaway the counsel appear to address on merits without referring even to the aspect of limitation as happened in this case till we pointed out to the counsel that he must first address us on the question of limitation.

7. We are thus, constrained to send a signal and we propose to do in all matters today, where there are such inordinate delays that the Government or State authorities coming before us must pay for wastage of judicial time which has its own value. Such costs can be recovered from the officers responsible.

8. Looking to the period of delay and the casual manner in which the application has been worded, we consider it appropriate to impose costs on the petitioner State of Rs 25,000 (Rupees twenty-five thousand) to be deposited with the Mediation and Conciliation Project Committee. The amount be deposited in four weeks. The amount be recovered from the officers responsible for the delay in

filing the special leave petition and a certificate of recovery of the said amount be also filed in this Court within the said period of time."

14. Now coming to the pleadings of the applicants/appellants in th present case. We deem it appropriate to extract the grounds. The same read as under:-

" 4. That the Law Department vide Government Order dated 31.08.2018 granted permission for filing of the Special Appeal against the impugned judgment and order dated 05.02.2018 and the same has been received vide letter dated 07.09.2018 of the State Government.

5. That the Senior Superintendent of Police, Lucknow vide his letter dated 29.09.2018 requested the learned Chief Standing Counsel, High Court, Lucknow for taking appropriate action regarding filing of the Special Appeal.

6. That the duly authorized pairokar alongwith the letter dated 29.09.2018 contacted the office of the learned Chief Standing Counsel, High Court, Lucknow on 03.10.2018.

7. That the paper Book for preparing Special Appeal was allotted to the Standing Counsel on 25.10.2018 and on being contacted by the pairokar same day, he advised the pairokar to contact him again alongwith the relevant necessary records and explanations for the delay caused in filing the Special Appeal. Accordingly, the Pairokar contacted the Standing Counsel on 06.01.2019 and the Special Appeal along with the Applications for interim relief and condonation of delay alongwith their respective affidavits have been drafted on the same very date and the same is being filed without any further delay.

8. That the delay in filing of the Special Appeal is genuine, bonafide and unintentional. The Special Appeal could not be filed earlier as it took time in filing the administrative formalities by following certain norms and procedure of disciplined and systematic performance of official functions, which includes preparation of office notes etc., after scrutinizing various records, movement of files step by step through different sections and to different officers and lastly to the head of the department and thereafter forwarding the matter to the Administrative Department in the Government for appropriate decision. The similar procedure is adopted in the Administrative Department also. The aforesaid process takes some time as it depends upon so many factors/ circumstances, such as preparation of office notes etc., as stated above, non-availability of certain necessary informations, as stated, non-availability of concerned officials/ officers, various holidays in between and certain unavoidable and unspoken circumstances. It also took some time in obtaining the requisite permission of the law department and also in preparation of the Special Appeal and its appendices."

15. In the case in hand as well, from the facts as have been noticed above, we find that at every stage there was casual approach of the State-Authorities or officials working therein, who are paid salaries from the State Exchequer but they fail to perform their duties. They cannot be allowed sit idle or sleep over the files. They are accountable for their actions/inactions. In the case in hand, the position looks otherwise. The files cannot be left to be dealt with as if there is no limitation to file appeals. The kind of explanation given in support of the application seeking condonation of delay is not acceptable in terms of the law laid down by the Hon'ble Supreme Court, hence, the application for

seeking condonation of delay is dismissed. As a result of which the appeal also stands dismissed.

16. However, before parting with the order, we are also conscious of the fact that the benefit of filing the delayed appeals should not go to a litigant at the cost of the State, with whom the officials may be in connivance. The responsibility needs to be fixed. In the case in hand, the appeal is being dismissed only on the ground of delay and latches, though it was found to be a fit case for filing appeal by the different Authorities of the State. We direct that whatever amount is to be paid to the respondent in terms of the order passed by the learned Single Judge of this Court, the same shall be recovered from the guilty officials/officers by holding a proper inquiry and the State shall not bear that burden under any circumstances. This will be a message to other officers in the State, why public at large, who are the contributors to the State-exchequer, should be made to bear the burden of the inaction by the different officers /officials in the State, which is paid out of the tax contributed by them.

17. The process of inquiry and recovery of the amount shall be completed within a period of four months from the date of receipt of copy of the order and a compliance report shall be submitted before the Senior Registrar of this Court, at Lucknow.

17. We also find it appropriate to record here that from the affidavit filed in support of the application seeking condonation of delay, it is evident that the system being followed after decision of cases needs to be re-visited. Office of Advocate General should ensure that after every case is decided by the Court, certified copy thereof should be applied for, immediately and not on the request made by the Department. Immediately, on receipt of the copy of the order, it should be sent to the Department concerned along with the opinion as to whether the case is fit for filing an appeal or not alongwith suggested grounds, instead of waiting for a letter from the concerned Department seeking opinion. Further, the letter should specifically state as to the date on which the limitation to file an appeal or availing any remedy against the order expires. It has to be ensured that opinion in the case alongwith copy of the order reaches the concerned department well before expiry of time for filing appeal and that date should be specifically mentioned. Benefit should be taken of technological advancements and the process could be online as well.

18. Let a copy of the order be sent to the Chief Secretary and Home Secretary, Government of U.P. for information and compliance. In case compliance report is not submitted within the period specified, the matter shall be listed in the Court only for the aforesaid purpose on July 18, 2022, otherwise the appeal stands dismissed.

(2022)03ILR A768
ORIGINAI JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.03.2022

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE JAYANT BANERJI, J.

Writ Tax No.78 of 2022

Daujee Abhushan Bhandar Pvt. Ltd., Faizabad ...Petitioner

Versus

U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Abhinav Mehrotra, Sri Kapil Goel, Sri Sandeep Goel

Counsel for the Respondents:
A.S.G.I., Sri Gaurav Mahajan

Tax Law – Constitution of India, 1950 - Article 226, - Income Tax Act, 1961 - Sections 139(1), 148, 149(1), 282(1)(c), 282 & 282-A, - Income Tax Rules, 1962 - Rule 127-A, - Information Technology Act, 2000 – Sections 2(d), 2(p), (2 (t), 2(za), 3 & 13, 13(1) - **Validity of Notice – issued time barred by the Assessing Authority – attempting to initiate proceeding u/s 148 of Act, 1961 – impugned notice signed by the Assessing authority digitally on last date of limitation & sent through email but service/received upon/by the Assesse after limitation period – Assesse filed objection on the ground of time barred – rejected, being notice within time – writ petition – joint reading of provisions u/s 282 & 282-A of Act, 1961 and u/s 13 of Act, 200 the meaning of word 'Issue' contains both 'sing' by the authority 'and then' issued to the Assesse either mode - merely 'digitally signing the notice' not comes under meaning of 'issuance of notice' - thus, impugned notice being served beyond limitation - as such same is liable to be quashed.**(Para – 20, 21, 29, 30)

Writ Petition allowed. (E-11)

List of Cases cited: -

1. Kanubhai M. Patel (HUF) Vs Hiren Bhatt or His Successors to Office (2011 Vol. 12 Taxmann.com 198 (Guj.),

2. Smt. Kusum Agarwal Vs Asst. Commissioner of Income Tax, Agra & anr.(Writ Tax No. 822 of 2016, decided on dated 28.08.2017),

3. R.K. Upadhyaya Vs Shanabhai P. Patel (1987 166 ITR 163),

4. Delhi Development Authority Vs H.C. Khurana (1993 Vol. 3 SCC),

5. Andhra Pradesh & ors. Vs CH. Gandhi (2013 vol. 5 SCC 111).

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

1. Heard Sri Dhruv Agarwal, learned Senior Advocate, who on our request assisted the Court as Amicus curiae and also heard Sri Abhinav Mehrotra, and Sri Kapil Goel, learned counsel for the petitioner and Sri Gaurav Mahajan, learned Senior standing counsel for the respondents i.e. Income Tax Department.

2. Briefly stated facts of the present case are that the petitioner is a regular assessee. It filed its return of Income under Section 139 (1) of the Income Tax Act, 1961 (hereinafter referred to as "the Act 1961") on 29.09.2013 for the Assessment Year 2013 - 14 and the assessment was completed.

3. Subsequently, the Assessing Authority attempted to initiate proceedings under Section 148 of the Act, 1961. For this purpose, a notice under Section 148 of the Act, 1961 for the Assessment Year 2013-14 was digitally signed by the Assessing Authority on 31.3.2021. It was sent to the assesses through e-mail and e-mail was undisputedly received by the petitioner on his registered e-mail I .D. on 06.04.2021. The limitation for issuing notice under Section 148 read with Section 149 of the Act, 1961 was upto 31.03.2021 for the Assessment Year 2013-14.

4. Under the circumstances, the petitioner filed objections before the Assessing Authority. One of the objections raised by the petitioner was that the notice

is time barred and thus without jurisdiction as it was issued on 06.04.2021 whereas the limitation for issuing notice under Section 148 read with Section 149 of the Act 1961 expired on 31.03.2021. The objection filed by the petitioner was rejected by the Assessing Authority holding that since the notice was digitally signed on 31.03.2021, therefore, it shall be deemed to have been issued within time i.e. on 31.03.2021.

5. Aggrieved, the petitioner has filed the present writ petition, praying for the following reliefs:-

"(a) Issue a writ, order or direction in the nature of certiorari quashing the notice under Section 148 of Income Tax Act, Dt.31.03.2021; and the connected proceedings for reassessment of Income for A.Y. 2013-14.

(b) Issue a writ in the nature of mandamus or an order prohibiting the operation of the proceedings initiated by the respondent number 2".

6. Yesterday, this writ petition was hard at length and following questions were framed for determination :-

"(i) Whether digitally signing notice would automatically amount to issuance of notice ?

(ii) Whether digitally signing a notice and issuing it are two different acts ?

(iii) Whether issuance of notice shall take place on the date and time when it is dispatched either electronically or through other mode ?

(iv) Whether merely generating notice from the Departmental Portal on 31.3.2021 and digitally signing it thereafter, would amount to issuance of notice ?

(v) Even if it is assumed that the notice under Section 148 of the Income Tax Act was issued on 31.3.2022 and despatched on 6.4.2022 then whether the unamended provision of Section 148 or amended provision of Section 148 would apply ?"

7. With the consent of the learned counsels for the parties, only question nos. (i) (ii) (iii) & (iv), as aforequoted, are being decided and the question No. (v) is left open.

Submissions

8. Learned counsel for the petitioner submits that digitally signing a notice is an act different from the act of issuing the notice. Section 149 provides limitation for issuance of the notice under section 148. When the notice has been issued to the petitioner by the Assessing Authority beyond the period of limitation i.e. after. 31.03.2021, therefore, the notice is time barred and no proceeding can be carried by the Assessing Authority pursuant to the impugned notice under Section 148 of the Act, 1961.

9. In support of the submissions, learned counsel for the petitioner has referred the provisions of Sections 148, 149, 282(1)(c) and 282 A of the Act, 1961 and Rule 127 A of the Income Tax Rules 1962 (hereinafter referred to as "the Rules 1962") and some definition clauses, Sections 3 and 13 of the Information

Technology Act, 2000 (hereinafter referred to as "the Act, 2000".

10. Learned counsel for the petitioner also relied upon a judgment of Gujrat High Court in **Kanubhai M. Patel (HUF) v. Hiren Bhatt or His Successors to Office (2011) 12 taxmann.com 198 (Guj.)** (paras 15, 15.1 & 16) and the judgment of this court dated 28.08.2017 in **Writ Tax No. 822 of 2016 (Smt. Kusum Agarwal Vs. Asst. Commissioner Of Income Tax, Agra And Another).**

11. **Sri Gaurav Mahajan**, learned counsel for the Income Tax Department submits that issue of notice means, the date on which the notice is digitally signed by the Assessing Authority. Since the impugned notice under Section 148 of the Act, 1961 has been signed by the Assessing Authority on 31.03.2021 i.e. well within the period of limitation, therefore, the impugned notice is wholly valid and the writ petition is not maintainable.

12. In support of his submissions Sri Gaurav Mahajan, has relied upon a judgment of Hon'ble Supreme Court in the case of **R.K. Upadhyaya v. Shanabhai P. Patel (1987) 166 ITR 163.**

13. Both the learned counsels for the parties have jointly stated that the limitation for issuing reassessment notice under Section 148 of the Act 1961 for the Assessment Year 2013-14 would have expired on 31.3.2020 but the limitation was extended by the Taxation and other laws amendment Act 2020 whereby the limitation stood extended upto 31.3.2021. Thus, learned counsels for both the parties are agreed that the limitation for issuance of notice under Section 148 of the Act, 1961 for the Assessment Year 2013 -14 was available to the Assessing Authority upto 31.03.2021.

Discussion and Findings

14. We have carefully considered the submissions of learned counsel for the parties and perused the record of the writ petition.

15. Before we proceed to examine the rival submissions, it would be appropriate to reproduce relevant provisions, as under :-

(A) Income Tax Act, 1961

*" **Section 149. Time limit for notice***

(1) No notice under section 148 shall be issued for the relevant assessment year,-

(a) if four years have elapsed from the end of the relevant assessment year, unless the case falls under clause (b) or clause (c);

(b) if four years, but not more than seven years, have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to one lakh rupees or more for that year.

(c) if seven years, but not more than sixteen years, have elapsed from the end of the relevant assessment year, unless the income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax which has escaped assessment.

Explanation.- In determining income chargeable to tax which has which

has escaped assessment for the purposes of this sub- section, the provisions of Explanation 2 of section 147 shall apply as they apply for the purposes of that section.].

(2). The provisions of sub- section (1) as to the issue of notice shall be subject to the provisions of section 151

(3) If the person on whom a notice under section 148 is to be served is a person treated as the agent of a non- resident under section 163 and the assessment, reassessment or re computation to be made in pursuance of the notice is to be made on him as the agent of such non- resident, the notice shall not be issued after the expiry of a period of two years from the end of the relevant assessment year.

Explanation._ For the removal of doubts, it is hereby clarified that the provisions of sub-section (1) and (3), as amended by the Finance Act, 2012, shall also be applicable for any assessment year beginning on or before the first day of April, 2012."

Section 282

282. (1) The service of a notice or summon or requisition or order or any other communication under this Act (hereafter in this section referred to as "communication") may be made by delivering or transmitting a copy thereof, to the person therein named,--

(c) in the form of any electronic record as provided in Chapter IV of the Information Technology Act, 2000 (21 of 2000); or

282A

(1) Where this Act requires a notice or other document to be issued by any income-tax authority, such notice or other document ***shall be signed and issued in paper from or communicated in electronic form*** *by that authority in accordance with such procedure as may be prescribed.*

(2) ***Every notice*** *or other document to be issued, served or given for the purposes of this Act by any income-tax authority,* ***shall be deemed to be authenticated*** *if the name and office of a designated income-tax authority is* ***printed, stamped*** *or otherwise written thereon.*

(3) For the purposes of this section, a designated income-tax authority shall mean any income-tax authority authorised by the Board to issue, serve or give such notice or other document after authentication in the manner as provided in sub-section (2).]

(B) Income Tax Rules 1962

Rule 127 A

127A. Authentication of notices and other documents-

(1) ***Every notice*** *or other document communicated* ***in electronic form*** *by an income-tax authority under the Act* ***shall be deemed to be authenticated,-***

(a) in case of electronic mail or electronic mail message (hereinafter referred to as the e-mail), if the name and office of such income-tax authority-

(i) is printed on the e-mail body, if the notice or other document is in the email body itself; or

(ii) is printed on the attachment to the e-mail, if the notice or other document is in the attachment,

and the e-mail is issued from the designated e-mail address of such income-tax authority;

(b) in case of an electronic record, if the name and office of the income-tax authority-

(i) is displayed as a part of the electronic record, if the notice or other document is contained as text or remark in the electronic record itself; or

(ii) is printed on the attachment in the electronic record, if the notice or other document is in the attachment,

and such electronic record is displayed on the designated website.

(2) The Principal Director General of Income-tax (Systems) or the Director General of Income-tax (Systems) shall specify the designated e-mail address of the income-tax authority, the designated website and the procedure, formats and standards for ensuring authenticity of the communication.

Explanation: For the purposes of this rule, the expressions-

(i) "electronic mail" and "electronic mail message" shall have the same meanings respectively assigned to them in Explanation to section 66A of the Information Technology Act, 2000 (21 of 2000);

(ii) "electronic record" shall have the same meaning as assigned to it in clause (t) of sub-section (1) of section 2 of the Information Technology Act, 2000 (21 of 2000)."

*(**C)Information Technology Act, 2000**

*2 (d) "affixing electronic signature" with its grammatical variations and cognate expressions means adoption of any methodology or procedure by a person for t**he purpose of authenticating an electronic record by means of digital signature;***

*2(p) "**digital signature" means authentication of any electronic record by** a subscriber by means of an electronic method or procedure in accordance with the provisions of section 3;*

*2(t) "**electronic record**" means data, record or data generated, image or sound stored, **received or sent** in an electronic form or micro film or computer generated micro fiche;*

*2(za) "**originator**" means a person who sends, generates, stores or transmits any electronic message or causes any electronic message to be sent, generated, stored or transmitted to any other person but does not include an intermediary;*

Section 13

Section 13 in The Information Technology Act, 2000

13. Time and place of despatch and receipt of electronic record.-

*(1) Save as otherwise agreed to **between the originator and the addressee,***

the despatch of an electronic record occurs when it enters a computer resource outside the control of the originator.

(2) Save as otherwise agreed between the originator and the addressee, the time of receipt of an electronic record shall be determined as follows, namely:-

(a) if the addressee has designated a computer resource for the purpose of receiving electronic records,-

(i) receipt occurs at the time when the electronic record enters the designated computer resource; or

(ii) if the electronic record is sent to a computer resource of the addressee that is not the designated computer resource, receipt occurs at the time when the electronic record is retrieved by the addressee;

(b) if the addressee has not designated a computer resource along with specified timings, if any, receipt occurs when the electronic record enters the computer resource of the addressee.

(3) Save as otherwise agreed to between the originator and the addressee, an electronic record is deemed to be despatched at the place where the originator has his place of business, and is deemed to be received at the place where the addressee has his place of business.

(4) The provisions of sub-section (2) shall apply notwithstanding that the place where the computer resource is located may be different from the place where the electronic record is deemed to have been received under sub-section (3).

(5) For the purposes of this section,-

(a) if the originator or the addressee has more than one place of business, the principal place of business, shall be the place of business;

(b) if the originator or the addressee does not have a place of business, his usual place of residence shall be deemed to be the place of business;

(c) "usual place of residence", in relation to a body corporate, means the place where it is registered.

16. Sub Section (1) of Section 149 starts with a prohibitory words that **"no notice** under Section 148 shall be issued for the relevant Assessment Year after expiry of the period as provided in sub Clauses (a) (b) and (c)". There is no dispute that the notice must be issued by the Assessing Authority within the period of limitation as provided in Section 149 of the Act, 1961. Section 282 of the Act, 1961 provides for mode of service of notices. Section 282 A provides for authentication of notices and other documents by signing it. Sub- Section 1 of Section 282 A uses the word " "Signed" and "issued in paper form" " or "communicated in electronic form by that authority in accordance with such procedure as may be prescribed". **Thus, signing of notice and issuance or communication thereof have been recognised as different acts.**

17. Rule 127 A(1) of the Rules 1962 provides that every notice or other document communicated in electronic form by an authority under the Act shall be deemed to be authenticated in case of electronic mail or electronic mail message

(e-mail) if the name and office of such income tax authority is printed on the e-mail body, if the notice or other document is in the e-mail body itself, or is printed on the attachment to the e-mail, if the notice or other document is in the attachment and the e-mail, is issued from the designated e-mail address of such income tax authority. **Thus, the issuance of notice and other document would take place when the e-mail is issued from the designated e-mail address of the concerned income tax authority.**

18. Since Section 149 of the Act 1961 requires notice to be issued by Income Tax Authority, therefore, in terms of sub Section (1) of Section 282 A it has to be signed by that authority and to be issued in paper form or communicated in electronic form by that authority in accordance with procedure prescribed.

19. The **communication in electronic form** has been prescribed in Rule 127 A of the Rules 1962 which provides a procedure for issuance of every notice or other document and the e-mail in electronic form/electronic mail which has to be issued from the designated e-mail address of such income tax authority.

20. Thus, after digitally signing the notice the income tax authority has to issue it to the assessee either in paper form or through electronic mail. Sub-Section (1) of Section 13 of the Act 2000 provides that dispatch of an electronic record occurs when it enters a computer resource outside the control of the originator. The aforesaid sub Section (1) of Section 13 indicates the point of time of issuance of notice. **Therefore, after a notice is digitally signed and when it is entered by the income tax authority in computer resource outside his control i.e. the control of the originator then that point of time would be the time of issuance of notice.**

21. The words "issue" or "issuance of notice" have not been defined under the Act 1961. However, the point of time of issuance of notice may be gathered from the provisions of the Act, 1961, the Rules, 1962 and the Act, 2000, as discussed above. Similar would be the position if the meaning of the word "issue" may be gathered in common parlance or as per dictionary meaning.

22. In **Chamber's Twentieth Century Dictionary,** the relevant meanings given to the word "issue" are act of sending out; to put forth; to put into circulation; to publish; to give out for use. **In the New Illustrated Dictionary, the relevant meaning attributed to the word "issue" is come out; be published; send forth ; publish ; put into circulation**.

23. The New Lexicon Webster's Dictionary of the English language 1988 edition its meaning of the word "issued" as under :-

"is-sue 1. n. a flowing, going or passing out || a place or means of going or flowing out, outlet || a ***publishing or giving out*** *|| something published or given out || an outcome, result, no one knows what the final issue will be || a question, point etc. under dispute or discussion, a matter of concern || (med.) a discharge of blood etc. || (med.) an incision made to induce such a discharge || (law) offspring at issue in disagreement || in dispute to bring (or put) to an issue to cause to reach the point where a decision can and must be made to join issue to take a conflicting view to take*

*issue to disagree 2. v. pres. part. is-su-ing past and past part. is-sued v.i. to come or flow forth || **to be derived, result | (law) to be descended || to be put into circulation**|| v.t. to publish or give out || to put into circulation, to issue a new coinage [O.F. issue, eissuel"*

24. In Black's Law Dictionary 9th edition the meaning of the word "issue" has been given as under :-

*"issue, vb. (14c) 1. To accrue <rents issuing from land> 2. To be put forth officially <without probable cause, the search warrant will notissue> 3. To **send out** or distribute officially <issue process> <issue stock> . - issuance, n."*

25. In the case of **Kanubhai M. Patel (HUF) v. Hiren Bhatt or His Successors to Office (2011) 334 ITR 25** Gujarat High Court has considered similar issue in the context of Section 149 of the Act 1961 and held, as under :-

"15. The expression "issue" has been defined in Black's Law Dictionary to mean "To send forth; to emit; to promulgate; as, an officer issues orders, process issues from court. To put into circulation; as, the treasury issues notes. To send out, to send out officially; to deliver, for use, or authoritatively; to go forth as authoritative or binding. When used with reference to writs, process, and the like, the term is ordinarily construed as importing delivery to the proper person, or to the proper officer for service etc."

*15.1 In **P. Ramanathan Aiyer's Law Lexicon the word "issue"** has been defined as follows:*

"Issue. As a noun, the act of sending or causing to go forth; a moving out of any enclosed place; egress; the act of passing out; exit; egress or passage out (Worcester Dict.); the ultimate result or end.

As a verb, "To issue" means to send out, to send out officially; to send forth; to put forth; to deliver, for use, or unauthoritatively: to put into circulation; to emit; to go out (Burrill); to go forth as a authoritative or binding, to proceed or arise from; to proceed as from a source (Century Dict.)

Issue of Process. Going out of the hands of the clerk, expressed or implied, to be delivered to the Sheriff for service. A writ or notice is issued when it is put in proper form and placed in an officer's hands for service, at the time it becomes a perfected process.

"Any process may be considered "issued" if made out and placed in the hands of a person authorised to serve it, and with a bona fide intent to have it served."

16. Thus, the expression to issue in the context of issuance of notices, writs and process, has been attributed the meaning, to send out; to place in the hands of the proper officer for service. The expression "shall be issued" as used in section 149 would therefore have to be read in the aforesaid context. In the present case, the impugned notices have been signed on 31.03.2010, whereas the same were sent to the speed post centre for booking only on 07.04.2010. Considering the definition of the word issue, it is apparent that merely signing the notices on 31.03.2010, cannot be equated with

issuance of notice as contemplated under section 149 of the Act. The date of issue would be the date on which the same were handed over for service to the proper officer, which in the facts of the present case would be the date on which the said notices were actually handed over to the post office for the purpose of booking for the purpose of effecting service on the petitioners. Till the point of time the envelopes are properly stamped with adequate value of postal stamps, it cannot be stated that the process of issue is complete. In the facts of the present case, the impugned notices having been sent for booking to the Speed Post Centre only on 07.04.2010, the date of issue of the said notices would be 07.04.2010 and not 31.03.2010, as contended on behalf of the revenue. In the circumstances, impugned the notices under section 148 in relation to assessment year 2003-04, having been issued on 07.04.2010 which is clearly beyond the period of six years from the end of the relevant assessment year, are clearly barred by limitation and as such, cannot be sustained."

26. In writ Tax No.822 of 2016 **Smt. Kusum Agarwal Vs. Asst. Commissioner Of Income Tax, Agra And Another,** decided on 28.08.2017 the Division Bench of this Court has held/observed as under:

"Sri R.R. Agarwal has cited Kanubhai M. Patel (HUF) v. Hiren Bhatt or His Successors to Office (2011) 12 taxmann.com 198 (Guj.). In this case also, the dispute was with regard to the issuance of notice u/s 148 of the Act and the limitation provided u/s 149 of the Act. The Division Bench of the Court held that merely signing of notice on a particular date cannot be equated with the date of issuance of the notice as contemplated u/s 149 of the Act. The notice therein was signed on the last date of limitation, i.e. 31.03.2010 and was actually handed over to the post office for the purposes of effecting service upon the assessee on 07.04.2010.

The same is the situation in the case we are dealing with inasmuch as the notice was signed on 31.03.2016 and was handed over the the postal authorities for effecting service upon the petitioner on 01.04.2016 as per the track report of the India Post. There is no evidence otherwise on record to establish that the notice was handed over to the post office for effecting service upon the petitioner on 31.03.2016.

In view of the aforesaid facts and circumstances of the case, we hold that the notice u/s 148 of the Act was issued to the petitioner beyond the last date of limitation prescribed and as such, is barred by time."

27. In the case of **Delhi Development Authority Vs. H.C. Khurana (paras 14 & 15) (1993) 3 SCC** Hon'ble Supreme Court has explained the meaning of the word "issue" and held/observed as under :-

"14. 'Issue' of the chargesheet in the context of a decision taken to initiate the disciplinary proceedings must mean, as it does, the framing of the chargesheet and taking of the necessary action to despatch the chargesheet to the employee to inform him of the charges framed against him requiring his explanation; and not also the further fact of service of the chargesheet on the employee. It is so, because knowledge to the employee of the charges framed against him, on the basis of the decision taken to initiate disciplinary proceedings, does not form a part of the decision making process of the authorities to initiate the

disciplinary proceedings, even if framing the charges forms a part of that process in certain situations. The conclusions of the Tribunal quoted at the end of para 16 of the decision in Jankiraman which have been accepted thereafter in para 17 in the manner indicated above, do use the word 'served' in conclusion No.(4), but the fact of 'issue' of the chargesheet to the employee is emphasised in para 17 of the decision. Conclusion No.(4) of the Tribunal has to be deemed to be accepted in Jankiraman only in this manner.

15. The meaning of the word 'issued', on which considerable stress was laid by learned counsel for the respondent, has to be gathered from the context in which it is used. Meanings of the word ''issue' given in the Shorter Oxford English Dictionary include 'to give exit to; to send forth, or allow to pass out; to let out; .... to give or send out authoritatively or officially; to send forth or deal out formally or publicly-, to emit, put into circulation'. The issue of a charge-sheet, therefore, means its despatch to the government servant, and this act is complete the moment steps are taken for the purpose, by framing the charge-sheet and despatching it to the government servant, the further fact of its actual service on the government servant not being a necessary part of its requirement. This is the sense in which the word 'issue' was used in the expression 'charge-sheet has already been issued to the employee', in para 17 of the decision in Jankiraman."

28. In the case of State of ***Andhra Pradesh and others Vs. CH. Gandhi (2013) 5SCC 111(para 19)*** Hon'ble Supreme Court explained the meaning of word "issue" in the context of a service matter and reiterated its earlier judgment in the case of **H.C. Khurana (supra)** observing as under :-

"19. Be it noted, in the said case, the decision rendered in Union of India and others v. K.V. Jankiraman and others [(1991) 4 SCC 109] was explained by stating thus:

*- "13. ... 'The word ''issued' used in this context in Jankiraman it is urged by learned counsel for the respondent, means service on the employee. We are unable to read Jankiraman in this manner. T**he context in which the word ''issued' has been used, merely means that the decision to initiate disciplinary proceedings is taken and translated into action by despatch** of the charge-sheet leaving no doubt that the decision had been taken. The contrary view would defeat the object by enabling the government servant, if so inclined, to evade service and thereby frustrate the decision and get promotion in spite of that decision.'"*

29. Thus, considering the provisions of Section 282 and 282 A of the Act, 1961 and the provisions of Section 13 of the Act, 2000 and meaning of the word "issue" we find that **firstly** notice shall be signed by the assessing authority **and then** it has to be issued either in paper form or be communicated in electronic form by delivering or transmitting the copy thereof to the person therein named by modes provided in section 282 which includes transmitting in the form of electronic record. Section 13(1) of the Act, 2000 provides that unless otherwise agreed, the dispatch of an electronic record occurs when it enters into computer resources outside the control of the originator. **Thus, the point of time when a digitally signed notice in the form of electronic record is**

entered in computer resources outside the control of the originator i.e. the assessing authority that shall the date and time of issuance of notice under section 148 read with Section 149 of the Act, 1961.

30. In view of the discussion made above, we hold that **mere digitally signing the notice is not the issuance of notice.** Since the impugned notice under Section 148 of the Act, 1961 was issued to the petitioner on 06.04.2021 through e-mail, therefore, we hold that the impugned notice under section 148 of the Act, 1961 is time barred. Consequently, the impugned notice is quashed.

31. The writ petition is **allowed.**

(2022)03ILR A779
ORIGINAI JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.03.2022

BEFORE
THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE JAYANT BANERJI, J.

Writ Tax No. 96 of 2022

M/S Apex Leather , Kanpur ...Petitioner
Versus
State Of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rahul Agarwal

Counsel for the Respondents:
Sri Amit Mahajan, Sri Bhanu Pratap Singh, Kachhawah, C.S.C., Sri Krishna Agarawal, Sri Shashi Prakash Singh

(A) Tax Law – Constitution of India, 1950 - Article 226, - Central Goods and Service Tax Act, 2017 - UP Goods & Service Tax Act, 2017 – Sections 54, 109 & 112 : - Validity of rejection of claim of refund u/s 54 of CGST/UPGST Act, 2017 - writ petition – preliminary objection by both St. Govt. as well as Central Govt. counsel – to avail the remedy of an Appeal u/s 112 of the Act, 2017 – Since, till date Govt. has not constitution of St. Bench & Areas Benches in UP - as such preliminary objection is impermissible. (Para – 5, 8)

(B) Tax Law – Constitution of India,1950 - Article 226, - Central Goods and Service Tax Act, 2017 - UP Goods and Service Tax Act, 2017 – Sections 54, 109 & 112 : - Writ Petition – against rejection order u/s section 54 – Remedy is to file statutory Appeal u/s 112 – Since, till date no constitution of benches of Appellate Tribunal in UP as such writ petitions are filed in High Court – one bench of Hon'ble High Court issued direction to constitute Appellate Tribunal – but same is not constituted due to interim order passed by another Bench – 'it is a settle law that, a coordinate bench cannot sit in appeal over the final judgment of another coordinate bench of equal strength – as such – to handle the alarming situation in UP being remediless - place this matter before Hon'ble Chief justice - for referred the 'question of formation of Tribunal in UP' to a Larger Bench. (Para No. 21, 22)

Writ Petition pending. (E-11)

List of Cases cited: -

1. Oudh Bar Asso. High Court, LKO VS U.O.I. & ors. (PIL (Civil) No. 6800/2019 order Dt. 31.05.2019),

2. M/s Torqu Pharmaceuticals Pvt. Ltd. Vs U.O.I. & ors. (Writ Tax No. 665/2018 order dated 09.02.2021),

3. Awadh Bar Asso. High Court LKO & AnotherVs UOI & ors. (PIL (Civil) No. 6024/2021 order dated 04.03.2021),

4. Jai Shri Laxman Rao Patil Vs St. of Mah. (2021 vol. 2 SCC 785),

5. UOI Vs Cipla Ltd. (2017 vol. 5 SCC 262),

6. UOI Vs Cynamide India Ltd.& anr.1987 Vol. 2 SCC 720),

7. Bihar Public Service Commissioner Vs Shiv Jatan Thakur (Dr.) (1994 Suppl. 3 SCC 220),

8. Morgan Stanley Mutual Fund Vs Kartick Das (1994 Vol. 4 SCC 225),

9. Sachidananda Pandey Vs St. of W.B. & ors.(1987 Vol. 2 SCC 295),

10. Bombay Dyeing & Manufacturing Co. Ltd. Vs Bombay Environmental Action Group & ors. (2005 Vol. 5 SCC 1961).

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

1. On oral request of learned counsel for the petitioner, the GST Council, New Delhi through its Member Secretary is allowed to be impleaded as respondent No.5.

2. Notice on behalf of respondent No.5 has been accepted by the office of learned Additional Solicitor General.

3. Heard Sri Rahul Agarwal, learned counsel for the petitioner, Sri B.P. Singh Kachhwah, learned Standing Counsel for the State-respondents. Sri Amit Mahajan, learned Senior Standing Counsel - (Indirect Taxes) for the respondent Nos.2 and 3 and Sri S.P. Singh, learned Additional Solicitor General for the respondent Nos.4 and 5.

4. Briefly stated facts of the present case are that the petitioner filed refund application under Section 54 of the Central Goods and Service Tax Act, 2017/ U.P. Goods and Service Tax Act, 2017 (hereinafter referred to as "the Acts, 2017') in form GST-RFD-01 on 31.03.2020 for which an acknowledge receipt in RFD-02 was issued by the respondents on 09.04.2020. The refund application of the petitioner was rejected by the proper officer by order dated 29.04.2020 in form GST-RFD-06. Aggrieved with the aforesaid order dated 29.04.2020, the petitioner filed an appeal before the respondent No.2, i.e. the First Appellate Authority under the Act, 2017, which was partly allowed by order dated 29.06.2021. Against the order of the First Appellate Authority, the petitioner has a right of appeal under Section 112 of the Act, 2017 but since GST Tribunal has not been constituted so far in the State of Uttar Pradesh, therefore, the petitioner has filed the present writ petition under Article 226 of the Constitution of India praying to quash the impugned order dated 29.06.2021 passed by the respondent No.2 in so far as it rejects the application for refund of the petitioner for the months prior to March, 2018 to the extent of Rs.7,92,739/-.

Preliminary objection raised by the Respondents:-

5. Learned standing counsel and the learned counsel for Indirect Taxes have raised a preliminary objection as to maintainability of the writ petition on the ground that the petitioner has a remedy of appeal under Section 112 of the Act, 2017. They along with the learned Additional Solicitor General of India, jointly submit that the matter of constitution of State Bench of Tribunal at Prayagraj and 4 Area Benches in other parts of Uttar Pradesh is pending before the respondent No.4 but on account of interim order dated 04.03.2021 passed by the Division Bench in PIL CIVIL No.6024 of 2021 (Awadh Bar Association High Court, Lko Thru Gen.Secy. & Anr. vs. U.O.I.Thru Secy. Finance Ministry, New Delhi & Ors.), neither State Bench nor

Area Benches under Section 109 of the Act, 2017 could be notified. Therefore, as and when the State Bench and Area Benches are notified, the petitioner may avail the statutory remedy of appeal under Section 112 of the Act, 2017. It is further submitted that disputed questions of fact are involved in the case, which cannot be decided in writ jurisdiction under Article 226 of the Constitution of India.

6. Learned standing counsel for the State of U.P. has also produced copy of instructions dated 08.03.2021 sent by Joint Commissioner (GST) Commercial Tax, Headquarter Lucknow.

7. Learned Additional Solicitor General of India has stated on the basis of instructions that Government of India wants to establish State Bench and Area Benches of GST Appellate Tribunal in the State of Uttar Pradesh but on account of interim order dated 04.03.2021 in PIL CIVIL No.6024 of 2021 (Awadh Bar Association High Court, Lko Thru Gen.Secy. & Anr. vs. U.O.I.Thru Secy. Finance Ministry, New Delhi & Ors.), the State Bench and Area Benches of GST Appellate Tribunal cannot be established in the State of Uttar Pradesh without leave of the court. He further submits that against the judgment dated 31.05.2019 in PIL CIVIL No.6800 of 2019 (Oudh Bar Asso. High Court, Lko. Thru General Secretary & Anr vs. U.O.I. Thru Secy. Ministry Of Finance & Ors.), the respondent Nos.4 and 5 have filed S.L.P. on 04.09.2020 being Dairy No.18877 of 2020 (Union of India vs. Oudh Bar Association, High Court Lucknow, U.P.), which is still pending and notices have not yet been issued. Learned Additional Solicitor General of India further states that the judgment dated 09.02.2021 in Writ Tax No.655 of 2018 (M/S Torque Pharmaceuticals Pvt. Ltd. vs. Union Of India And 5 Others) and other 29 connected writ petitions, has not been challenged so far by the respondent Nos.4 and 5 before the Hon'ble Supreme Court.

Submission on behalf of the petitioner:-

8. Learned counsel for the petitioner has referred to the provisions of Section 109 of the Act, 2017, judgment of Lucknow Bench of this Court **dated 31.05.2019 in PIL CIVIL No.6800 of 2019** (Oudh Bar Asso. High Court, Lko. Thru General Secretary & Anr vs. U.O.I. Thru Secy. Ministry Of Finance & Ors.), the judgment dated **09.02.2021 in Writ Tax No.655 of 2018** (M/S Torque Pharmaceuticals Pvt. Ltd. vs. Union Of India And 5 Others) and 29 other connected writ petitions and the interim order dated 04.03.2021 in PIL CIVIL No.6024 of 2021 (Awadh Bar Association High Court, Lko Thru Gen.Secy. & Anr. vs. U.O.I.Thru Secy. Finance Ministry, New Delhi & Ors.). He submits that ***firstly,*** interim order dated 04.03.2021 passed in PIL CIVIL No.6024 of 2021 is wholly without jurisdiction inasmuch as by the aforesaid interim order, the effect and operation of the division Bench judgment in the case of M/S Torque Pharmaceuticals Pvt. Ltd. (supra) has been suspended by another Division Bench, which is wholly impermissible, ***secondly,*** large number of dealers under the Act, 2017 have been left remediless due to non-creation of GST Tribunal in the State of Uttar Pradesh despite statutory provision of appeal under Section 112 and this situation has arisen at the instance of a Bar Association which has no locus standi to oppose to the constitution of Tribunal or to render remediless lacs and lacs of dealers in the garb of the aforesaid

PIL, ***thirdly,*** no public interest can be said to be involved in the aforesaid two PILs filed by a Bar Association and ***fourthly***, that on one hand, the respondent No.5 has failed to carry out the legislative mandate of Section 109 of the Act, 2017 and thus, dealers have been left remediless and on the other hand, the respondent Nos.1, 2 and 3 have raised a preliminary objection as to maintainability of the writ petition on the ground of statutory remedy of appeal, which is impermissible.

9. We have carefully considered the submissions of learned counsels for the parties and perused the records and instructions.

Discussion:-

10. As per copy of **letter of Additional Chief Secretary, Tax and Registration dated 21.02.2019** annexed with the instructions of the State-respondents, the number of registered dealers under the Act, 2017 were about 14 lacs as against the 7.5 lacs total dealers registered under the U.P. VAT Act. As per instructions, **the number of appeals expected to be filed before the GST Tribunal would be between 12,000 to 15,000 per year, i.e. 1000 to 1250 appeals per month.** These, figures were determined by the State of U.P. prior to issuance of the aforesaid D.O. letter dated 21.02.2019 addressed to the Secretary/ GST Council, Government of India, New Delhi. It was also mentioned in the letter that due to non-creation of Tribunal, 320 writ petitions have been filed in the High Court against the orders of the First Appellate Authority. **Thus, from the facts as stated by the State of U.P. in its own letter dated 21.02.2019, about 15,000 appeals per year are likely to be filed before the Tribunal,** which is the last fact finding authority. **However, due to interim order dated 04.03.2021 passed by a Division Bench in PIL CIVIL No.6024 of 2021 (Awadh Bar Association High Court, Lko Thru Gen.Secy. & Anr. vs. U.O.I.Thru Secy. Finance Ministry, New Delhi & Ors.), the GST Tribunal could not be notified by the respondent No.5.** For ready reference the order dated 04.03.2021 passed in PIL CIVIL No.6024 of 2021, is reproduced below:

"At the threshold, it is stated by learned Additional Solicitor General of India that respondent nos. 1 and 2 have taken a decision to file a Special Leave Petition to assail correctness of the judgment dated 09.02.2021 in Writ Tax No. 655 of 2018 passed by a coordinate Bench of this Court at Allahabad.

This petition for writ is preferred on behalf of Awadh Bar Association High Court, Lucknow and Sri Sharad Pathak, Secretary of the Awadh Bar Association High Court, Lucknow.

Grievance of the petitioners is with regard to decision of the Goods and Services Tax Council on Agenda Item No. 6 undertaken in its 39th meeting held on 14.03.2020.

Several contentions have been raised by learned counsel for the petitioners while questioning correctness of the decision aforesaid. Having considered the same, we deem it appropriate to admit this petition for writ and to hear the same finally at earliest.

Accordingly, the writ petition is admitted for hearing. No post admission

notice be issued as the parties are already represented by their counsels.

Having considered the arguments advanced and also the instructions communicated to us on behalf of respondent nos. 1 and 2, we deem it appropriate to direct respondent nos. 1 and 2 for not establishing Goods and Services Tax Appellate Tribunal for the State of Uttar Pradesh without leave of this Court.

Let this petition for writ be listed for final disposal on 15.03.2021.

In the meanwhile, respondents, if desire, may file counter affidavit to the petition for writ."

11. Section 109 of the CGST Act, 2017 has conferred power upon the Central Government to constitute Goods and Service Tax Appellate Tribunal by notification, on the recommendation of the GST Council. As per scheme of the Act, the GST Tribunal would be the last fact finding authority. **Non-constitution of Tribunal has left remediless lacs and lacs dealers under the Act, 2017 in the State of Uttar Pradesh since the year 2017, particularly small and medium class dealers who are not able to afford to file writ petitions against orders of the First Appellate Authority for variety of reasons including high cost of litigation in High Court.**

12. The High Court under Article 226 of the Constitution of India has undoubtedly very wide powers but such powers cannot be said to be limitless. That apart, a coordinate bench cannot sit in appeal over the final judgment of another coordinate bench of equal strength and cannot pass an interim order in such manner which may result either in staying or directly diluting the effect and operation of a final judgment which prima facie appears to have been done by the interim order dated 04.03.2021 in PIL Civil No.6024 of 2021.

<u>On the point of Interim Order:-</u>

13. In the case o**f Jaishri Laxmanrao Patil vs. State of Maharashtra, (2021) 2 SCC 785 (para-11),** Hon'ble Supreme Court held as under:

"11. It is no doubt true that the Act providing reservations has been upheld by the High Court and the interim relief sought by the Appellants would be contrary to the provisions of the Act. This Court in Health for Millions v. Union of India, (2014) 14 SCC 496 held that courts should be extremely loath to pass interim orders in matters involving challenge to the constitutionality of a legislation. However, if the Court is convinced that the statute is ex facie unconstitutional and the factors like balance of convenience, irreparable injury and Public Interest are in favour of passing an interim order, the Court can grant interim relief. There is always a presumption in favour of the constitutional validity of a legislation. Unless the provision is manifestly unjust or glaringly unconstitutional, the courts do show judicial restraint in staying the applicability of the same. ***It is evident from a perusal of the above judgment that normally an interim order is not passed to stultify statutory provisions****. However, there is no absolute rule to restrain interim orders being passed when an enactment is ex facie unconstitutional or contrary to the law laid down by this Court. "*

(Emphasis supplied by us)

14. In **Union of India vs. Cipla Ltd., (2017) 5 SCC 262 (para-168)**, Hon'ble

Supreme Court considered the question of grant of interim relief **where public interest is involved** and held as under:

"168. Under these circumstances, we are clearly of the view that in matters where public interest is involved, the Court ought to be circumspect in granting any interim relief. The consequence of an interim order might be quite serious to society and consumers and might cause damage to public interest and have a long term impact. *We make it clear that it is not our intention to suggest to any Court how and in what circumstances interim orders should or should not be passed but it is certainly our intention to make it known to the Courts that the* ***time has come when it is necessary to be somewhat more circumspect while granting an interim order in matters having financial or economic implications."***

(Emphasis supplied by us)

15. In **Union Of India & Anr vs Cynamide India Ltd. & Anr, (1987) 2 SCC 720 (para-37),** Hon'ble Supreme Court **considered the stay of implementation of the notifications** and held as under:

"37. We notice that in all these matters, the High Court granted stay of implementation of the notifications fixing the maximum prices of bulk drugs and the retail prices of formulations. We think that in matter of this nature, where prices of essential commodities are fixed in order to maintain or increase supply of the commodities or for securing the equitable distribution and availability at fair prices of the commodity, it is not right that the court should make any interim order staying the implementation of the notification fixing the prices. We consider that such orders are against the public interest and ought not to be made by a court unless the court is satisfied that no public interest is going to be served. "

(Emphasis supplied by us)

16. In **Bihar Public Service Commissioner Vs. Shiv Jatan Thakur (Dr.), (1994) Suppl. 3 SCC 220 (para-38),** Hon'ble Supreme Court considered the **validity of interim order passed by the High Court interfering with the normal functioning** of Bihar Public Service Commission and held as under:

"38. It is the said interim orders which are the impugned in the Special Leave Petitions. ***We are really unable to see how the Writ Jurisdiction of the High Court under Article 226 of the Constitution of India could have been availed of to make the said interim orders which interfered with the normal functioning of the BPSC by the constitutional functionaries,*** *even if the High Court desired to have the views of the BPSC as regards the writ petition filed by Dr. Thakur against the BPSC and the functioning of its Chairman. We are indeed unable to understand now such interim orders could be regarded as those which have been made in aid of the final relief, if any, required to be granted in the Writ Petition or required to maintain status quo pending final disposal of the writ petition. When the nature of the interim order is seen, it becomes obvious that the High Court has sought to take over responsibility of carrying on the functions of the BPSC by appointing its own chairman for conducting a meeting of the BPSC. It is no doubt open to the Court to reject the affidavit filed on behalf of the BPSC by the Chairman on its view that it cannot be*

regarded as the opinion of the BPSC. But, in a case, even where such decision of the Commission as a body had been called for, the High Court was not enabled, in the purported exercise of its jurisdiction under Article 226 of the Constitution, ***to make such interim orders which would have made the functioning of the BPSC, a constitutional institution, a mockery in the eyes of the general public and exposed its constitutional functionaries to ridicule.*** *It is true that Article 226 of the Constitution, empowers the High court to exercise it discretionary jurisdiction to issue directions, orders or writs, including writs in the nature of habeas corpus, certiorari, quo warranto and mandamus or any of them for the enforcement of the rights conferred under the Constitution or for an other purpose, but such discretion to issue directions or writs on orders conferred on the High Court under Article 226 being a judicial discretion to be exercised on the basis of well-established judicial norms, could not have been used by the High Court to make the said interim orders which could not have any way helped or aided the Court in granting the main relief sought in the writ petition. The said interim orders, therefore, not being those made to maintain the status quo or undo an order, the review of which is sought, so that the ultimate relief to be granted to the party approaching it, may not become futile, they become wholly unsustainable.* ***Such interim orders are made by the High Court, to say the least, without realisation that they had the effect of putting the Chairman and its Members to ridicule in the eyes of the general public and making a constitutional institution of the BPSC a mockery.*** *For the said reasons, the interim orders impugned in the S.L.P.s cannot be sustained and are liable to be set aside."*

(Emphasis supplied by us)

17. In the case of **Morgan Stanley Mutual Fund vs Kartick Das, (1994) 4 SCC 225 (para-36)**, Hon'ble Supreme Court laid down certain **factors which should weigh with the court in grant of ex parte injunctions**, as under:

"6. As a principle, ex parte injunction could be granted only under exceptional circumstances. The factors which should weigh with the court in the grant of ex parte injunction are-

(a) whether irreparable or serious mischief will ensue to the plaintiff;

grant of it would involve;

(c) the court will also consider the time at which the plaintiff first had notice of the act complained so that the making of improper order against a party in his absence is prevented;

(d) the court will consider whether the plaintiff had acquiesced for sometime and in such circumstances it will not grant ex parte injunction;

(e) the court would expect a party applying for ex parte injunction to show utmost good faith in making the application.

(f) even if granted, the ex parte injunction would be for a limited period of time.

(g) General principles like prima facie case balance of convenience and irreparable loss would also be considered by the court."

When a public interest litigation is usually entertained?

18. In the case of **Malik Brothers vs Narendra Dadhich & Ors, (1999) 6 SCC 552 (para-2)**, Hon'ble Supreme Court considered the question when a public interest litigation may be entertained by a court and held as under:-

"2.....Before embarking upon an inquiry into the legality of the impugned judgment of the High Court, it is necessary to bear in mind that a public interest litigation is usually entertained by a court for the purpose of redressing public injury, enforcing public duty, protecting social rights and vindicating public interest. The real purpose of entertaining such application is the vindication of the rule of law, effective access to justice to the economically weaker class and meaningful realisation of the fundamental rights. The directions and commands issued by the courts of law in a public interest litigation are for the betterment of the society at large and not for benefiting any individual. But if the court finds that in the garb of a public interest litigation actually an individual,s interest is sought to be carried out or protected, it would be the bounden duty of the court not to entertain such petition as otherwise the very purpose of innovation of public interest litigation will be frustrated. It is in fact a litigation in which a person is not aggrieved personally but brings an action on behalf of down-trodden mass for the redressal of their grievance....." (Emphasis supplied by us)

19. In the case of ***Sachidananda Pandey vs State Of West Bengal & Ors, (1987) 2 SCC 295 (para-61),*** Hon'ble Supreme Court held as under:

"61. It is only when courts are apprised of gross violation of fundamental rights by a group or a class action or when basic human rights are invaded or when there are complaints of such acts as shock the judicial conscience that the courts, especially this Court, should leave aside procedural shackles and hear such petitions and extend its jurisdiction under all available provisions for remedying the hardships and miseries of the needy, the under-dog and the neglected....."

(Emphasis supplied by us)

20. In the case o**f Bombay Dyeing & Manufacturing Co. Ltd vs Bombay Environmental Action Group and others, (2005) 5 SCC 1961 (para-22)**, Hon'ble Supreme Court **explained that when an interim order may be passed in a public interest litigation** and held as under:

*"22.....But, there cannot be doubt or dispute whatsoever that before an interim order is passed and in particular a public interest litigation, the court must consider the question as regard **existence of a prima facie case**, balance of convenience as also the question as to whether the **writ petitioners** shall suffer **an irreparable injury**, if the injunction sought for is refused. The courts normally do not pass an interlocutory order which would affect a person without giving an opportunity of hearing to him. Only in extreme cases, an ad interim order can be passed but even therefor, the following parameters as laid down by this Court in Morgan Stanley Mutual Fund etc. vs. Kartick Das etc. [(1994) 4 SCC 225] are required to be complied with:....." (Emphasis supplied by us)*

21. In view of alarming situation created due to non-establishing of State Bench and Area Benches of GST Tribunal

in the State of Uttar Pradesh, rendering the entire class of dealers remediless under the Act, 2017 from availing statutory remedy of appeal under Section 112 of the Act, 2017, we are of the view that under the facts and circumstances and prevailing situation, the matter with regard to the following questions are referred to Larger Bench:-

(i) Whether by interim order dated 04.03.2021 in PIL CIVIL No.6024 of 2021 (Awadh Bar Association High Court, Lko Thru Gen.Secy. & Anr. vs. U.O.I.Thru Secy. Finance Ministry, New Delhi & Ors.), directing for not establishing GST Appellate Tribunal for State of Uttar Pradesh without leave of the court, could be passed in conflict with the final judgment dated 09.02.2021 in Writ Tax No.655 of 2018 passed by the Division Bench?

(ii) Whether under the facts and circumstances of the case and in the interest of dealers in State of Uttar Pradesh under the CGST Act/ U.P.GST Act, 2017, a direction needs to be issued immediately to the respondent No.4 to notify the State Bench and Area Benches of GST Appellate Tribunal in the State of Uttar Pradesh, within a time bound period so that persons/ dealers may avail statutory remedy of appeal under Section 112 of the CGST Act/ U.P. GST Act, 2017 and they may not suffer further?

(iii) Establishment of the State Bench of GST Appellate Tribunal at Prayagraj and its four Area Benches in the State of Uttar Pradesh in terms of the final judgment of the Division Bench dated 09.02.2021 in Writ Tax No.655 of 2018 (M/s Torque Pharmaceuticals Pvt. Ltd. vs. Union of India and 5 others) and other 29 connected writ petitions?

22. Let this order alongwith the records of the writ petition be placed before Hon'ble the Chief Justice for constitution of a Larger Bench so that people in the State of Uttar Pradesh having right to avail remedy of appeal under Section 112 of the CGST/ U.P. GST Act, 2017 may avail the statutory remedy and may not remain remediless.

(2022)03ILR A787
ORIGINAI JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.03.2022

BEFORE
THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE JAYANT BANERJI, J.

Writ Tax No. 1029 of 2021

Bharat Mint & Allied Chemicals, Badaun
...Petitioner
Versus
Commissioner Commercial Tax & Ors.
...Respondents

Counsel for the Petitioner:
Sri Abhinav Mehrotra, Sr Satya Vrata Mehrotra

Counsel for the Respondents:
C.S.C., A.S.G.I.

(A) Tax Law – Constitution of India,1950 - Article 226, - Central Goods and Service Tax Act, 2017 -U.P. Goods & Service Tax Act, 2017 – Sections 74, 75(4) & 107 - Validity of impugned assessment order – imposing demand of Tax, interest & penalty without affording opportunity of hearing to the Assesse – writ petition – patent breach of principle of natural justice – impugned order quashed with cost of Rs. 10,000/- matter remitted back to proceed afresh in accordance with law, after affording opportunity of hearing. (Para – 9, 17, 18, 19)

(B) Tax Law – Constitution of India, 1950 - Article 226, - Central Goods & Service Tax Act, 2017/U.P. Goods and Service Tax Act, 2017 – Sections 74, 75(4) & 107- Writ Petition - **Validity of impugned assessment order on the ground of breach of principle of natural justice – objection taken counter - alternative remedy – it is settled law that alternative remedy is not a complete bar to entertain a writ petition U/A 226 – writ petition allowed with cost with direction to Commissioner Commercial Tax U.P. through Registrar General – to ensure & follow the principles of nature justice in the St. of U.P. by the Assessing Authorities**.(Para – 13, 15, 20)

Writ Petition Allowed. (E-11)

List of Cases cited: -`

1. U.O.I. & ors. Vs M/s. Jesus Sales Corporation AIR 1996 SC 1509

2. Himmatlal Harilal Mehta Vs St. of M.P., AIR 1954 SC 403,

3. Collector of Customs Vs Ramchand Sobhraj Wadhwani, AIR 1961 SC 1506,

4. Collector Of Customs & Excise, Cochin & ors. Vs A. S. Bava, AIR 1968 SC 13,

5. M.P. St. Agro Industries Development Corpn. Ltd. & anr. Vs Jahan Khan (2007) 10 SCC 88,

6. Dhampur Sugar Mills Ltd. Vs St. of U.P. & ors. (2007) 8 SCC 338,

7. BCPP Mazdoor Sangh Vs NTPC (2007) 14 SCC 234.

8. Rajasthan St. Electricity Board Vs U.O.I., (2008) 5 SCC 632,

9. Mumtaz Post Graduate Degree College Vs University of Lucknow, 6 (2009) 2 SCC 630,

10. Godrej Sara Lee Ltd. Vs Assistant Commissioner (AA), (2009) 14 SCC 338,

11. U.O.I. Vs Mangal Textile Mills (I) (P) Ltd., (2010) 14 SCC 553,

12. U.O.I. Vs Tantia Construction (P) Ltd., (2011) 5 SCC 697,

13. Southern Electricity Supply Co. of Orissa Ltd. Vs Sri Seetaram Rice Mill, (2012) 2 SCC 108,

14. St. of M.P. Vs Sanjay Nagaich (2013) 7 SCC 25,

15. St. of H.P. Vs Gujarat Ambuja Cement Ltd., (2005) 6 SCC 499,

16. Star Paper Mills Ltd. Vs St. of U.P. & ors., JT (2006) 12 SC 92,

17. State of Tripura Vs Manoranjan Chakraborty, (2001) 10 SCC 740,

18. Paradip Port Trust vs Sales Tax Officer and Ors. (1998) 4 SCC 90,

19. Feldohf Auto & Gas Industries Ltd. Vs U.O.I. (1998) 9 SCC 710,

20. Whirlpool Corporation Vs Registrar of Trademarks (1998) 8 SCC 1;

21. Guruvayur Devasworn Managing Committee Vs C.K. Rajan (2003) 7 SCC 546,

22. Siemens Ltd. Vs St. of Mah.(2006) 12 SCC 33,

23. Kaikhosrou (Chick) Kavasji Framji of Indian Inhabitant Vs U.O.I. (2019) 20 SCC 705,

24. M/s Shree Bhawani Paper Mills Ltd. Vs St. of U.P. & Another (Writ Tax No. 255/2012, order dt. 10.09.2015),

25. M/s. Rapti Commissions Agency Vs U.O.I. (2010) 1 AllLJ. 710,

26. Oudh Sugar Mill Vs St. of U.P. (2015) 3 AllLJ 774 (para 27).

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

1. Heard Sri Abhinav Mehrotra, learned counsel for the petitioner and

learned standing counsel for the State - respondents.

2. This writ petition has been filed praying for the following relief:

"1. The Hon'ble Court may be pleased to issue a writ, order or direction in the nature of CERTIORARI, calling for the Record of proceedings from Revenue and to thereafter be further pleased to set-aside and quash the IMPUGNED Order of Adjudication Dt. 09.11.2021 [ANNEXURE NO.7] and connected demand of tax which is made is gross violation of the principles of natural Justice; NO oral hearing in the matter was afforded to Petitioner, adverse material has not been confronted to Petitioner resulting in a most UNFAIR TRIAL.

2. The Hon'ble Court may be pleased to issue a writ, order or direction in the nature of CERTIORARI to set aside and quash the IMPUGNED Order of Adjudication Dt. 09.11.2021 which is made is gross disregard to Judicial Discipline and without meeting the mandate of Law as contained under Section 74(2) of the GST Act.

3. The Hon'ble Court may be pleased to issue a writ, order or direction in the nature of MANDAMUS commanding Revenue authorities to reconsider the case of the Petitioner, lawfully and in good-faith, in the light of submissions filed by Petitioner, and with supplying of relief upon documents and after affording due and proper opportunity of hearing."

Submissions

3. Learned counsel for the petitioner submits that the impugned assessment order creating demand of tax, interest and penalty, has been passed without affording opportunity of hearing contemplated in Section 75(4) of the Central Goods and Services Tax, 2017/ U.P. Goods and Services Tax, 2017 (hereinafter referred to as "the Act 2017") and thus, the impugned order being patently in breach of principles of natural justice, is unsustainable and deserves to be quashed.

4. Learned standing counsel submits that the petitioner has an alternative remedy of appeal under Section 107 of the Act, 2017. Therefore, the writ petition is not maintainable.

Discussion & Findings

5. We have carefully considered the submissions of learned counsel for the parties.

Question

The two question involved in this writ petition are as under :-

(i) Whether opportunity of personal hearing is mandatory under Section 75(4) of the CGST/UPGST Act 2017 ?

(ii) Whether under the facts and circumstances of the case the impugned adjudication order has been passed in breach of principle of natural justice and consequently it deserves to be quashed in exercise of powers conferred under Article 226 of the Constitution of India ?

6. We have perused the show cause notice dated 09.09.2021 in which it has been mentioned as under:

"You may appear before the undersigned for personal hearing either in

person or through representative for representing your case on the date, time and venue, if mentioned in the table below."

7. In the table below the aforementioned lines, date, time and venue of personal hearing has not been mentioned. Section 75(4) of the Act, 2017 provides that opportunity of personal hearing shall be granted where a request is received in writing from the person chargeable with tax or penalty or where any adverse decision is contemplated against such person.

8 . Section 75(4) of the Act, 2017 reads as under:

"An opportunity of hearing shall be granted where a request is received in writing from the person chargeable with tax or penalty, or **where any adverse decision is contemplated against such person."**

9. From perusal of Section 75(4) of the Act, 2017 it is evident that opportunity of hearing has to be granted by authorities under the Act, 2017 where either a request is received from the person chargeable with tax or penalty for opportunity of hearing or where any adverse decision is contemplated against such person. Thus, where an adverse decision is contemplated against the person, such a person even need not to request for opportunity of personal hearing and it is mandatory for the authority concerned to afford opportunity of personal hearing before passing an order adverse to such person.

10. In the counter affidavit the respondents have taken the stand that no opportunity of hearing is required before passing the assessment order. In support of their contention the respondents have relied upon the judgment of Hon'ble Supreme Court in **Union of India and Others Vs. M/s.Jesus Sales Corporation AIR 1996 SC 1509**. Perusal of the judgment in the case of **M/s. Jesus Sales Corporation (supra)** shows that the observation was made by Hon'ble Supreme Court while interpreting 3rd proviso to Section 4 M(1) of the Imports and Exports (Control) Act 1947, which is reproduced below :

"Provided also that, where the Appellate authority is of opinion that the deposit to be made will cause undue hardship to the appellant, it may, at its discretion, dispense with such deposit either unconditionally or subject to such conditions as it may impose."

11. The aforequoted 3rd proviso of Section 4 M (1) of the Act 1947 does not contemplate any opportunity of personal hearing in contrast to the provisions of Section 75(4) of the CGST/UPGST Act, 2017 which specifically mandates for opportunity of hearing before passing the order. The counter affidavit has been filed by an Officer of the rank of Joint Commissioner, Corporate Circle Commercial Tax, Bareilly who has either not read the aforesaid judgment of Hon'ble Supreme Court or was not able to understand it and in a casual manner the counter affidavit has been filed in complete disregard to the statutory mandate of Section 75(4) of the Act 2017.

12. It has also been admitted in the counter affidavit that except permitting the petitioner to reply to the show cause notice, opportunity of personal hearing has not been afforded to the petitioner. Thus the legislative mandate of Section 75(4) of the Act to the authorities to afford opportunity

of hearing to the assessee i.e. to follow principles of natural justice, has been completely violated by the respondents while passing the impugned order.

13. **The stand taken by the respondents in the counter affidavit that the writ petition is not maintainable as the petitioner has an alternative remedy of appeal under Section 107 of the Act, can also not be accepted inasmuch as it is settled law that availability of alternative remedy is not a complete bar to entertain a writ petition under Section 226 of the Constitution of India.** Certain exceptions have been carved out by Hon'ble Supreme Court that a writ petition under Article 226 of the Constitution of India may be entertained even there is an alternative remedy. One of the principle in this regard is that if the order impugned has been passed in gross violation of principles of natural justice. It is admitted case of the respondents that no opportunity of personal hearing, as contemplated under Section 75(4) of the Act, 2017, was afforded to the petitioner before passing the impugned order.

14. During the course of hearing of this writ petition, learned standing counsel has produced before us a photo stat copy of the order of the Assessing Authority relating to the impugned order and perusal thereof shows that no opportunity of hearing as contemplated under Section 75(4) of the Act, 2017 was not afforded to the petitioner. Thus, there being patent breach of principles of natural justice, the present writ petition is maintainable against the impugned order.

15. Article 226 of the Constitution of India confers very vide powers on High Courts to issue writs but this power is discretionary and the High Court may refuse to exercise the discretion if it is satisfied that the aggrieved person has adequate or suitable remedy elsewhere. It is a rule of discretion and not rule of compulsion or the rule of law. Even though there may be an alternative remedy, yet the High Court may entertain a writ petition depending upon facts of each case. It is neither possible nor desirable to lay down inflexible rule to be applied rigidly for entertaining a writ petition. Some exceptions to the rule of alternative remedy as settled by Hon'ble Supreme Court are as under:-

(i) Where there is complete **lack of jurisdiction** in the officer or authority to take the action or to pass the order impugned.

(ii) Where **vires of an Act, Rules**, Notification or any of its provisions **has been challenged.**

(iii) Where an order prejudicial to the writ petitioner has been passed in **total violation of principles of natural justice.**

(iv) Where **enforcement of any fundamental right** is sought by the petitioner.

(v) Where **procedure required for decision has not been adopted.**

(vi) Where **Tax is levied without authority of law.**

(vii) Where decision is an abuse of process of law.

(viii) Where **palpable injustice shall be caused** to the petitioner, if he is forced to adopt remedies under the statute

for enforcement of any fundamental rights guaranteed under the Constitution of India.

(ix) Where **a decision or policy decision has already been taken by the Government** rendering the remedy of appeal to be an empty formality or futile attempt.

(x) Where there is no **factual dispute but merely a pure question of law or interpretation** is involved.

(xi) Where **show cause notice** has been issued with **preconceived or premeditated or closed mind.**

16. The above principles are supported by the law laid down by Hon'ble Supreme Court in the case of **Himmatlal Harilal Mehta v. State of Madhya Pradesh, AIR 1954 SC 403, Collector of Customs v. Ramchand Sobhraj Wadhwani, AIR 1961 SC 1506, Collector Of Customs & Excise ,Cochin & Ors. vs A. S. Bava, AIR 1968 SC 13, Dr. Smt. Kuntesh Gupta vs Management Of Hindu Kanya Mahavidyalaya, L.K. Verma v. HMT Ltd. and anr., (2006) 2 SCC 269, Paras 13 and 20, M.P. State Agro Industries Development Corpn. Ltd. & Anr. vs. Jahan Khan (2007) 10 SCC 88 para 12, Dhampur Sugar Mills Ltd. v. State of U.P. and others (2007) 8 SCC 338, BCPP Mazdoor Sangh Vs. NTPC (2007) 14 SCC 234 (para 19), Rajasthan State Electricity Board v. Union of India, (2008) 5 SCC 632 (para 3), Mumtaz Post Graduate Degree College Vs. University of Lucknow,(2009) 2 SCC 630 (para 22 and 23), Godrej Sara Lee Limited v. Assistant Commissioner (AA), (2009) 14 SCC 338. 14, Union of India v. Mangal Textile Mills (I) (P) Ltd., (2010) 14 SCC 553 (paras 6,7,10 and 12), Union of India v. Tantia Construction (P) Ltd., (2011) 5 SCC 697, Southern Electricity Supply Co. of Orissa Ltd. v. Sri Seetaram Rice Mill, (2012) 2 SCC 108 (paras 79,80,81,82,86,87 and 88), State of M.P. Vs. Sanjay Nagaich (2013) 7 SCC 25 (para 34,35,38,39), State of H.P. vs. Gujarat Ambuja Cement Ltd., (2005) 6 SCC 499 (para 11 to 19), Star Paper Mills Ltd. Vs. State of U.P. and others, JT (2006) 12 SC 92, State of Tripura vs. Manoranjan Chakraborty, (2001) 10 SCC 740 para 4; Paradip Port Trust vs Sales Tax Officer and Ors. (1998) 4 SCC 90, Feldohf Auto & Gas Industries Ltd. Vs. Union of India (1998) 9 SCC 710; Isha Beebi Vs. Tax Recovery Officer (1976) 1 SCC 70 (para 5); Whirlpool Corporation Vs. Registrar of Trademarks (1998) 8 SCC 1; Guruvayur Devasworn Managing Committee Vs C.K. Rajan (2003) 7 SCC 546 (para 67, 68), Oryx Fisheries Pvt. Ltd. Vs. Union of India & Others (2010)13 SCC 427 (Paras 27 to 38), Mangilal Vs. State of M.P. (1994) 4 SCC 564 (Para 6), Siemens Ltd. VS. State of Maharashtra (2006) 12 SCC 33 (para 9 & 11), Kaikhosrou (Chick) Kavasji Framji of Indian Inhabitant Vs. Union of India (2019) 20 SCC 705 (para 59) and judgments of this Court in Writ Tax No. 255 of 2012 (M/s Shree Bhawani Paper Mills Ltd. Vs. State Of U.P. and Another) decided on 10.09.2015, M/s. Rapti Commissions Agency Vs. Union of India (2010) 1 AllLJ. 710 :(2009) 244 ELT 8 and Oudh Sugar Mill Vs. State of U.P. (2015) 3 AllLJ 774 (para 27).**

17. For all the reasons aforestated, the i**mpugned order dated 9.11.2021** under Section 74 of the Act for the **tax period April (year 2019-20)** can not be sustained and is **hereby quashed.**

18. Liberty is granted to the respondents to pass an order afresh in

accordance with law, after affording opportunity of personal hearing to the petitioner.

19. **Writ petition is allowed to the extent indicated above with cost of Rs.10,000/-.**

20. A copy of this order be sent by the Registrar General of this Court to the Commissioner, Commercial Tax U.P. Lucknow who shall ensure that principles of natural justice as contemplated under Section 75(4) of the CGST/UPGST Act 2017 be followed by Proper Officers/Assessing Authorities in the State of Uttar Pradesh.

(2022)03ILR A793
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 28.03.2022

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
HON'BLE SUBHASH VIDYARTHI, J.

Writ Tax No. 37 of 2022

Rochana Agarwal C/o Ved Prakash Agarwal ...Petitioner

Versus

Assistant Commissioner of Income Tax, Sitapur & Ors. ...Respondents

Counsel for the Petitioner:
Surangama Sharma

Counsel for the Respondents:
Manish Misra, A.S.G.I., Dr. Ravi Kumar Mishra

Civil Law – Constitution of India, 1950 - Article 226, - Income Tax Act, 1961 - Sections 10(38), 133(6), 143, 147, 148 & 151 - Validity of Notice U/s 148 of Act, 1961 as well as order passed by ACIT rejecting her objections against initiation of re-assessment proceedings – writ petition – scope of power of judicial review while scrutinizing a notice issued U/s 148 of Act, - Section 147 provides Re-assessment can be initiated only if the Assessing officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year – in petitioner's case Assessing officer has gone through the income tax return and other related documents of the Assesse and has observed that he Assesse is a beneficiary of receiving bogus entries which is believable – as such no case is made out to interfere – sufficiency or correctness of the material cannot be considered at stage - accordingly writ petition dismissed. (Para – 24, 26, 27, 28,)

Writ Petition Dismissed. (E-11)

List of Cases cited: -

1. Raymond woolen Mills Ltd. Versus I.T.O., (1999) 236 ITR 36 (SC)

2. Raymond Woollen Mills Ltd. Vs ITO, (2008) 14 SCC 218

3. CIT Vs Techspan India (P) Ltd., (2018) 6 SCC 685,

4. Indra Prastha Chemicals Pvt. Ltd. & ors. Vr. CIT & another, 2004 SCC OnLine All 2133.

5. Phool Chand Bajrang Lal Vs ITO, (1993) 4 SCC 77

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

1. Heard Shri Suyash Agrawal and Ms. Surangama Sharma, learned counsel for the petitioner and Shri Manish Misra, learned counsel for the respondents.

2. By means of this writ petition filed under Article 226 of the Constitution of India, the petitioner has challenged the

validity of a notice dated 31.03.2021 issued by the Assistant Commissioner of Income Tax, Sitapur New (hereinafter referred to as "ACIT") under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as 'Act') proposing to assess/reassess the income/loss for the assessment year 2015-16, stating therein that he has reasons to believe that petitioner's income chargeable to tax has escaped assessment and directing the petitioner to submit a return for the said assessment year. The petitioner has also challenged the order dated 02.09.2021 passed by the ACIT rejecting her objections against the initiation of re-assessment proceedings under Section 147 read with Section 148 of the Act.

3. The petitioner's case is that on 30.03.2016, he had filed an income tax return for the assessment year 2015-16 for a total income of Rs. 10,69,430/- before the Income Tax Officer-3 (5), Lakhimpur and the return of the petitioner was processed on the same day under Section 143 (1) of the Act. On 16.05.2019, the Income Tax Officer-3 (5), Lakhimpur Kheri had issued a notice to the petitioner under Section 133 (6) of the Act calling for certain information pertaining to the assessment year 2017-18. The petitioner submitted the requisite information through her reply filed on 04.06.2019 and the Income Tax Officer accepted the submissions of the petitioner made in her reply and dropped the proceedings.

4. On 31.03.2021, the ACIT issued the impugned notice under Section 148 of the Act to the petitioner in respect of the assessment year 2015-16 stating that he had reason to believe that the petitioner's income chargeable to tax for the said assessment year has escaped assessment within the meaning of Section 147 of the Act. On 10.04.2021, the petitioner asked for being provided with the reasons for re-opening of the assessment. The petitioner's contention is that the ACIT required her to file a return in compliance of the notice dated 31-03-2021 under Section 148 of the Act and only then the reasons for re-opening of the assessment would be supplied to her. On 31.03.2021, the petitioner filed a return in compliance to the aforesaid notice dated 31-03-2021 under Section 148 of the Act before Income Tax Officer-3 (5), Lakhimpur Kheri. On 01.06.2021, the ACIT supplied a copy of the approval under Section 151 of the Act containing the reasons for initiating the proceedings under Section 147 read with Section 148 of the Act and also containing the satisfaction of the Approving Authority for issuing notice under Section 148 of the Act.

5. The ACIT has recorded that during investigation, it was observed that the M/s KCGP Share Broking Service Pvt. Ltd. has been used to provide bogus accommodation entries to various beneficiaries. The assessee has sought to bring his unaccounted money into his regular books and/or convert his unaccounted money into camouflaged capital gain/loss and claiming it to be exempt under Section 10 (38), or setting of such bogus loss against genuine taxable profits.

6. The ACIT has further noted that the Assessing Officer has gone through the income tax return and other related documents of the assessee and has observed that the assessee is one of the beneficiaries of M/s KCGP Share Broking Services Pvt. Ltd., which is engaged in providing accommodation entry to the beneficiaries. The assessee is a beneficiary of receiving bogus accommodation entries

to the tune of Rs. 6,94,540/-. The ACIT has expressed the view that the assessee has introduced her own undisclosed income in her books of account by way of accommodation entries by showing artificial transactions to make the same valid transactions though it is simply a planning to introduce unexplained money to the tune of Rs. 6,94,540/- into books of account. After considering the report of the Assistant Director of Income Tax (Inv.), Unit-3(3), Kolkata and the material available on record, the ACIT recorded that he has reason to believe that the income amounting to Rs. 6,94,540/- has escaped assessment in respect of the assessee. Hence the issue of notice under Section 148 of the Act was deemed fit.

7. On the basis of the aforesaid reasons, the Joint Commissioner of Income Tax, Sitapur Range communicated that the case falls under Clause 1 (v) of the Instruction dated 04.03.2021 issued by the CBDT, New Delhi and necessary approval of the learned CCIT, Allahabad has been obtained. Considering the reasons recorded by the Assessing Officer, the Approving Authority recorded satisfaction that it was a fit case of issuance of a notice under Section 148 of the Act.

8. The petitioner filed her objections against the notice, stating that during the assessment year 2015-16 she had earned gain on sale of shares. The Income Tax Officer-3 (5), Lakhimpur Kheri had made an inquiry and had issued a notice to the petitioner under Section 133 (6) of the Act on the above transaction relating to shares. The petitioner had submitted a written reply alongwith the relevant evidences and after examining the same, the Income Tax Officer-3 (5), Lakhimpur Kheri had disposed of his notice/inquiry by recording *"submission of the assessee is accepted. Hence, no action is required in this case"*. No other factual point was raised by the petitioner in her objections and besides the aforesaid sole factual objection, the petitioner relied upon certain case laws and submitted that re-assessment without any additional information would amount to change of opinion and a mere change of opinion does not empower the Assessing Officer to re-open the assessment. The petitioner requested for dropping the proceedings under Section 148 of the Act.

9. On 02.09.2021, the ACIT, Sitapur-New has passed an order rejecting the petitioner's objection against initiation of re-assessment proceedings which order has been challenged by the petitioner by filing this writ petition.

10. We have considered the submissions made by Shri Suyash Agrawal and Ms. Surangama Sharma, learned counsel for the petitioner and Shri Manish Misra, the learned counsel for Income Tax Department.

11. Before proceeding to examine the rival contentions advanced on behalf the parties, it would be appropriate to refer to some pronouncements of the Hon'ble Supreme Court explaining the scope of judicial scrutiny under Article 226 of the Constitution of India while examining the validity of a notice issued under Section 148 of the Income Tax Act.

12. In **Raymond woolen Mills Ltd. Versus I.T.O.,** (1999) 236 ITR 36 (SC) the Hon'ble Supreme Court held that at the stage of the notice of reopening of the assessment, the Court has only to see whether there is prima facie some material on the basis of which the Department could

reopen the case. The sufficiency or correctness of the material cannot be considered at this stage.

13. Again, in **Raymond Woollen Mills Ltd. v. ITO**, (2008) 14 SCC 218, the Hon'ble Supreme Court reiterated that while examining the validity of a notice issued under Section 148 of the Income Tax Act, *"we do not have to give a final decision as to whether there is a suppression of material facts by the assessee or not. We have only to see whether there was prima facie some material on the basis of which the Department could reopen the case. The sufficiency or correctness of the material is not a thing to be considered at this stage."*

14. In light of the aforesaid pronouncements of the Hon'ble Supreme Court we proceed to examine the rival submissions of advanced on behalf of the parties so as to ascertain as to whether there was prima facie some material on the basis of which the Department could reopen the case, without going into the sufficiency or correctness of the material.

15. Mr. Suyash Agarwal has submitted that the Income Tax Officer-3 (5), Lakhimpur Kheri had made an inquiry and had issued a notice to the petitioner under Section 133 (6) of the Act on the above transaction relating to shares. The petitioner had submitted a written reply alongwith the relevant evidences and after examining the same, the Income Tax Officer-3 (5), Lakhimpur Kheri had disposed of his notice/inquiry by recording *"submission of the assessee is accepted. Hence, no action is required in this case"*. Therefore, there is no justification for issuance of a notice under Section 148 of the Act on the same issue.

16. A copy of the said order of ITO-3(5) has been filed as Annexure No. 3 to the Writ Petition. It does not bear any number, date or the official seal of the authority who has purportedly passed the order so as to inspire even a prima facie confidence regarding its genuineness. Moreover, it would be no bar against issuance of a notice under Section 148 of the Act, provided the requisite conditions exist.

17. The reason for issuing the notice under Section 148 of the Act is that during investigation, the Assessing Officer has gone through the income tax return and other related documents of the assessee and has found that the M/s KCGP Share Broking Service Pvt. Ltd. has been used to provide bogus accommodation entries to various beneficiaries. The assessee is one of the beneficiaries of M/s KCGP Share Broking Services Pvt. Ltd., which is engaged in providing accommodation entries to the beneficiaries. The assessee is a beneficiary of receiving bogus accommodation entries to the tune of Rs. 6,94,540/-. The ACIT has expressed the view that the assessee has introduced her own undisclosed income in her books of account by way of accommodation entries by showing artificial transactions to make the same valid transactions, though it is simply a planning to introduce unexplained money amounting to Rs. 6,94,540/- into books of account. After considering the report of the Assistant Director of Income Tax (Inv.), Unit-3(3), Kolkata and the material available on record, the ACIT recorded that he has reason to believe that the income amounting to Rs. 6,94,540/- has escaped assessment in respect of the assessee. Hence the issuance of notice under Section 148 of the Act was deemed fit.

18. By means of the earlier notice dated 16-05-2019 issued under Section 133 (6) of the Act regarding the case of the petitioner for the assessment year 2017-18, the Assessing Officer had merely called for the following informations :-

(i) copy of DEMAT A/c and substantiate that the entire profit on sale of scripts was offered to tax.

(ii) Financial ledger for F.Y. 2014-15 showing all transactions related to shares.

(iii) Copies of complete contract notes with regard to the shares/securities transaction undertaken during the F.Y. 2014-15 relevant to A.Y. 2015-16.

(iv) Explain the source for the investment made in the transactions.

19. Thus it is clear that the aforesaid notice dated 16-05-2019 calling for information under Section 133 (6) of the Act in the case of the petitioner for the assessment year 2017-18, did not at all cover the reasons for issuance of the notice under Section 148 for the assessment year 2015-16. Moreover, while issuing the notice under Section 133 (6) or while allegedly passing the unnumbered, undated and unsealed order dropping further proceedings in pursuance of the notice relating to assessment year 2017-18, no opinion had been framed by the Assessing Officer regarding the reasons on which the notice under Section 148 of the Act has been issued for the assessment year 2015-16.

20. In the objections filed against the notice under Section 148 of the Act, the petitioner has relied upon certain decisions of the other High Courts holding that reassessment without any additional information amounts to change of opinion.

21. The meaning of the expression "change of opinion" has been explained by the Hon'ble Supreme Court in **CIT v. Techspan India (P) Ltd.,** (2018) 6 SCC 685, in the following words: -

"16. To check whether it is a case of change of opinion or not one has to see its meaning in literal as well as legal terms. The words "change of opinion" imply formulation of opinion and then a change thereof. In terms of assessment proceedings, it means formulation of belief by an assessing officer resulting from what he thinks on a particular question. It is a result of understanding, experience and reflection.

17. It is well settled and held by this Court in a catena of judgments and it would be sufficient to refer to CIT v. Kelvinator of India Ltd. wherein this Court has held as under: (SCC p. 725, para 5-7)

"5. ... where the assessing officer has reason to believe that income has escaped assessment, confers jurisdiction to reopen the assessment. Therefore, post-1-4-1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words "reason to believe".... Section 147 would give arbitrary powers to the assessing officer to reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen.

6. We must also keep in mind the conceptual difference between power to review and power to reassess. The assessing officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfilment of certain precondition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place.

7. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the assessing officer. Hence, after 1-4-1989, assessing officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief."

18. Before interfering with the proposed reopening of the assessment on the ground that the same is based only on a change in opinion, the court ought to verify whether the assessment earlier made has either expressly or by necessary implication expressed an opinion on a matter which is the basis of the alleged escapement of income that was taxable. If the assessment order is non-speaking, cryptic or perfunctory in nature, it may be difficult to attribute to the assessing officer any opinion on the questions that are raised in the proposed reassessment proceedings. Every attempt to bring to tax, income that has escaped assessment, cannot be absorbed by judicial intervention on an assumed change of opinion even in cases where the order of assessment does not address itself to a given aspect sought to be examined in the reassessment proceedings."

22. In the present case, prior to issuing the notice in question, the Assessing Officer had not formed any opinion regarding the reasons on which the notice under Section 148 of the Act has been issued and, therefore, it is not a case of "change of opinion" and challenge to the notice under Section 148 of the Act on the ground that it seeks to initiate reassessment on the ground of a change of opinion, cannot be accepted.

23. Sri Agarwal has contended that the "reason to believe" must be of the assessing officer himself and he cannot act on the reasons recorded by any other authority. In the present case, the assessing officer has acted on a report of the Assistant Director of Income Tax (Inv.), Unit-3 (3), Kolkata. The notice issued on the basis of information received from any other officer cannot be said to have been issued by the assessing officer on the basis of his own "reasons to believe" and it does not conform to the statutory mandate of Section 148 of the Act. He has placed reliance on a judgment of this Court in **Indra Prastha Chemicals Pvt. Ltd. and others Versus Commissioner of Income-Tax and another**, 2004 (271) ITR 113 = 2004 SCC OnLine All 2133, wherein it has been held that: -

9. Under section 147 of the Act the proceedings for the reassessment can be initiated only *if the Assessing Officer has reason to believe* that any income chargeable to tax has escaped assessment for any assessment year. The question whether the Assessing Officer had reasons to believe is not a question of limitation only but is a question of jurisdiction, a vital thing, which can always be investigated by the court in an application under article 226 of the Constitution as held in *Daulatram Rawatmal v. ITO*, [1960] 38 ITR 301 (Cal); *Jamna Lal Kabra v. ITO*, [1968] 69 ITR 461 (All); *Calcutta Discount Co. Ltd. v. ITO*, [1961] 41 ITR 191; *C.M. Rajgharia v. ITO*, [1975] 98 ITR 486 (Patna) and *Madhya Pradesh Industries Ltd. v. ITO*, [1965) 57 ITR 637 (SC)."

(Emphasis supplied)

24. A perusal of the reasons recorded by the assessing officer shows that after considering the report of the Assistant Director of Income Tax (Inv.), Unit-3(3), Kolkata, the Assessing Officer has

conducted an investigation and has gone through the income tax return and other related documents of the assessee and has observed that the assessee is a beneficiary of receiving bogus accommodation entries to the tune of Rs. 6,94,540/- and it is only thereafter that he has recorded that he has reason to believe that the income amounting to Rs. 6,94,540/- has escaped assessment in respect of the assessee. When pursuant to an information received from the Assistant Director of Income Tax (Inv.), Unit-3 (3), Kolkata, the assessing officer has conducted an investigation, has gone through the income tax return and other related documents of the assessee and has observed that the assessee is a beneficiary of receiving bogus accommodation entries to the tune of Rs. 6,94,540/- and he has found a reason to believe that the income amounting to Rs. 6,94,540/- has escaped assessment in respect of the assessee, we do not find any force in the submission made on behalf of the petitioner that the assessing officer has acted on a report of the Assistant Director of Income Tax (Inv.), Unit-3 (3), Kolkata and he has not recorded his own reasons to believe, and thus the same is rejected.

25. Sri. Manish Mishra, the learned Counsel for the respondents, has placed reliance on the following passage of the decision of the Hon'ble Supreme Court in **Phool Chand Bajrang Lal v. ITO,** (1993) 4 SCC 77: -

"19. ...*Thus, where the transaction itself on the basis of subsequent information, is found to be a bogus transaction, the mere disclosure of that transaction at the time of original assessment proceedings, cannot be said to be disclosure of the "true" and "full" facts in the case and the ITO would have the jurisdiction to reopen the concluded assessment in such a case.* It is correct that the assessing authority could have deferred the completion of the original assessment proceedings for further enquiry and investigation into the genuineness to the loan transaction but in our opinion his failure to do so and complete the original assessment proceedings would not take away his jurisdiction to act under Section 147 of the Act, on receipt of the information subsequently. The subsequent information on the basis of which the ITO acquired reasons to believe that income chargeable to tax had escaped assessment on account of the omission of the assessee to make a full and true disclosure of the primary facts was relevant, reliable and specific. It was not at all vague or non-specific.

...

25. From a combined review of the judgments of this Court, it follows that an Income Tax Officer acquires jurisdiction to reopen assessment under Section 147(a) read with Section 148 of the Income Tax Act, 1961 only if on the basis of specific, reliable and relevant information coming to his possession subsequently, he has reasons which he must record, to believe that by reason of omission or failure on the part of the assessee to make a true and full disclosure of all material facts necessary for his assessment during the concluded assessment proceedings, any part of his income, profit or gains chargeable to income tax has escaped assessment. *He may start reassessment proceedings either because some fresh facts come to light which were not previously disclosed or some information with regard to the facts previously disclosed comes into his possession which tends to expose the untruthfulness of those facts. In such situations, it is not a case of mere change of*

opinion or the drawing of a different inference from the same facts as were earlier available but acting on fresh information. Since, the belief is that of the Income Tax Officer, the sufficiency of reasons for forming the belief, is not for the Court to judge but it is open to an assessee to establish that there in fact existed no belief or that the belief was not at all a bona fide one or was based on vague, irrelevant and non-specific information. To that limited extent, the Court may look into the conclusion arrived at by the Income Tax Officer and examine whether there was any material available on the record from which the requisite belief could be formed by the Income Tax Officer and further whether that material had any rational connection or a live link for the formation of the requisite belief. It would be immaterial whether the Income Tax Officer at the time of making the original assessment could or, could not have found by further enquiry or investigation, whether the transaction was genuine or not, if on the basis of subsequent information, the Income Tax Officer arrives at a conclusion, after satisfying the twin conditions prescribed in Section 147(a) of the Act, that the assessee had not made a full and true disclosure of the material facts at the time of original assessment and therefore income chargeable to tax had escaped assessment. The High Courts which have interpreted *Burlop Dealer case3* as laying down law to the contrary fell in error and did not appreciate the import of that judgment correctly." **(Emphasis supplied)**

26. When we examine the facts of the present case keeping into view the scope of power of judicial review while scrutinizing a notice issued under Section 148 of the Act as explained in **Raymond woolen Mills Ltd. (1) and (2) and Phool Chand Bajarang Lal (Supra),** we find that the notice under Section 148 of the Act has been issued by the assessing officer after conducting an investigation and going through the income tax return and other related documents of the assessee and after giving reason to believe that the income amounting to Rs. 6,94,540/- has escaped assessment in respect of the assessee. We are satisfied that there is prima facie material available on record before the assessing officer for issuing a notice for reassessment and the notice under Section 148 of the Act. While this Court examines the validity of the notice issued under Section 148 of the Income Tax Act, the Court does not have to give a final decision as to whether there is suppression of material facts by the assessee or not and the sufficiency or correctness of the material is not a thing to be considered at this stage.

27. Thus, in our considered opinion the order dated 02-09-2021 passed by the Assessing Officer rejecting the petitioner's objections against issuance of the notice, does not suffer from any such illegality as to warrant interference by this Court in exercise of its Writ Jurisdiction,

28. The Writ Petition lacks merits and is, accordingly, **dismissed.**

29. Parties to bear their own costs.

(2022)03ILR A800
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.02.2022

BEFORE

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

First Appeal No. 351 of 2020

Smt. Mohit Preet Kapoor ...Appellant
Versus
Sumit Kapoor ...Respondent

Counsel for the Appellant:
Shri Ashok Kumar Goyal, Sri Ritesh Upadhyay

Counsel for the Respondent:
Sri Vishal Mohan Gupta, Sri Dinesh Kumar Maurya, Sri Sanjay Kumar Dwivedi

(A) Civil Law – Hindu Marriage Act, 1955 - Sections 13, 13(1) & 24 - Indian Penal Code, 1860 - Sections 498 & 506 - Dowry Prohibition Act, 1961 - Section – 3/4 - Hindu Adoption & Maintenance Act, 1956 – Sections – 18 & 20 - Divorce Petition filed by husband – on the ground of *Desertion* & *Cruelty* - Appeal filed by wife - husband did not pay interim mandamus till date, he did not care his minor child too and also not appear in present Appeal in-spite of filing of caveat application either in-person or through counsel - which shows that husband himself not willing to take care of his wife – visiting her parents' house (situated near by 400 meters**) frequently without taking consent of her husband or his family members & cannot constituted the desertion – difference between husband & wife could also not lead to constitute an inference that wife is not willing to cohabitate with her husband –the finding of family court, treating all the allegation made in divorce petition as a gospel truth is not sustainable in the eyes of law – hence, decree of divorce liable to be set aside. (**Para – 29, 31, 34, 35**)**

(B) Civil Law – Hindu Marriage Act, 1955- Sections -13, 13(1) & 24 - Indian Penal Code, 1860 - Sections 498 & 506 - Dowry Prohibition Act, 1961 - Section - 3/4, Hindu Adoption and Maintenance Act, 1956 – Sections – 18 & 20: — Divorce Petition filed by husband – on the ground of *Desertion* & *Cruelty* - Appeal filed by wife - husband neither pay interim mandamus nor care his minor child till date – since, wife & her daughter abandoned by her husband – they could not left to survive on their own – direction issued – wife can availed the remedy u/s 18 of Act, 1956 – wife is entitle of arrears towards Maintenance as fixed by court below & w.e.f. Feb. 2022 Rs. 30,000/- per month towards maintenance of her daughter from her husband – default if any on the part of respondent wife is can avail the remedy of contempt of court. (Para – 41, 42, 43, 44, 45**)**

Appeal Allowed. (E-11)

List of Cases cited: -

1. Savitri Pandey Vs Prem Chandra Pandey (2002 Vol. 2 SCC 73).

(Delivered by Hon'ble Mrs. Sunita Agarwal, J.
&
Hon'ble Krishan Pahal, J.)

1. This is wife's appeal directed against the judgment and order dated 19.03.2020 passed by the Additional Principal Judge, Family Court, Bareilly under Section 13 of the Hindu Marriage Act. The marriage of the appellant with the respondent was held on 15.12.2013.

2. The divorce petition had been filed by the respondent husband on 6.3.2017 on the ground that the appellant, his wife, had left her matrimonial home on 10.1.2015 without any rhyme or reason, in his absence, alongwith her family members. At that point of time, the appellant wife was pregnant for two months. It was alleged in the divorce petition that while leaving her matrimonial home, the appellant took all her jewellery as also Rs.36,000/- in cash kept by the respondent in his safe. On 25.1.2015, the respondent went to bring the appellant back to his home when she refused to maintain any kind of relationship with him.

3. It was further contended that on 22.8.2015, the appellant had given birth to

a girl child. She was admitted in the hospital by the respondent who had borne all expenses of birth of his daughter. The appellant wife went to her paternal home after birth of the child. After about eight to ten days, the respondent went to bring the appellant back to his home when she denied to meet him and did not allow him to even see his child. On 15.1.2017 the respondent again went alongwith his relative to bring the appellant to his home when she had denied to accompany him. It is, thus, stated in the divorce petition that the appellant was residing separately since 10.1.2015 and she has refused to keep relationship with the respondent.

4. The plea in the divorce petition, thus, is that the appellant wife had deserted her husband/respondent without any rhyme or reason and refused to cohabit with him. The cause of action for filing the divorce petition stated to have arisen on 10.1.2015 when appellant wife had left her matrimonial home along with her father and brother and lastly on 15.1.2017 when she refused to accompany the respondent to her matrimonial home. Another ground for seeking divorce is that the appellant had refused to do the household work and misbehaved with the family members of the respondent. She used to go to her paternal home or to her relatives without any information to the respondent or his family members.

5. The trial court had framed four issues; Issue nos. 1 and 2 framed by the trial court read as under:

"1. क्या विपक्षी द्वारा याची के साथ विवाह के पश्चात विभिन्न अवसरों पर क्रूरता का व्यवहार किया?

2. क्या विपक्षी ने याची को दिनाँकः 10.01.2015 से बिना किसी युक्तियुक्त कारण के परित्यक्त कर रखा है?"

6. In support of the averments in the divorce petition, the respondent husband had produced five witnesses including himself as P.W-1. P.W-2 Amit Kapoor is brother of the respondent; P.W-3 is father-in-law of P.W.-2 Amit Kapoor and P.W-4 is neighbour of the respondent; P.W-5 is an acquaintance. In rebuttal, appellant-wife entered in the witness box as O.P.W-1 and her father Atar Singh as O.P.W-2.

7. An application under Section 24 of the Hindu Marriage Act was filed by the appellant on 6.9.2017 which was contested by the respondent by filing his objection on 26.2.2018. By the order dated 10.7.2018, while allowing the application under Section 24 of the Hindu Marriage Act, an amount of Rs.5,000/- per month was awarded to the appellant and Rs.2000/- for her daughter towards monthly maintenance. In addition to the same, Rs.20,000/- in lumpsum was awarded towards the cost of the proceedings.

8. A written statement in rebuttal was filed by the appellant wife on 06.10.2018 wherein she had categorically denied the assertion that she had left her matrimonial home on 10.1.2015 rather it was stated therein that the appellant lived with the respondent, her husband, in his house uptil July, 2016. A child was born out of the wedlock on 22.8.2015 in Rashmi Goyal Hospital situated at Rampur Garden Bareilly. The appellant was admitted in the hospital by the respondent on 22.8.2015 who had signed the consent letter for the surgery. It is emphatically denied that the appellant had refused to have sexual relationship with the respondent. It was further stated that after the birth of the girl child the respondent did not care to take the appellant to his home from the hospital and she had to go to her father's home. After

about a period of four months, the respondent went to the house of the appellant's parents and when the matter was amicably settled and the appellant came to live with the respondent in his house. On 13.6.2016, their daughter had to undergo an operation for which she was admitted in Medanta Medicity Hospital Gurgaon when both the appellant and respondent were with their child. After surgery, the appellant-wife came back to the house of the respondent and stayed there until 21 July, 2016 when she was turned out of her matrimonial home along with her infant daughter. It is alleged in the written statement that the original documents such as Aadhar Card, Pan Card, Driving licence, Voter Id, Marriage certificate and other documents pertaining to the educational qualification of the appellant-wife were in the possession of the respondent and he was misusing them by forging her signature.

9. An F.I.R under Section 498, 506 I.P.C and ¾ of D.P Act was lodged in P.S Prem Nagar Bareilly on 27.01.2018 by the appellant-wife against the respondent in respect of which investigation was going on whereas interim protection had been granted by this Court in a writ petition filed by the respondent. It is denied by the appellant that she took her jewellery while leaving the home of the respondent. It is also denied that the respondent went to the house of the parents of the appellant on 25.1.2015. 10. Some photographs have been filed by the appellant along with the written statement to prove that she along with her daughter were living alongwith the respondent. It was lastly stated that on 15.12.2015 marriage of the brother of the respondent was solemnised wherein the appellant had participated. Some of the photographs in which the appellant and respondent could be seen with the wife of the elder brother of the respondent were of the month, February, 2016. It is lastly stated that the respondent had filed Income Tax Returns of the appellant by forging her signature for the assesment year, 2013-14 till 2016-17.

11. The contention of the appellant, thus, is that she was turned out of her matrimonial home by the respondent on 21.7.2016 without any reasonable cause and the respondent did not care for his wife and the infant child.

12. Noticing the pleadings of the parties, the evidence on record, in his statement as P.W-1, the respondent has admitted factum of marriage though denied the demand of dowry and stated that his wife/appellant used to threatened him that she would implicate him in a false case of dowry. The averment of desertion on the part of the wife as on 10.1.2015, as stated in the divorce petition, has been reiterated in the examination-in-chief. It was also stated that the appellant was admitted in the hospital by the respondent during birth of their child and the respondent borne all the expenditures therein. It was also admitted that during surgery of their daughter on 13.6.2016 in Medanta Medicity Hospital, the appellant was present. However, it is denied that at that point of time the appellant, his wife, was living with him. The photographs marked as paper nos.30Ga/4, 30Ga/5, 30Ga/6, 30Ga/7, 30Ga/8, and 30Ga/9 were admitted by the respondent. It was also admitted that the marriage of his brother on 15.12.2015 was attended by the appellant and the said date is also the wedding anniversary of the appellant and the respondent. Paper no.20/14 is the photograph of 15.12.2015 which was the date of marriage of the

brother of the respondent, his own wedding anniversary. It is admitted that in the said photograph, wife and daughter of the respondent could be seen with him. Paper no.30Ga/10 is the photograph wherein the appellant, respondent and brother and sister-in-law of the respondent could be seen together. This document is also admitted. Other photographs marked as paper no.30Ga/11, 30Ga/13, 30Ga/15, 30Ga/16, 30 Ga/17 and 30Ga/18 are also admitted to the appellant which are photographs of his daughter with his parents. Paper no.30Ga/18 is the photograph which is admittedly of the respondent and his wife, but he has refused to recognize the place where it was taken.

13. As noted above, it is pertinent to state here that in one of the photographs paper no.30Ga/6, the respondent could be seen along with his wife (appellant) and daughter. The respondent has admitted that the said photograph was taken after birth of his daughter when she was about four to five months. There are photographs of mother and daughter of the respondent with him which are admitted though it is not specified by him as to when and where those photographs were taken and what was the age of his child at that point of time. One of the photographs marked as 30Ga/9 is of the drawing room of the house of the respondent where his daughter, who was about 7-8 months old, could be seen on a walker. In the cross examination, the respondent had categorically stated that his brother Amit got married on 15.12.2015. In the marriage anniversary of his brother which was on 15.12.2016, the appellant was not present. We are surprised to note at this moment that the family court had recorded a finding that the appellant had attended the wedding anniversary of his brother-in-law on 15.12.2016 and the photograph paper no.30Ga/9 was of the said function which was held in the house of the respondent. It is difficult to understand as to what was the basis of the said finding.

14. Contrary to this, the appellant in her statement before the family court has categorically asserted that her parent's house and her matrimonial house are located barely at a distance of 400 metres. Her husband took her to the hospital when their child was born on 22.8.2015. Paper no.30Ga/9 has been proved to be the photograph of her child which was taken in the drawing room of the house of the respondent. Paper no.30Ga/10 is the photograph of the appellant along with the respondent and her sister-in-law and brother-in- law Amit Kapoor. This photograph was stated to have been taken in the month of February, 2016 when they went to attend a marriage in the family. Paper no.30Ga/11 is also the photograph of the appellant and her sister-in-law (wife of Amit Kapoor-brother of respondent). Paper no.30/12 is the photograph of the respondent, his daughter alongwith his mother and was stated to have been clicked in the drawing room of the house of the respondent. Paper no.30Ga/14 is the photograph of their marriage anniversary on 15.12.2015 (which incidently was the date of marriage of brother of the respondent). Paper no.30Ga/15 is the photograph of Amit Kapoor (brother of the respondent), daughter of the appellant and mother of the respondent. Paper no.30Ga/17 is the photograph which as per the statement of the appellant is of their marriage anniversary which is also admitted to the respondent as he stated that the said photograph was taken in the marriage of his brother Amit wherein his wife could also be seen. Paper no.30Ga/18

is the photograph wherein the appellant and respondent could be seen together and it was stated by the appellant that the said photograph was clicked in a Mall in Delhi on 14.2.2016 whereas the respondent had refused to recognise the place where it was taken.

15. The appellant in her statement has categorically stated that she was kicked out of her matrimonial home on 21.7.2016 and the first information report was lodged against the respondent thereafter. She was confronted on the allegations of demand of dowry in the cross examination. The appellant has asserted in cross that the marriage of her brother-in-law was held after two years of their marriage on 15.12.2015, and their marriage anniversary also fell on the said date. She had reiterated that she remained in the house of the respondent till July, 2016 and at that point of time she was not pregnant. She had categorically denied of leaving her matrimonial home in January, 2015.

16. In support of the plea of desertion, the respondent has produced other witnesses also. P.W-2 is the brother of the respondent namely Amit Kapoor. He has stated that the appellant had left their home on 10.1.2015 alongwith her father saying that she would come back after few days. He states that the father of the appellant remained in their house for around 30-45 minutes. In cross, he states that whatever has been stated in paragraph-5 in his examination-in-chief with regard to the appellant taking her jewellery and money while leaving on 10.1.2015, was based on the information given to him by his brother, the respondent herein.

17. P.W-3 is the father-in-law of P.W-2-Amit Kapoor. He states that he was an acquaintance of the family of the respondent since, 2012 and in the year 2015, the talk of marriage of his daughter with Amit Kapoor, brother of the respondent, was going on. On 10.1.2015, he went to the house of the respondent to invite them for his wedding anniversary. While he was in the house of the respondent, father of the appellant came at around 6.00 p.m and took the appellant alongwith him. He then stated that on 25.1.2015 he along with the respondent went to the house of the appellant to bring her back when she refused to come back with the respondent. In cross, P.W-3 states that on 25.1.2015 he went to the house of the respondent by chance and he was not called by the respondent. He then stated that when P.W-1 respondent got his wife admitted for delivery, he was informed by P.W-1 on telephone and he (P.W-3) also reached the hospital when he came to know about the birth of their child.

18. P.W-4 is a neighbour named as Ram Chandra Lal Srivastava whose house is located in front of the house of the respondent. He states that he saw the appellant leaving her matrimonial home alongwith her father about five years back while he was standing outside his house. After that he had never seen the appellant in her matrimonial house.

19. P.W-5 namely Ashok Kumar Khanna is an acquaintance of the respondent who stated that he knew the family since 2002. He states that the appellant had left her matrimonial home in January, 2015 at around 6.30 p.m and he had seen her leaving. He further states that he knew father of the appellant and had seen him going along with the appellant. The statement in paragraph-'6' in the examination-in-chief of this witness is

verbatim the same as that of P.W-4 namely Ram Chandra Lal Srivastava. P.W-5 also admitted in the cross that the statement in para-6 of the examination in chief made by him was based on the information given to him by P.W-4 namely Ram Chandra Lal Srivastava and this fact has not been disclosed by him while making the said statement.

20. On appreciation of the oral evidence led by the respondent husband, at least, this can be elicited that P.W-3, P.W-4 and P.W-5 are the persons who had no knowledge as to whether the appellant had actually left her matrimonial home on 10.1.2015 with the intention to end her matrimonial relationship. The statement of P.W-3 in this regard is not credible, in as much as, he admitted that he was not related to the family on two crucial dates, i.e. on 10.1.2015 and 25.1.2015. His statement that the appellant had left her matrimonial home along with her father on 10.1.2015 and refused to come back on 25.1.2015 when he also went along with the respondent to bring her back, is sketchy. He seems to be either a chance witness or brought up by the respondent. At least the statements of P.W-3, P.W-4 and P.W-5 cannot be proof of desertion on the part of the appellant.

21. We are left with two witnesses, i.e the respondent himself and his brother Amit Kapoor. P.W.-2-Amit Kapoor was the resident of the same house. He states that the appellant had left along with her father on 10.01.2015 saying that she would come back within few days. In the examination in chief this witness states that his brother went to the house of the appellant on 25.1.2015 but she refused to come back.

In cross, P.W-2 states that he brought the appellant back to his house many a times but did not remember the exact number, though lastly he brought her back in December, 2016. He further clarified that the statement made by him in para-5 in examination-in-chief that the appellant took his jewellery and cash alongwith her clothes while leaving her matrimonial home on 10.1.2015 was based on the information given by his brother/respondent.

22. P.W.1, the respondent husband reiterated his averments in the divorce petition by making statement in cross that the appellant had left her matrimonial home on 10.1.2015 and after fifteen days, i.e 25.01.2015 he himself went to bring her back. She, however, refused to accompany him. Their child was born in the hospital on 22.8.2015 and he got admitted his wife in the hospital. For the treatment of his daughter, he took her to Medanta Hospital Gurgaon and got her admitted therein on 13.06.2016. P.W-1 has, however, denied that his wife was residing with him on 22.08.2015 and 13.06.2016. He also admits that the appellant along with her daughter attended the marriage of his brother Amit solemnized on 15.12.2015. In the cross examination, P.W-1 has denied that the appellant had attended the marriage anniversary of his younger brother Amit on 15.12.2016. The photographs shown to P.W-1 had been admitted being of himself, his family and his daughter alongwith the appellant.

23. A perusal of this part of statement of P.W.-1 indicates that the photographs of his daughter uptil the age of 7-8 months were taken at different point of time and location and some in his house also. In one of these photographs, the child could be seen in the walker in a room of the house of the respondent. P.W.-1 admitted the

photograph marked as paper no.30Ga/9 which is of his daughter when she was aged about 7-8 months at that point of time. On appreciation of the statement of P.W-1/husband, it is evident that the appellant and her daughter were well photographed in the house of the respondent, i.e the matrimonial home of the appellant. In various photographs, P.W.-1 himself could be seen alongwith his daughter in his own house. There is a categorical statement of the appellant O.P.W-1 that she was residing in her matrimonial house both at the time of birth of her daughter and her treatment in Medanta Medicity Hospital Gurgaon and thereafter till July, 2016. The distance between two houses, i.e paternal home of the appellant and her matrimonial house (the respondent's home) is barely 400 metres. In these circumstance, the statement of P.W.-1 that the appellant had deserted him by leaving her matrimonial home on 10.01.2015, in his absence, permanently is unbelievable. There is admission of the respondent/P.W-1 that his wife though attended the wedding of his younger brother Amit on 15.12.2015 but was not present in his marriage anniversary on 15.12.2016. The statement of P.W-2 in the cross examination that he went to bring the appellant back many a times and lastly brought her back in December, 2016, also shows that the appellant came to her matrimonial home at least after 10.01.2015.

24. From the evidence on record, thus, it cannot be accepted that the appellant had left her matrimonial home on 10.01.2015 with the intention to end her matrimonial relationship. The statement of appellant O.P.W-1 that she came back to her matrimonial home after four months of birth of her daughter when the respondent himself brought her back and remained there till July, 2016 is found to be more convincing. The plea of desertion on the part of the appellant without any reasonable cause and denial of matrimonial obligation on her part, therefore, is not found proved.

25. While recording finding on the issue no.2 of desertion, the Family Court has recorded that the appellant could not explain as to how and why she attended the wedding anniversary of her brother-in-law on 15.12.2016 when she was thrown out of her matrimonial home by her husband on 21.07.2016. The findings returned by the trial court on the issue of desertion is as follows:

"प्रश्न यह है कि जब दिनांक 21.07.2016 को यदि मारपीट कर जान से मारने की धमकी देते हुए घर से निकाल दिया तो दिनाँकः 15.12.2016 को विपक्षी याची के बड़े भाई की वर्षगाँठ में शामिल कैसे हुई। इससे पुनः विपक्षी के अभिवचनों तथा साक्ष्य में संदेह पैदा होता है कि याची द्वारा विपक्षी के साथ क्रूरता की गयी। मारपीट की गयी और घर से निकाला गया। इससे इस तथ्य की भी पुष्टि हो रही है कि याची के घर में शादी तथा वर्षगाँठ के समय विपक्षी आयी, उसने शादी व कार्यक्रम में शिरकत की और फिर मायके चली गयी। शादी व वर्षगाँठ में विपक्षी के आने व शामिल होने के तथ्य को याची नकार नहीं रहा हैं फोटोग्राफ को भी नकार नहीं रहा है लेकिन इसका तात्पर्य यह नहीं है कि विपक्षी याची के साथ रह ही थी। विवाद इतना है कि दिनाँकः 15.01.2015 को विपक्षी याची के घर से अपने पिता के साथ बहाना करके मायके गयी कि दिनांक 21.07.2016 को विपक्षी को याची ने मारपीटकर घर से निकाला। तथ्यों एवं साक्ष्यों के विश्लेषण से यह स्पष्ट है कि यदि दिनाँकः 21.07.2016 को मारपीटकर विपक्षी को घर से निकाला गया होता तो दिनाँकः 15.12.2015 को शादी के वर्षगाँठ जो सुमित के बड़े भाई अमित कपूर की थी, में विपक्षी शामिल नही होती।

साक्ष्य से यह भी स्पष्ट है कि याची के साथ विपक्षी ने संसर्ग करने के मना कर दिया और दिनाँकः 10.01.2015 के बाद विपक्षी याची के साथ पति-पत्नी के रूप में नहीं रही। दहेज के सम्बन्ध में प्रताड़ना व क्रूरता इस न्यायालय में विपक्षी ने साक्ष्य से साबित करने का प्रयत्न नहीं किया। वजह वह बेहतर समझती होगी। इससे याची के इन तथ्यों की पुष्टि हो रही है कि दिनाँकः 15.01.2015 से विपक्षी ने उसका बिना किसी युक्तियुक्त कारण के परित्यक्त कर रखा है। तद्नुसार यह वाद बिन्दु निस्तारित किया जाता है।"

26. This finding of the Family Court is against the evidence on record, the categorical statement of the respondent P.W.1 that her wife did not attend the wedding anniversary of his younger brother Amit on 15.12.2016. It seems that the Family court has misread the statement of P.W-1.

27. As regards the legal position, on the issue of desertion, the Apex Court in ***Savitri Pandey vs Prem Chandra Pandey reported in (2002) 2 SCC 73*** considering its earlier decisions has held that the desertion in its essence means the intentional permanent forsaking and abandonment of one spouse by other without that other's consent, and without reasonable cause. To constitute the offence of desertion so far as the deserting spouse is concerned, two essential conditions must be there:

(i)the factum of separation.

(ii)the intention to bring cohabitation permanently to end (animus deserendi).

28. Similarly two elements are essential so far as the deserted spouse is concerned:

(1) the absence of consent, and

(2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form necessary intention aforesaid.

29. It was held that for holding desertion as proved the inference may be drawn from certain facts viewing them as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of desertion. Desertion may also be constructive which can be inferred from attending circumstances. It has also always to be kept in mind that the question of desertion is a matter of inference to be drawn from the facts and circumstances of each case.

30. In the instant case, from the act and conduct of the parties, it cannot be inferred that the appellant had deserted her husband (respondent) with the intention to bring cohabitation permanently to an end by leaving her matrimonial home on 10.01.2015 in the absence of her husband. The appellant was pregnant at that time and she may have gone to her parents house which was barely 400 metres, for sometime. Further, the act of the appellant in visiting her parents house frequently without taking consent of her husband and other family members cannot constitute the offence of desertion on her part. P.W-2, brother-in-law of the appellant had stated that he brought her back many a times from her parents house and lastly she came in December, 2016. The plea of desertion taken by the respondent can not be accepted from the facts and circumstances of the case, in as much as, such an inference cannot be drawn from the attending circumstances which speak otherwise. It may be inferred that there

were differences between husband and wife but the act of desertion, without reasonable cause, with the intention to bring cohabitation permanently to end is not proved, at least not on 10.01.2015. The cause of action as alleged to have been accured firstly on 10.01.2015 and lastly on 15.01.2017, the period of two years of desertion, is not proved from the material on record.

31. Further, the appellant has come out with the categorical statement that she alongwith her daughter was thrown out of her matrimonial home by the respondent in July, 2016. The respondent admittedly did not bring any legal action with a view to assert his right to restitute his conjugal rights. When application under Section 24 of the Hindu Marriage Act was filed, the respondent contested the same on various pleas and did not come forward to pay interim maintenance even for his daughter. In this appeal, the respondent did not appear in spite of filing of the caveat application and service of the notice upon him, on account of which the status quo order was passed on 05.10.2020. The respondent or his counsel never participated in this proceeding which shows that the respondent husband himself is not willing to take care of his wife and even his minor daughter. It seems that he has deserted her wife on his own and is running away from his responsibility of a father towards his minor daughter.

32. For the above discussion, the findings returned by the Family Court on issue no.2 that the appellant had deserted her husband without any reasonable cause from 10.01.2015 and further on 15.01.2017 deserve to be set aside.

33. On the issue no.1 of cruelty, the Family Court has returned the following finding:

"उपरोक्त वाद बिन्दु के परिप्रेक्ष्य में उभय पक्षों द्वारा प्रस्तुत अभिलेखीय तथा मौखिक साक्ष्यों का तथ्य परख विश्लेषण किया जिससे यह स्पष्ट है कि याची ने साक्ष्य से यह साबित किया है कि विपक्षी उसके साथ पत्नी के रूप में संसर्ग नहीं करना चहाती थी। करने से मना करती थी। मात्र 400 मीटर दूर मायका होने के कारण बिना बताये वह मायके चली जाती थी। रिश्तेदारी में भी चली जाती थी। याची द्वारा दिये गये साक्ष्य को विपक्षी ने न तो जिरह में नकारा है और न ही कोई सुझाव दिया। याची ने साक्ष्य से यह भी साबित किया है कि विपक्षी बहू की हैसियत से न तो घर में खाना बनाती थी और न ही घर का काम करती थी। याची के माता पिता व घरवालों के साथ दुव्यर्वहार करती थी। इस तथ्य का भी जिरह में खण्डन नहीं हुआ और न ही सुझाव दिया गया जबकि याची ने साक्ष्य से साबित किया कि वह विपक्षी को प्रेम से रखता था। विपक्षी को संतान उत्पत्ति के समय अस्पताल में पति की हैसियत से न केवल भर्ती कराया बल्कि उसके इलाज का पूरा खर्चा उठाया। यही नहीं अपनी बेटी के सर्जरी के लिए न केवल मेदांता में पत्नी व बेटी को ले गया, उसका पूरा खर्च उठाया। अपने भाई की शादी की वर्षगांठ मे मोहित प्रीत को बुलाकर उसे पूरा प्रेम व सम्मान दिया। उसके बावजूद मोहित प्रीत ने दहेज प्रताड़ना की एफ०आई०आर० करायी, वह भी तलाक के मुकदमे के बाद। तलाक के मुकदमें में दहेज प्रताड़ना का कोई हवाला नहीं है। यदि दहेज को लेकर मोहित प्रीत को प्रताड़ित किया गया तो न केवल उसके जवाबदावे में यह तथ्य आते बल्कि साक्ष्य में भी इन तथ्यों को विस्तार से कहा जाता। यदि मारापीटा गया और उसके बाद विपक्षी मायके चली गयी तो मेडिकल हो सकता था, रिपोर्ट कर सकती थी, ऐसा कुछ भी नहीं हुआ। इससे यह स्पष्ट हो रहा है कि विपक्षी अपने व्यवहार व आचरण से याची के विरूद्ध क्रूरता की गयी व उसके परिवार के साथ दुर्व्यवहार किया गया।

तद्नुसार यह वाद बिन्दु सं० 1 याची के पक्ष में सकारात्मक रूप से निस्तारित किया जाता है।"

34. The conclusion drawn by the trial court is that the appellant used to go her parent's house without any information to the respondent or his family members and she did not do daily chores of the house being a daughter-in-law. We may record that not a single instance of such an act of the appellant has been brought on record either by the respondent or his brother who entered in the witness box as P.W-2. The general allegations and casual statement of the respondent in the divorce petition has been treated as a gospel truth by the Family Court without any cogent evidence on record. The act of the appellant in visiting her parent's house, in any case, even without the permission of the respondent does not amount to cruelty. The facts that the appellant was admitted in the hospital by the respondent at the time of her delivery or he had borne expenses for treatment of their daughter do not go against the appellant rather these facts support the case of the appellant that she did not leave her husband that too permanently with the intention of bringing the cohabitation to an end and has never done any act to deprive the respondent from the pleasure of fatherhood. The ground of cruelty on the said assertion is not made out.

35. Last ground to hold cruelty on the part of the appellant is that she had lodged a criminal case against her husband and in-laws on the false plea of demand of dowry and her statement that she was thrown out of her matrimonial house by the respondent by beating her is false. The Family Court while recording the said finding has completely ignored the fact that the first information report was lodged by the appellant on 27.01.2018 much after the divorce petition was instituted on 6.3.2017. The act of the appellant in lodging the first information report on the plea of demand of dowry may not be approved by the Family Court but the said issue was not subject matter of scrutiny in the divorce proceeding. Surprisingly, the family court has lost sight of the fact that the plea of cruelty was taken as a ground of divorce in the plaint filed on 06.03.2017. The plaintiff, i.e the respondent herein was required to prove the existence of such acts or conduct of the appellant which amounted to cruelty prior to the date of institution of the divorce suit. Any subsequent conduct of the appellant in lodging the first information report after she was thrown away from her matrimonial home by the respondent cannot be treated as an act of cruelty on the part of the appellant.

36. The respondent husband could not prove cruelty from any act or conduct or behaviour of the appellant by leading any evidence much less cogent evidence. The findings on issue no.1 on the plea of cruelty returned by the family court are, thus, liable to be set aside.

37. For the foregoing discussion and reasons, the divorce decree granted by the trial court cannot be sustained in the eye of law. The judgment and order dated 19.03.2020 passed by the Additional Principal Judge, Family Court Bareilly is hereby set aside.

38. The divorce petition no.284 of 2017 (Sumit Kapoor vs Smti Mohit Preet Kapoor) under Section 13(1) of the Hindu Marriage Act is dismissed as such.

39. However, before parting with this judgment, we would like to address one

more issue which is of maintenance to wife and daughter deserted by the respondent.

40. It is evident from the record that the appellant got interim maintenance under Section 24, pursuant to the order dated 10.07.2018 whereby Rs.5,000/- was fixed for the appellant and Rs.2,000/- for her daughter on monthly basis by the Family Court. After dismissal of the divorce suit on 19.03.2020, the interim maintenance has been stopped.

41. While admitting this appeal and passing the interim order of status quo, this Court did not clarify that interim maintenance would payable to the appellant and her daughter. The result is that during the pendency of the appeal, the appellant and her daughter have been left to survive on their own. They have no financial support as the appellant has no income. The question is as to whether after dismissal of the divorce suit, the appellant is entitled for maintenance while living separately in case her husband refuses to maintain her. This issue can be answered with the help of the provisions contained in Section 18 of the Hindu Adoption and Maintenance Act, 1956 which provides that a Hindu wife shall be entitled to live separately from her husband without forfeiting her claim for maintenance, in case her husband is guilty of desertion or abandoning her without reasonable cause or is guilty of willfully neglecting her. The right to claim interim maintenance by instituting a suit under Section 18 of the Hindu Adoption And Maintenance Act, 1956 is a substantive right and can be availed by the appellant by bringing her own action.

42. However, as to the dependant daughter, who is aged about six years, the obligation is upon the respondent by virtue of Section 20 of the Hindu Adoption and Maintenance Act, 1956. The appellant needs money to provide education, clothing, food and participation in extra curricular activities for the upbringing of her daughter. The meagre amount of maintenance of Rs.2,000/- per month for the minor daughter as fixed by the Family Court has also been stopped since the year, 2020 after the decree of divorce was passed in favour of the respondent.

43. Considering the fact that the respondent is a Chartered Accountant and is engaged in this profession since the year 2012, we find it fit and proper that an amount of Rs.30,000/- per month shall be paid by the respondent towards maintenance of his daughter. The said amount shall be payable w.e.f February, 2022 and shall be transmitted in the Saving bank account of the appellant by 10th of each succeeding month. For February, 2022, the payment shall be made by 10th March, 2022.

44. Further, as there was an order of status quo in this appeal, for the period from the date of admission of the present appeal till the date of its disposal, the appellant would be entitled to interim maintenance as fixed by the Family Court vide order dated 18.09.2018. The arrears of monthly maintenance to the tune of Rs.5,000/- for the appellant and Rs.2,000/- for the daughter, from the date of admission of the appeal i.e 5.10.2020 till the date of the decision, is to be paid within a period of four months from the date of receipt of the copy of this order.

45. Any default on the part of the respondent in making the above payment timely, would entitle the appellant to institute the execution proceeding before the competent Court.

46. With the above observations and directions, the appeal is **allowed.**

(2022)03ILR A812
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.02.2022

BEFORE

THE HON'BLE J.J. MUNIR, J.

Second Appeal No. 108 of 1995

Vishram Shukla ...Appellant
Versus
Smt. Rajdei & Ors. ...Respondents

Counsel for the Appellant:
Sri Arvind Kumar, Sri B.M. Pandey, Sri N.L. Tripathi, Sri R.S. Maurya, Sri Raj Kumar Kesari, Sri Vijay Kumar Rai, Sri Sankatha Rai

Counsel for the Respondents:
Sri Ram Kishore Pandey, Sri V.K. Tripathi, Sri Virendra Kumar Gupta

(A) Civil Law - Civil Procedure Code, 1908 - Section 100, Order VI -Rule 4, Order XVII-Rule 3, Order XLI – Rule 27: - Plaintiff's Second Appeal – arising from a Suit for specific performance - for agreement of sale - *Decreed* by Civil Judge – Civil Appeal - filed by defendants, allowed, setting aside judgment & decree – thus, Second Appeal against—Lower appellate Court held that agreement for sale was a result of fraud and collusion - Finding of lower appellate Court that respondents neither entered into any agreement, nor received any earnest money - And alleged agreement for sale was beyond real St. of affairs – once an illiterate and rustic women urges a plea of *non-est-factum* by underlying fraud or misrepresentation – then the burden of proof would certainly lie on beneficiary – it cannot be discharged not only by leading evidence to show that the document was explained to her & she understood it, but by other direct & circumstantial evidences as it has been held in 'Mst. Kharbuja Kuer Vs Jangbahadur Rai & other' Judgment – there is no reason for this court to take a different view than that taken by the Lower Appellate Court – hence, Second Appeal fails and is dismissed with costs to the defendants in all courts. (Para – 31, 33, 37, 40, 48, 49**)**

Appeal dismissed. (E-11)

List of Cases cited: -

1. K N Nagarajappa & ors. Vs H. Narasimha Reddy (AIR 2021 SC 4259),

2. Ramesh Chand Vs Sant Ram (2020 Vol. 5 ALJ 453),

3. Mst. Kharbuja Kuer Vs Jangbahadur Rai & ors. (AIR 1963 SC 1203),

4. Chitambaram Pillai & ors. Vs Muthammal & anr.(1993 vol. 1 MLJ 535),

5. Smt. Sonia Parshini Vs Sheikh Moula Baksha (AIR 1955 Cal. 17),

6. Hodges & anr.Vs Delhi and Londan Bank, Ltd. (1899-1900 XXVII Indian Appeals 168),

7. Paras Nath Rai Vs Tileshar Kunwar (1965 All,L.J. 1080),

8. Manohar Lal Vs Rajeshwari Devi & ors. (AIR 1977 All 36),

9. Byles, J, in Foster Vs Mackinno, (1869 (4) CP 704),

10. Mahendra Singh Vs Ramesh Singh (2021 Vol. 2 ALJ 606).

(Delivered by Hon'ble J.J. Munir, J.)

1. This is a plaintiff's Second Appeal, arising from a Suit for specific performance of contract.

2. The facts giving rise to this Appeal are these:

One Kewla Prasad was the *bhumidhar* of Plot No.563, ademeasuing 2-17-17, situate at Mauza Tisentulapur, *Pargana* Khairagarh, District Allahabad (now Prayagraj). Kewla Prasad transferred an area of 12 *biswa* 17 *dhur* in favour of Ram Shringar, Ram Surat and Kailash Nath, sons of Shyam Lal. He transferred the residue of 2 *bigha* 5 *biswa* in favour of Smt. Rajdei, the wife of one of his grandsons, Uma Shankar in the branch of his son, Shiv Mohan and his minor son, Girja Shankar. The transfer aforesaid in favour of Smt. Rajdei and Girja Shankar was made through a registered sale deed dated 29.05.1986. About a month and a half after the sale deed last mentioned was executed by Kewla Prasad in favour of Smt. Rajdei and Girja Shankar (minor), it was claimed by one Vishram Shukla that Smt. Rajdei and the minor, Girja Shankar, represented by his mother and guardian, Smt. Sukhdei, had executed a registered agreement to sell in his favour on 15th July, 1986, covenanting to transfer the property, received by them through the sale deed dated 29.05.1986. The two had settled under the agreement to sell dated 15.07.1986, a sale consideration of Rs.60,000/-.

It was alleged by Vishram Shukla that at the time of registration of the agreement, Smt. Rajdei and Smt. Sukhdei, on behalf of the minor, had accepted in earnest a sum of Rs.35,000/- with a covenant that the balance of Rs.25,000/- would be paid at the time of execution of the sale deed. The sale deed was agreed to be executed within two years. Vishram Shukla claimed that he was always ready and willing to secure necessary execution and registration of the sale deed and for the purpose, sent a notice on 13.06.1988 to Smt. Rajdei and Smt. Sukhdei, representing the minor's interest, asking them to appear before the Sub-Registrar, Meja on 15.07.1988. But the two did not appear.

It was on these allegations that Vishram Shukla instituted Original Suit No.529 of 1988 for specific performance of contract, arraying Smt. Rajdei as defendant no.1, Girja Shankar, then a minor aged about 17 years through his mother and next friend, Smt. Sukhdei as defendant no.2 and Smt. Sukhdei as the third defendant. There is an alternate relief claimed in the suit for refund of the earnest of Rs.35,000/- with interest, if specific performance be refused. This suit was instituted on 04.08.1988. Vishram Shukla, who has died pending this Appeal, represented by his four sons, who are his heirs and LRs, is the plaintiff-appellant here, whereas Smt. Rajdei, Girja Shankar and Smt. Sukhdei are the three defendant-respondents. The deceased plaintiff-appellant, represented by his heirs and LRs, who are appellant nos.1/1 to 1/4, shall hereinafter be referred to as 'the plaintiff'. The three defendants shall hereinafter be referred to as 'the defendants', wherever the reference is to all of them and by their names, in case of an individual reference.

3. A joint written statement dated 27.02.1989 was filed by the defendants, generally traversing the plaint allegations. The sale deed of 29th of May, 1986 in favour of Smt. Rajdei and the minor Girja Shankar was not denied and it was averred that the purchasers had become *bhumidhar*s in possession of the land transferred to them. It was said in the additional pleas that on 29.05.1986, the three other sons of Kewla Prasad, to wit, Lal Mani, Raj Narain and Gulab Shankar had quarreled over the assignment of land by Kewla Prasad to the

two defendants. They had fomented Daya Shankar, another son of Shiv Mohan, their brother and also a grandson of Kewla Prasad to protest that he had not been assigned any land by Kewla Prasad. This had led to strife in the family and in order to buy peace, Smt. Rajdei and Smt. Sukhdei, acting for the minor, agreed to transfer to Daya Shankar one-third share in whatever land was assigned to them by Kewla Prasad under the sale deed of 29.05.1986. Smt. Rajdei and Smt. Sukhdei had asked Daya Shankar to offer a reasonable price for the purpose, to which Daya Shankar said that he did not have ready money. He demanded that a registered agreement be executed in his favour and upon necessary resources being garnered, he would get a sale deed executed for the agreed one-third share.

4. It is the defendants' case that the proposal was accepted by Smt. Rajdei and by Smt. Sukhdei on behalf of the minor, Girja Shankar, that was settled at a bargained price of Rs.9,000/- for the one-third share. It is pleaded in the written statement that this settlement was arrived at in order to quell strife in the family of Shiv Mohan. The defendants came up with a specific case that on 15.07.1986, Smt. Rajdei and Sukhdei went over to the Sub-Registrar's office to execute a registered agreement for the one-third part of whatever had been assigned to them under the sale deed of 29.05.1986. Since the plaintiff is a relative of the defendants and had been visiting Village Tikapur, while Smt. Sukhdei's husband, Shiv Mohan was not in town, the plaintiff accompanied Smt. Rajdei and Smt. Sukhdei to the Sub-Registrar's office. It is pleaded that at the time of execution of the registered agreement, Daya Shankar agreed to pay in earnest a sum of Rs.3500/- out of the agreed sale consideration of Rs.9,000/-. There is a specific plea raised in the written statement that both Smt. Rajdei and Smt. Sukhdei are illiterate and rustic women hailing from a village, and taking advantage of their handicap arising from ignorance, the plaintiff illegally got a registered agreement to sell in his favour for the entire land admeasuring 2 *bigha* 3 *biswa*.

5. It is specifically pleaded further that on 15.07.1986, the defendants did not execute any registered agreement in favour of the plaintiff, contracting to sell the said land, which shall hereinafter be referred to as the 'suit property', for a sum of Rs.60,000/-. It is also pleaded that they never received the earnest of Rs.35,000/- from the plaintiff and never executed the registered agreement to their knowledge. It is also pleaded on behalf of the defendants that the registered agreement to sell dated 15.07.1986 in favour of the plaintiff (for short, 'the suit agreement') is the product of fraud and deceit. Neither the contents of the suit agreement were read out to the defendants nor were they made understand it. It is also pleaded specifically that they never instructed the suit agreement to be scribed nor were they aware of its contents. It is further pleaded in paragraph No.23 of the written statement that the plaintiff, along with Lal Mani, Raj Narain and Gulab, who are brothers of Shiv Mohan, have connived together to secure execution of the suit agreement dated 15.07.1986 fraudulently, taking advantage of the defendants' ignorance. It is particularly pleaded that the defendants came to know of the suit agreement and the fraud played upon them in consequence of service of summons of the suit, which they could understand after necessary consultations with their local Counsel. It is also averred

in paragraph No.25 that the plaintiff, in any event, is not entitled to a decree of specific performance.

6. On the pleadings of parties, the Trial Court struck the following issues:

"1- Whether the plaintiff has entered into an agreement with defendants nos.1 and 2 and paid Rs.35,000/- as advance?

2- Whether the plaintiff has given any notice to defendant, as alleged?

3- Whether agreement has been procured by practising fraud on defendant?

4- To what relief?"

7. In support of the plaintiff's case, the suit agreement in original was filed and the plaintiff examined himself as PW-1. Another witness, Shrinath was examined as PW-2, who is an attesting witness to the suit agreement. The defendants, on the other hand, examined Smt. Rajdei as DW-1 and Shiv Mohan as DW-2.

8. There is an interesting feature about the proceedings in the suit. After the parties' evidence was over and the suit was set down for address of arguments, the plaintiff did not appear and the defendants' learned Counsel did not address the Court in his absence. The Trial Judge proceeded to decide the suit on merits upon considering the evidence of parties on each of the issues and *vide* judgment and decree dated 03.12.1991. The suit was decreed for specific performance.

9. An application to set aside the decree dated 03.12.1991, that was brought dubbing the judgment *ex parte*, was rejected by the Trial Judge *vide* order dated 15.02.1992. It was held that the Court had proceeded under Order XVII Rule 3 CPC and pronounced judgment on merits. It does not appear from record that this order was disturbed. There is no quarrel about it any more.

10. The defendants appealed the Trial Court's decree to the District Judge of Allahabad, where it was numbered as Civil Appeal No.197 of 1992. The appeal was assigned to the learned IIIrd Additional District Judge, Allahabad, before whom it came up for hearing on 17.11.1994. The learned Additional District Judge, by his judgment and decree dated 17.11.1994, allowed the appeal and dismissed the suit, leaving parties to bear their own costs.

11. Aggrieved, this appeal from appellate decree was instituted on 27.01.1995 by the plaintiff.

12. This appeal was admitted to hearing on 03.10.2007. On 17.12.2007, it came up for hearing before the Court. The Court, holding service to be sufficient, proceeded to determine the appeal *ex parte* by the judgment and decree dated 17.12.2007. The appeal was heard *ex parte* on the following substantial questions of law:

"(i) Whether the lower appellate court acted illegally in reversing the finding recorded by the trial court on irrelevant circumstances culled out by the lower appellate court itself?

(ii) Whether the lower appellate court has acted illegally in accepting the vague assertion of fraud and mis-representation made by the defendants in the written statement without any particulars in the pleading and the e*vide*nce on the record?

(iv) Whether none of the particulars noticed by the lower appellate

court in support of its judgment, were pleaded in the written statement and proved by the defendants. No suggestion was made at all during the course of e*vide*nce and the argument before the trial court. The lower appellate court has based its finding only on surmises and conjectures. The finding recorded by the lower appellate court, therefore, is arbitrary, erroneous, illegal and perverse?"

13. The appeal was allowed, answering all the substantial questions of law in the plaintiff's favour, with the result that the Lower Appellate Court's decree was set aside and that of the Trial Court restored.

14. An application to set aside the *ex parte* judgment and decree and re-admit the appeal to its original file and number was made to this Court on behalf of the defendants. The application was allowed on 21.05.2013 and the *ex parte* judgment and decree dated 17.12.2007 was set aside. This Court, however, proceeded to hear the appeal on merits. The entire *ex parte* judgment dated 17.12.2007 was extracted by the Court in the judgment and order dated 21.05.2013 and it was remarked that the Court was not inclined to take a different view after hearing learned Counsel for the defendants at length. This Court, however, modified the decree of the Trial Court in that, that while restoring it for the relief of the specific performance, a direction was made to the plaintiff to pay an additional sum of Rs.70,000/- along with the balance sale consideration of Rs.25,000/-, requiring all of it to be deposited within two months of the date of judgment. There were certain incidental directions also in the decree.

15. On a Petition for Special Leave being preferred to the Supreme Court, leave was granted by their Lordships and the Civil Appeal allowed by an order dated 23.08.2019, with a remand to this Court, directing the second appeal to be decided after hearing the learned Counsel for the parties. The suit being of the year 1988, this Court was requested to decide the appeal preferably within six months. This appeal came up for hearing before this Court on 22.01.2020 and two more substantial questions of law were framed, which read:

"(V) Whether in case of an illiterate and rustic woman, who raises a plea of non est factum, the burden of proof is reversed and lies upon the other side, who propound the document?

(VI) Whether a document in respect of which it is pleaded by a party that it was obtained by the other side through fraud and misrepresentation, is the said document voidable at the option of the party claiming this fraud or misrepresentation, or it is void?"

16. It must also be noticed that an application to bring on record additional e*vide*nce under Order XLI Rule 27 CPC was made on behalf of the plaintiff, particularly, bearing in mind substantial question of law No. (V), formulated *vide* order dated 22.01.2020. This application sought to admit to the record certified copies of sale deeds dated 30.05.1997, 30.06.2010, 22.07.2011, executed by defendant no.1, Smt. Rajdei in favour of different third parties. Also, a certified copy of the *khatauni* issued on 27.01.2020, relating to *Khata* No.77 for the Fasli Years 1423-1428, was sought to be brought on record as additional e*vide*nce. This application was allowed *vide* order dated 25.02.2020 and the four documents, whereof formal proof was dispensed with, were ordered to be exhibited *vide* order

dated 01.07.2021. The documents have been exhibited, under orders of the Court by the Joint Registrar, as Exhibits A1, A2, A3 and A4.

17. Heard Mr. Raj Kumar Kesari, learned Counsel for the plaintiff and Mr. Virendra Kumar Gupta, learned Counsel appearing on behalf of the defendants.

18. The foremost substantial question of law, that is required to be answered, is the one numbered as (V), formulated *vide* order dated 22.01.2020. Along with it, Question No. (ii), initially formulated, and Question No. (VI), also formulated *vide* order dated 22.01.2020, can be conveniently considered.

19. The question, whether in the case of an illiterate and rustic woman, who raises a plea of *non est factum*, the burden of proof is reversed and lies upon the other side, who propounds the document, has been a matter of issue in the past also. It must be said straightaway that a plea of *non est factum* raised by any illiterate and rustic woman, who says that she could not understand the contents or even the nature of the document, to which she has appended her mark, is distinct and different from a plea of fraud and misrepresentation. It is quite another matter that the *non est factum* pleaded by an illiterate and rustic woman may be the result of fraud and misrepresentation, or pleaded to be so, to explain how she appended her mark to a document, the contents whereof she did not understand or even its nature. But a plea of *non est factum*, raised by an illiterate and rustic woman, is distinct and different from a plea of fraud and misrepresentation, raised as such, to question the validity of one's own solemn deed.

20. The principle about reversal of burden applicable to illiterate and rustic woman evolved essentially from the plea of *non est factum* in England, where there was no principle about reversal, but the distinction between this plea on one hand and fraud and misrepresentation on the other, was clearly delineated. The rule about reversal of burden was invented in the Indian context by the Privy Council relating to *pardanashin* women through a series of decisions and later came to be extended to illiterate and rustic women as a class by Indian Courts, who suffers from the same kind of disabilities as *pardanashin* women.

21. I had occasion to trace and consider the development of the rule, besides subtleties of its distinction from a plea of fraud and misrepresentation, as also its application to illiterate and rustic woman, in **Mahendra Singh v. Ramesh Singh, 2021(2) ALJ 606**. I would venture to quote wholesomely from **Mahendra Singh** *(supra)* all that has bearing on the point and the substantial question of law under consideration. In **Mahendra Singh**, the origin of the rule and its development in India was adumbrated thus:

"31. It would be profitable first to look at the principle about a person's solemn deed, regarding which he/ she says that he/ she signed, understanding it to be something else. This plea is often described as the mind not accompanying the signatures. It is also familiarly referred to in the world of law as *non est factum*. This plea, on the basis of which the maker of a solemn deed could avoid liability about the disposition made, had its origin in the English Law. The principle finds its classical statement in the oft-quoted decision of **Byles, J. in Foster vs. Mackinnon, [1869(4) C.P. 704]**. It is held there:

"it is invalid not on the ground of fraud where fraud exists but on the ground that the mind of the signor did not accompany the signature: in other words, that he never intended or contemplated to sign, and, therefore, in contemplation of law never did sign the contract to which his name is appended."

The principle had a long history of evolution in England and was always recognized as distinct and different from a plea to avoid a transaction on the ground of fraud, duress or undue influence. There was, however, no principle about reversal of burden of proof, that obliged the beneficiary of a transaction to prove its due understanding by the maker of a solemn deed, who alleged *non est factum*. The principle about reversal of burden in the case of *pardanashin* women, in the first instance and its later extension to other ignorant and illiterate women, as a distinct class, entitled to that protection in the matter of disposition of their rights in property, was evolved by the Privy Council, bearing in mind disabilities, associated with the members of the beneficiary class.

32. The origin of the principle about reversal of burden regarding transactions entered into with *pardanashin* women and the way it evolved about how that burden was to be discharged, was the subject matter of decision by the Supreme Court in **Mst. Kharbuja Kuer vs. Jangbahadur Rai and others, AIR 1963 SC 1203.** In the said decision, tracing the origin of the rule and laying down by what standard and in what manner that burden is to be discharged, K. Subba Rao, J. (as His Lordship then was) held:

"(5). ..... This proposition, in our view, is clearly wrong and is contrary to the principles laid down by the Privy Council in a series of decisions. In India pardahnashin ladies have been given a special protection in view of the social conditions of the times; they are presumed to have an imperfect knowledge of the world, as, by the pardah system they are practically excluded from social intercourse and communion with the outside world. In Farid-Un-Nisa v. Mukhtar Ahmad, 52 Ind App 342 at p. 350: (AIR 1925 PC 204 at p. 209), Lord Sumner traces the origin of the custom and states the principle on which the presumption is based. The learned Lord observed:

"In this it has only given the special development, which Indian social usages make necessary, to the general rules of English law, which protect persons, whose disabilities make them dependent upon or subject them to the influence of others, even though nothing in the nature of deception or coercion may have occurred. This is part of the law relating to personal capacity to make binding transfers or settlements of property of any kind."

The learned Lord also points out:

"Of course fraud, duress and actual undue influence are separate matters."

It is, therefore, manifest that the rule evolved for the protection of pardahnashin ladies shall not be confused with other doctrines, such as, fraud, duress and actual undue influence, which apply to all persons whether they be pardahnashin ladies or not.

(6). The next question is what is the scope and extent of the protection. In Geresh Chunder Lahoree v. Mst. Bhuggobutty Debia, 13 Moo Ind App 419 (PC) the Privy Council held that as regards documents taken from pardahnashin women the court has to ascertain that the party executing them has been a free agent and duly informed of what she was about. The reason for the rule is that the ordinary presumption that a person understands the

document to which he has affixed his name does not apply in the case of a pardahnashin woman. In Kali Baksh v. Ram Gopal, 43 Ind App 23 at p. 29 (PC), the Privy Council defined the scope of the burden of a person who seeks to sustain a document to which a pardahnashin lady was a party in the following words:

"In the first place, the lady was a pardahnashin lady, and the law throws round her a special cloak of protection. It demands that the burden of proof shall in such a case rest, not with those who attack, but with those who found upon the deed, and the proof must go so far as to show affirmatively and conclusively that the deed was not only executed by, but was explained to, and was really understood by the grantor. In such cases it must also, of course, be established that the deed was not signed under duress, but arose from the free and independent will of the grantor."

The view so broadly expressed, though affirmed in essence in subsequent decisions, was modified, to some extent, in regard to the nature of the mode of discharging the said burden. In 52 Ind App 342 at p. 352: (AIR 1925 PV 204 at p. 210) it was stated:

"The mere declaration by the settler, subsequently made, that she had not understood what she was doing, obviously is not in itself conclusive. It must be a question whether, having regard to the proved personality of the settler, the nature of the settlement, the circumstances under which it was executed, and the whole history of the parties, it is reasonably established that the deed executed was the free and intelligent act of the settler or not. If the answer is in the affirmative, those relying on the deed have discharged the onus which rests upon them."

While affirming the principle that the burden is upon the person who seeks to sustain a document executed by a pardahnashin lady that she executed it with a true understanding mind, it has been held that the proof of the fact that it has been explained to her is not the only mode of discharging the said burden, but the fact whether she voluntarily executed the document or not could be ascertained from other e*vide*nce and circumstances in the case. The same view was again reiterated by the Judicial Committee, through Sir George Rankin, in Hem Chandra v. Suradhani Debya, AIR 1940 PC 134. Further citation is unnecessary. The legal position has been very well settled. Shortly it may be stated thus: The burden of proof shall always rest upon the person who seeks to sustain a transaction entered into with a pardahnashin lady to establish that the said document was executed by her after clearly understanding the nature of the transaction. It should be established that it was not only her physical act but also her mental act. The burden can be discharged not only by proving that the document was explained to her and that she understood it, but also by other e*vide*nce, direct and circumstantial."

33. The application of the rule, regarding reversal of burden, governing transactions by *pardanashin* women was acknowledged to be extended to illiterate and ignorant women by this Court in **Paras Nath Rai vs. Tilesar Kunwar, 1965 All. L.J. 1080,** which has been followed by this Court in **Laxmi Narain** *(supra)*. The extension of the rule to an illiterate widow was acknowledged by this Court in **Manohar Lal vs. Rajeshwari Devi and others, AIR 1977 All 36.**

34. The earliest origin for an extension of the rule about reversal of burden relating to *pardanashin* women to other classes of women, subject to the same disabilities, though not strictly

pardanashin, had origin in the decision of the Privy Council in **Hodges and another vs. Delhi and London Bank, Limited, (1899-1900) XXVII Indian Appeals 168.** The suit that led to the appeal was about the validity of certain transactions between a traditional Indian women from Kashmir (who had married a British Army Officer) and a Bank, where she had dealt with her shares, assigning them to the Bank, in order to liquidate a loan, if required. The loan appears to have been taken by her son, a certain Colonel Oldham, from the Bank. The loan agreement on the debtor's part was signed by Colonel Oldham, Katherine Hodges and one Captain Craster. The Indian woman had lived as a British Army Officer's wife, and in course of time had become a widow. She had taken the name of Katherine Hodges. In the loan agreement, though she was a party, the loan was taken by her son, Colonel Oldham. Katherine Hodges and Captain Craster were understood to have stood sureties with joint and several liability. In order to secure the loan advanced to her son, Katherine Hodges had handed over to the Bank certain shares in other Banks, through a letter written by her to the Bank. There was also a power of attorney, authorizing the Bank to sell the shares, in order to liquidate the loan, in case conditions of repayment were violated. After her death, there was some default by Colonel Oldham. There are other issues about discharge of sureties, but all that is not relevant. The Bank brought a suit to recover against the parties to the loan agreement personally, and from the estate of Katherine Hodges. On behalf of the estate of Katherine Hodges, there was a very interesting defence that she "was a quasi purdanashin lady, of no education, unable to read or write English, and quite incapable of understanding the terms of the three instruments in question; which were not explained to her, and on which she had no independent advice." (quoted verbatim from the report of the judgment). The plea in substance asked for extension of the principle governing cases of dealings by a third party with *pardanashin* women, regarding disposition of their property or interest. In answering the question, Lord Hobhouse, speaking for the Board, held:

"In this part of the case there is no discrepancy in the ev*ide*nce except on some small immaterial details, and none at all in the findings of the two Courts. It is abundantly clear that Mrs. Hodges was not a *pardanashin*. The term quasipurdanashin seems to have been invented for this occasion. Their Lordships take it to mean a woman who, not being of the *pardanashin* class, is yet so close to them in kinship and habits and so secluded from ordinary social intercourse, that a like amount of incapacity for business must be ascribed to her, and the same amount of protection which the law gives to *pardanashin* must be extended to her. The contention is a novel one and their Lordships are not favourably impressed by it. As to a certain well known and easily ascertained class of women, well known rules of law are established, with the wisdom of which we are not now concerned. Outside that class it must depend in each case on the character and position of the individual woman whether those who deal with her are or are not bound to take special precautions that her action shall be intelligent and voluntary, and to prove that it was so in case of dispute. Mrs. Hodges was an independent woman of more than ordinary capacity for, and experience in, dealing with property. It would be very unjust to hold that the Bank was bound to treat her on any other footing." (Emphasis supplied)

35. The principle then, on which the decision of the Privy Council turned,

was not to extend the protection to illiterate women or those who could not read, write or understand English as a class, like *pardanashin* women by treating them to be what was dubbed as quasi *pardanashin*. Rather, it was held that extension of the protection, that is to say, reversal of burden, in cases of such women, who were claimed to be illiterate or otherwise not acquainted with the ways of the world or as it is described in later decisions as secluded from the society, would depend in each case on the character and position of the person concerned.

36. In **Sm. Sonia Parshini vs. Sheikh Moula Baksha, AIR 1955 Cal 17,** Debabrata Mukharjee, J, speaking for the Division Bench of the Calcutta High Court, posed the following question, opening the judgment:

"The question raised in this appeal is whether a deed of sale executed by an illiterate woman without the benefit of independent advice is subject to the same jealous scrutiny of the Court as an instrument executed in similar circumstances by a *pardanashin* lady strictly socalled."

His Lordship went on to hold thus:

"(6) The substantial question here is whether in the facts and circumstances proved the plaintiff appellant could be held to be entitled to this protection. This would require examination of the reasons behind the rule protecting transactions in which paradanashin women are concerned. The inhibitions imposed by social conditions upon women of a certain well-defined class bring in their train disabilities which have compelled reversal of the rule that ordinarily a person is to be held to his contract. These disabilities are due largely to illiteracy and ignorance which superadded to restrictions on free movement and contact with the world outside induce a condition of helplessness requiring the utmost vigilance to prevent unfairness in a deal in which she is concerned. The parties to the transaction not being evenly placed, courts called upon to pronounce on such transactions have always jealously guarded against possible unfairness. It has therefore come to be recognised as a rule of law that a party founding on a deed executed in such circumstances has to establish intelligent understanding of the deed and the burden is not discharged by mere proof of the execution of the document. Questions of fraud or undue influence apart, the plain requirement of the law in such cases is clear proof of comprehension of the contents of the document executed by her.

Such protection cannot plainly be the exclusive privilege of the class commonly known as pardanashin. The parda with its inhibitions may be an additional feature or element in the case but the real reason behind the rule is lack of understanding and appreciation of what an illiterate woman without independent advice, is about. Where ignorance and illiteracy are proved exposing the woman concerned to the danger and the risk of an unfair deal it would, we think, be a perversion of the rule to deny in such case the protection, despite the helplessness of her state, merely on the ground that she is not strictly *pardanashin*. It is quite conceivable that a woman belonging to the *pardanashin* class properly so-called may in spite of the restraints of the parda have sufficient understanding and appreciation of the contents of a document to which she is a party. In such case there can be no question of the protective cloak being thrown around her and she cannot be heard to plead her 20 pardah in avoidance of the transaction. The criterion cannot be the

social status implied in the pardah class but the ability to comprehend the contents of the document in question and the means or opportunities of such comprehension. The emphasis must be on the factual understanding of the document with reference to the individual concerned and not upon presumptive disability incidental to mere status. (Emphasis supplied)

37. To the understanding of this Court, this rule has been approved to apply to the identified class of women, called *pardanashin* on a presumptive basis. In dealing with *pardanashin* women, the rule appears to be that the beneficiary of transactions from such women, where they deny the transaction or plead *non est factum*, must discharge the burden to affirmatively prove that the executor of the document understood what the transaction was, as also its terms broadly. Even in case of *pardanashin* women, there are noticeable remarks in the authorities which indicate that in a given case, it could be shown that a particular *pardanashin* woman, though properly a member of that class, was wordly-wise, and, therefore, not entitled to a protection of the rule about reversal of burden. In course of time, the rule has been extended to other ignorant and illiterate women, who are similarly circumstanced and subject to the same disabilities as *pardanashin* women. The raison d'être to extend protection of the rule in question as remarked in **Sm. Sonia Parshini**, is not a membership of the class, known as *pardanashin* women, but the presumed inability of members of that class to comprehend the nature of the transaction, they have gone about due to myriad factors, that inhibit their understanding. For the same reason, the protection has been extended to women who are ignorant and illiterate and frequently described as unacquainted with the ways of the world.

38. This Court cannot ignore to refer to a decision of the Madras High Court in **Chidambaram Pillai and 3 others vs. Muthammal and another, (1993) 1 M.L.J. 535**, which undertakes a most comprehensive review about the law on the subject of reversal of burden in case of *pardanashin* women and other illiterate women. The decision in **Chidambaram Pillai** *(supra)* expounds the principle that the protection is available to illiterate women in the same manner as *pardanashin* women. Their Lordships of the Division Bench in **Chidambaram Pillai** *(supra)* have expounded and summarized the principles about extension of the rule regarding reversal of burden to illiterate women, thus:

"16. The pardah system as understood by the courts in India is not the system of keeping a woman under a veil indoors in zenana, but in seclusion, away from the knowledge of the world, in the sense that they are not ordinarily allowed to interact with the male folk and are kept away from social intercourse and communion with the outside world. The view of the Lahore Court in the case of Favvar-ud-din v. Kutab-ud-Din1 had almost worked as an alarm for the courts to develop a sense that any strict meaning to parda was going to exclude a greatly deprived section of the society from the protection cloak of the law, namely, the illiterate women and other women having such infirmities that they practically live without any social intercourse and communion with the outside world. The judicial consensus, as we have already noticed, has been expressed thus:--

"The rules regarding transaction by the *Pardanashin* apply equally to

illiterate women though they may not be in a strict sense *Pardanashin*."

A *Pardanashin* may not be illiterate, but she still may be ignorant in the sense that she has an imperfect knowledge of the world, and she is practically excluded from social intercourse and communion with the outside world. Her ignorance is the curse of a social usage that womenfolk depend upon malefolk for transaction of their business with the outside world. Thus, not all women, but only those who are practically excluded from social intercourse and communion with the outside world fall in this category. If it is for this reason that they are taken as persons suffering from disabilities which make them dependent upon or subject to the influence of others, the illiterate women who, for the reason of social compulsion are required to move out to work in the fields and elsewhere for livelihood, cannot be said to be less disabled and deprived. Even if they are intelligent to know where to go and how to earn their livelihood, yet they cannot read anything nor write anything, and unless told about the contents by others, will not know what the document contains. To the extent the character, content and the effect of the document are concerned, she has to be presumed to be ignorant by sheer illiteracy, the curse which is still pervading the ancient society particularly the women living in this part of the country, a fact about which, we think, we are competent to take judicial notice. We find ourselves in complete agreement with the view that the special cloak of protection applied to Pardanashin women has to be applied to illiterate women as well."

(emphasis supplied)"

22. The reversal of burden in case of illiterate and rustic woman may be a rule that is dependent on dynamic social conditions. The kind of illiterate and rustic women, who are entitled to the same protection as *pardanashin* women in contemporary time, may be a dying breed with more empowerment of women in rural areas as well, but this case has arisen in the decade of eighties of the last century, when conditions were not very different from what obtained in the context when the rule was invented and applied. It is also clear by the distinction noticed in **Mahendra Singh** that a plea of fraud and misrepresentation by a defendant is generically different from a plea of *non est factum*. Once an illiterate and rustic woman urges a plea of *non est factum*, the underlying fraud or misrepresentation pleaded is not material. What is material is *non est factum*, which means no more than this that handicapped by her utter illiteracy and lack of acquaintance with the ways of the world, she was incapable of understanding the nature of the transaction that she went about and affixed her mark to. Once that plea is urged, the burden of proof would certainly lie on the beneficiary of the document executed by an illiterate and rustic woman to affirmatively show that she understood clearly the nature of transaction and what she was undertaking to do by her solemn deed. This burden of proof cast upon the beneficiary of the transaction, embodied in the document, can be discharged not only by leading e*vide*nce to show that the document was explained to her and she understood it, but by other e*vide*nce, direct and circumstantial, as held in **Mst. Kharbuja Kuer v. Jangbahadur Rai and others, AIR 1963 SC 1203**. The relevant part has been extracted in the decision of this Court in **Mahendra Singh**.

23. Mr. Kesari, learned Counsel for the plaintiff, has been at pains to show from

the pleadings and the evidence that Smt. Rajdei and Smt. Sukhdei well understood the nature of the transaction, when they executed the suit agreement. Mr. Kesari has drawn the attention of the Court to the examination-in-chief of Smt. Rajdei, where she has said that she went to the Sub-Registrar's office along with her month-in-law, Smt. Sukhdei, besides Lal Mani, Gulab and Raj Narain, all of whom are brothers of Shiv Mohan, Rajdei's father-in-law and Smt. Sukhdei's husband. Mr. Kesari has impressed upon the Court that if the case of the defendants were to be believed, that they had gone to the Sub-Registrar's office to execute an agreement to sell in favour of Daya Shankar to settle inequities of distribution of property within the family of Kewla Prasad, in the branch of Shiv Mohan, the presence of Daya Shankar at the Sub-Registrar's office, who did not object to the suit agreement being executed in favour of the plaintiff, negatives the defendant's case.

24. It is pointed out elsewhere from the e*vide*nce of Shiv Mohan that his wife, Smt. Sukhdei had paid a sale consideration of Rs.27,000/- to his father for the purpose of execution of the sale deed in favour of the two defendants. It has been strongly urged by Mr. Kesari that the presence of close relatives at the time of execution of the suit agreement, would show that the two defendants, assuming that they are illiterate and rustic women, were in the company of those who would have advised them about the nature of the transaction. In the presence of three brothers of Shiv Mohan, besides the intended beneficiary of the agreement to sell, that never came to be executed, that is to say, Daya Shankar, it cannot be gainsaid, according to the learned Counsel for the plaintiff, that the two illiterate defendants could have executed the suit agreement without understanding its contents or nature. The learned Counsel, therefore, hints through these submissions that there are circumstances to show that assuming the handicap of the two defendants, due to illiteracy and lack of understanding of the ways of the world, they were in company, at the relevant time, of those whose guidance could not have permitted them to falter.

25. So far as reference to the cross-examination of DW-1, Shiv Mohan is concerned, the mention there of the sale consideration of Rs.27,000/- being paid by Smt. Sukhdei to her father-in-law, Kewla Prasad for the sale deed, is an endeavour to show that Smt. Sukhdei, defendant no.3, despite her illiteracy, was not a woman unacquainted with the ways of the world. She was worldly-wise. The Court has also been elaborately addressed by the learned Counsel for the plaintiff on the point that PW-2, Shrinath, who is an attesting witness to the suit agreement, is the sister's son of Kewla Prasad, that is to say, a cousin to Shiv Mohan, being his aunt's son. He is, thus, closely related to Shiv Mohan's daughter-in-law, defendant no.1 as well as defendant no.2, who is Shiv Mohan's brother and defendant no.3, who is Shiv Mohan's wife and Kewla Prasad's daughter-in-law. He has affirmed the transaction, including payment of the earnest by the plaintiff. The e*vide*nce of this witness has been emphasized, where it is said that the contents of the suit agreement were read over to the defendants by the scribe and also by the Registrar. He has also emphasized in his testimony that the Registrar had ascertained if the defendants had received the earnest of Rs.35,000/-, which they acknowledged before the Sub-Registrar. By pointing out to all these details of the e*vide*nce of PW-2, it is the

endeavour of the plaintiff to show that whatever be the defendants' handicap, they well understood the transaction that they went about.

26. There is one thing which the plaintiff had added to the cart of e*vide*nce before this Court by invocation of the provisions of Order XLI Rule 27 CPC. It is the three sale deeds executed by Smt. Rajdei in favour of third parties, relating to immovable property. By relying on these deeds, it is the plaintiff's endeavour to show that Smt. Rajdei, though illiterate, is not a woman who does not understand the ways of the world. If she can go about executing sale deeds of land, she must be assumed to possess sufficient knowledge of worldly affairs to understand what she was doing, when she appended her mark to the suit agreement. She cannot get away with the protection, to which an illiterate and rustic woman is otherwise entitled. This endeavour of the plaintiff is different from showing that the defendants, or for that matter, defendant no.1, Smt. Rajdei did actually understand the nature and contents of the suit agreement. This part of the effort is to show that she is not at all entitled to invoke the rule about reversal of burden on account of her illiteracy and rustic way of life.

27. Towards the close of his submissions, Mr. Kesari has relied upon a decision of this Court in **Ramesh Chand v. Sant Ram, 2020 (5) ALJ 453** to submit that merely because a person is illiterate, burden of proof would not shift to the beneficiary of the transaction. This contention, based on the decision in **Ramesh Chand** *(supra)*, shall be dealt with a little later in the course of this judgment.

28. Mr. Virendra Kumar Gupta, learned Counsel for the defendants, on the other hand, has been equally at pains to show that the transaction was conceived as a settlement of inequities that arose within the family of Kewla Prasad and his children, due to the sale deed that he executed in favour of two sons of Shiv Mohan, depriving the third, Daya Shankar and particularly, three of his own sons. It is pointed out that faced with bickerings in the family, the defendants had agreed to convey a one-third share to Daya Shankar and for the purpose, had proceeded to the Sub-Registrar's office to execute a registered agreement to sell in Daya Shankar's favour. He has drawn the attention of the Court to Paragraph No.16 of written statement, where the motive for the intended transaction, that made the defendants go to the Sub-Registrar's office, is disclosed. Paragraph No.16 of the written statement reads:

"16. That the defendant, Rajdei for herself and the defendant, Sukhdei, acting as the defendant, Girja Shankar's guardian and mother, agreed to sell for a consideration of Rs.9000/-, their one-third part of Gata No.563, admeasuring *2 bigha 3 biswa i*n favour of Daya Shankar, to which Daya Shankar also agreed and this led to an end the strife amongst Shiv Mohan's descendants."

29. It is then pointed out by Mr. Virendra Kumar Gupta that it is universally said in the testimony of all the witnesses, including the two plaintiff's witnesses and the two on the defendants' side that a meeting *(Panchayat)* was held fifteen days prior to the execution of the suit agreement. In the said meeting, according to the testimony of DW-1 and DW-2, it was decided that one-third share in Gata No.563 would be transferred in favour of Daya Shankar. It is emphasized that both the

defendants, particularly DW-1, Smt. Rajdei, in her testimony is emphatic that she never intended to transfer her property to the plaintiff. It is also pointed out that Daya Shankar was present at the time of execution of the document and defrayed all expenses, like travel and registration charges. In this connection, attention of the Court has been drawn to the testimony of DW-1. It is also urged by Mr. Gupta that there is not the slightest e*vide*nce to show that Shiv Mohan had any urgent need to sell off the property to liquidate any loan or meet expenses for some child's education. Smt. Rajdei has specifically denied in her testimony that there was a debt to liquidate.

30. This Court is conscious of the fact that it is not our province to appreciate the niceties of e*vide*nce, or for that matter, much of e*vide*nce. The e*vide*nce is to be examined in the context of the substantial questions of law that arise for consideration and the way the case of parties, on the e*vide*nce led, has been decided by the Courts below. It has been held, so far as substantial question of law No. (V) is concerned, that burden would be upon the party who takes from an illiterate and rustic woman under her deed, and not upon the woman who impugns her deed on the ground that she never understood its nature or contents, handicapped by her illiteracy and lack of acquaintance with the ways of the world. It has also been held that to discharge this burden, not only direct e*vide*nce may be led to show that the document, that an illiterate and rustic woman executed, was read over and explained to her, but other e*vide*nce, particularly circumstances, can also be shown, that point to the fact, one way or the other, whether a woman, who is handicapped in the manner under reference, did understand the contents and nature of the transaction embodied in her deed.

31. It has to be seen by this Court whether the two Courts below have approached the case of parties and e*vide*nce, without faltering on the law and in the manner that their conclusions accord with the answer to the question. It is to this extent that this Court can look into the case of parties and e*vide*nce. After all, a cause cannot be decided bereft of the facts, on the foot of which it arises. In this connection, reference may be made to the authority of their Lordships of the Supreme Court in **K.N. Nagarajappa and others v. H. Narasimha Reddy, AIR 2021 SC 4259,** where it has been held:

"14. Undoubtedly, the jurisdiction which a High Court derives under Section 100 is based upon its framing of a substantial question of law. As a matter of law, it is axiomatic that the findings of the first appellate court are final. However, the rule that sans a substantial question of law, the High Courts cannot interfere with findings of the lower Court or concurrent findings of fact, is subject to two important caveats. The first is that, if the findings of fact are palpably perverse or outrage the conscience of the court; in other words, it flies on the face of logic that given the facts on the record, interference would be justified. The other is where the findings of fact may call for examination and be upset, in the limited circumstances spelt out in Section 103 CPC.

15. Section 103 CPC reads as follows:

"103. *Power of High Court to determine issues of fact*

In any second appeal, the High Court may, if the evidence on the record is

sufficient, determine any issue necessary for the disposal of the appeal,-

(a) which has not been determined by the lower Appellate Court or both by the Court of first instance and the lower Appellate Court, or

(b) which has been wrongly determined by such Court or Courts reason of a decision on such question of law as is referred to in section 100."

16. In the judgment reported as Municipal Committee, Hoshiarpur v. Punjab State Electricity Board2, this court held as follows:

"26. Thus, it is evident that Section 103 CPC is not an exception to Section 100 CPC nor is it meant to supplant it, rather it is to serve the same purpose. Even while pressing Section 103 CPC in service, the High Court has to record a finding that it had to exercise such power, because it found that finding (s) of fact recorded by the court (s) below stood vitiated because of perversity. More so, such power can be exercised only in exceptional circumstances and with circumspection, where the core question involved in the case has not been decided by the court(s) below.

27. There is no prohibition on entertaining a second appeal even on a question of fact provided the court is satisfied that the findings of fact recorded by the courts below stood vitiated by non-consideration of relevant evidence or by showing an erroneous approach to the matter i.e. that the findings of fact are found to be perverse. But the High Court cannot interfere with the concurrent findings of fact in a routine and casual manner by substituting its subjective satisfaction in place of that of the lower courts. (Vide Jagdish Singh v. Natthu Singh [(1992) 1 SCC 647]; Karnataka Board of Wakf v. Anjuman-E-Ismail Madris-Un-Niswan [(1999) 6 SCC 343] and Dinesh Kumar v. Yusuf Ali [(2010) 12 SCC 740].)

28. *If a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then the finding is rendered infirm in the eye of the law. If the findings of the Court are based on no evidence or evidence which is thoroughly unreliable or evidence that suffers from the vice of procedural irregularity or the findings are such that no reasonable person would have arrived at those findings, then the findings may be said to be perverse. Further if the findings are either ipse dixit of the Court or based on conjecture and surmises, the judgment suffers from the additional infirmity of non-application of mind and thus, stands vitiated. (Vide Bharatha Matha v. R. Vijaya Renganathan [(2010) 11 SCC 483]"*

17. In a recent judgment of this court, Narayan Sitaramji Badwaik (Dead) Through Lrs. v.Bisaram3 this court observed as follows, in the context of High Courts' jurisdiction to appreciate factual issues under Section 103 IPC:

"11. A bare perusal of this section clearly indicates that it provides for the High Court to decide an issue of fact, provided there is sufficient evidence on record before it, in two circumstances. First, when an issue necessary for the disposal of the appeal has not been determined by the lower Appellate Court or by both the Courts below. And second, when an issue of fact has been wrongly determined by the Court(s) below by virtue of the decision on the question of law under Section 100 of the Code of Civil Procedure."

18. ..... If the appellants' arguments were to prevail, the findings of fact based upon an entirely erroneous appreciation of facts and by overlooking material e*vide*nce would necessarily have to remain and bind the parties, thereby causing injustice. It is precisely for such reasons that the High Courts are empowered to exercise limited factual review under Section 103 CPC. However, that such power could be exercised cannot be doubted. The impugned judgment does not expressly refer to that provision. In the circumstances of the case, it is e*vide*nt that the High Court exercised the power in the light of that provision. ....."

(Emphasis supplied)

32. Before proceeding to scrutinize the judgments of the Courts below on the principles indicated, by which e*vide*nce should be evaluated in the face of a plea of *non est factum* by an illiterate woman executing a document, the decision of this Court in **Ramesh Chand** *(supra)* relied upon by Mr. Kesari to say that burden of proof would not shift upon the beneficiary of the document, requires consideration. This Court in **Ramesh Chand** was concerned about a plea relating to burden of proof being shifted upon the defendant, on account of the plaintiff's illiteracy, where the plaintiff challenged his deed on the ground of fraud. This Court neither considered the issue of shifting of burden upon the other side in the context of a plea of *non est factum* by an illiterate woman, who was the executant, nor decided anything in relation to the aforesaid principle. For one, the plaintiff in **Ramesh Chand** was a man, who, though illiterate, may have been subject to a slight variation regarding reversal of burden, even if he had pleaded *non est factum*. But more than that *non est factum* was never pleaded or considered. It was a plea of fraud that was raised and in the context of plea of fraud, it was held by my esteemed Brother Vivek Agarwal, J. that burden of proof would not shift to the defendant merely on account of the plaintiff's illiteracy. The decision in **Ramesh Chand** is, therefore, clearly distinguishable on principle and has no application here.

33. The Lower Appellate Court in its judgment has taken note of the principle with reference to authority, that given the illiteracy of the two defendants, burden would lie on the plaintiff to establish affirmatively that the transaction embodied in the suit agreement was a conscious act of the defendants, once they have taken a plea that they never understood its contents or nature. Broadly, it must be remarked that the Lower Appellate Court has rightly understood the principle, by which the case of parties and the e*vide*nce would have to be approached. The Lower Appellate Court has then recorded findings based on circumstances to conclude that the suit agreement does not appear to embody a conscious and well understood transaction by the defendants. In elaborate but not too prolix a detail, the Lower Appellate Court has enumerated those circumstances. It has been held that there is no e*vide*nce on record to show that the defendants would be willing to sell the suit property. The reason to enter into the transaction, disclosed in the suit agreement, is household affairs, liquidation of loan and the minor's education, but there is no e*vide*nce on record to show that there was a loan to liquidate or any such child undergoing education of a kind that may involve usual expenditure that would necessitate a sale of the suit property. It has been held that the cause to enter the transaction, as disclosed in the suit

agreement, is not at all countenanced by the e*vide*nce on record.

34. It has then been held by the Lower Appellate Court that the sale deed by Kewla Prasad in favour of the two defendants was executed on 29.05.1986. This remark is followed by some discussion about the plausible time when the document would be returned after registration and a note of the fact that there is no e*vide*nce to show that the defendants' name had been mutated in the revenue records by the relevant time. These remarks are followed by an observation that it is not the intention of the Court (Lower Appellate Court) that without mutation in their favour, the defendants could not dispose of their interest, but the fact has been noted to ascertain that what was the crashing urgency that without waiting for a mutation based on the deed of Kewla Prasad and without the original deed being handed over to the vendees within a week or two, the defendants would enter into a transaction for sale. It has then been opined by the Lower Appellate Court that these facts indicate that Kewla Prasad's sale deed in favour of the defendants led to a dispute in the family of the kind pleaded in the written statement and that taking advantage thereof, the defendants' relatives brought about a situation that impelled them to execute an agreement to sell of the kind pleaded in the written statement.

35. Now, it must be remarked that the agreement to sell pleaded in the written statement by the defendants is one in favour of Daya Shankar, Shiv Mohan's son, who had been left out of the disposition made by Kewla Prasad. The Lower Appellate Court has then proceeded on to hold that a time period of two years for the execution of the sale deed after paying a sum of Rs.35,000/- out of a settled sale consideration of Rs.60,000/- seems too long in the circumstances, because in the time period of two years, the prices would go up. It has been remarked that the transaction could be supported on ground of an urgent need of the defendants, but about that, there is no e*vide*nce.

36. The Lower Appellate Court has then recorded a most decisive finding based on circumstances and says that the circumstances do not support why within a very short period of time, after execution of the sale deed by Kewla Prasad in favour of the defendants, the defendants would execute the suit agreement in the plaintiff's favour. There is a finding also recorded that the source or the bank account, wherefrom the sum of Rs.35,000/- was drawn not being explained, does not inspire much confidence. The last finding that is recorded is one that converges on the disability of the two defendants, arising from their illiteracy. It has been remarked that both the defendants are illiterate women and have their husbands and other members in the family. On the date of the transaction, Smt. Sukhdei's husband, Shiv Mohan, who is literate, was not invited to witness the suit agreement. Also, no receipt for the money received was executed in Shiv Mohan's presence. It has been inferred that these circumstances show that no member of the defendants' family, who could understand the contents and the nature of the suit agreement, was associated with the transaction, leading to the suit agreement. It is on the basis of all these circumstances that the Lower Appellate Court has held that the suit agreement was never executed and no consideration passed hands. The findings clearly lead to an inference that the Lower Appellate Court was not satisfied that the defendants at all

understood the nature of the transaction or the contents of the suit agreement, and therefore, held it to be not their deed. This is precisely the result of the success of a plea of *non est factum*. The Lower Appellate Court has apparently placed burden of proof on the plaintiff's shoulder to affirmatively prove that the suit agreement was understood about its contents and the nature of the transaction by the two illiterate and rustic women, who are the defendants. The Lower Appellate Court did not find it to be discharged successfully by the plaintiff and in reaching that conclusion, the Lower Appellate Court has relied on very relevant e*vide*nce.

37. Within the limitations of the jurisdiction under Section 100 CPC, there is no reason for this Court to take a different view of the e*vide*nce than that taken by the Lower Appellate Court. Of course, to add to the line of reasoning of the Lower Appellate Court, particularly, in answer to the very elaborate and erudite submissions of Mr. Kesari, it must be remarked that the family members, who were present around the place at the time when the transaction was entered into, are the three brothers of Shiv Mohan, who had caused one of his sons, Daya Shankar to rebel against his grandfather's disposition made in favour of two of his brothers. If the said relatives were around the place when the suit agreement was executed, the two defendants, who are illiterate and rustic women, could hardly expect any guidance or help.

38. Here, it must also be noticed that much emphasis has been placed by Mr. Kesari upon the additional documents admitted to record, particularly, the three sale deeds by defendant no.1, Rajdei dated 30.05.1997, 30.06.2010, 22.07.2011. The suggestion, that has strongly come from the learned Counsel for the plaintiff, is that the tenor of the document show that Rajdei, in entering into transactions relating to sale of property, established that she is not a woman unacquainted with the ways of the world, though she may be illiterate. It must be remarked that for one, the sale deeds relied upon by the learned Counsel for the plaintiff are of a much later date after the cause of action involved here arose. The earliest of the three sale deeds is of the year 1997 and the last is one of the year 2012. The one in between the two is of the year 2010. The suit agreement here dates back to the year 1986. Therefore, between the earliest of the three sale deeds relied upon by the plaintiff to show Rajdei's prowess in understanding and handling worldly affairs and property matters, there is a lapse of eleven years, a long time in a human's short life. Humans by nature, whether literate or illiterate, generally get better acquainted with worldly matters as they mature. There could, of course, be exceptions or classes or communities where this may not happen. In contemporary times, exposures of even illiterate persons to many worldly matters and their knowledge about life has undergone unprecedented change, but that would not work backwards in time across a decade and a year for an illiterate and rustic woman, who executed the suit agreement to be accepted as wordly wise.

39. Quite apart, all this is based on the assumption that Rajdei, over time, has become better acquainted with worldly matters. It is not necessarily so. It is quite possible that the three sale deeds, executed in the years 1997, 2010 and 2012, have been executed by Rajdei with the aid and assistance of her husband, Uma Shankar or some other member of the family, who enjoyed her confidence and had her best

interest at heart. These are issues, indeed, of e*vide*nce, which, notwithstanding the admission of the additional documents, ought not to be probed any further by this Court.

40. Be that as it may, as already said, the Lower Appellate Court has taken a logical view of the e*vide*nce on record, applying the principle correctly to place burden of proof upon the plaintiff. In the circumstances, **substantial question No. (V) is answered in the affirmative,** holding that in the case of an illiterate and rustic woman, who raises a plea of *non est factum*, the burden of proof is reversed and lies on the party, who seeks to take advantage of the document.

41. So far as substantial question of law nos. (ii) and (VI) are concerned, it is submitted by Mr. Gupta that given the plea of *non est factum* that is involved, both these substantial questions, do not arise for consideration in this appeal. Mr. Kesari, on the other hand, says that they do and are required to be answered. Learned Counsel for both parties have been heard on the said questions, including the issue whether they are at all involved.

42. This Court is of opinion that both the aforesaid questions do not really arise. The reason is that the case here is not based on a case of the document being vitiated by fraud and misrepresentation. As such, it is a case based on a different plea and that is *non est factum*. There is established authority noticed in **Mahendra Singh** that clearly distinguishes a plea of *non est factum* from a plea of fraud and misrepresentation. The law governing proof of the plea of fraud and misrepresentation does not apply to a plea of *non est factum*. It certainly does not apply to the case of an illiterate and rustic woman, where the burden of proof, in the face of a plea of *non est factum* is placed on the party, who claims under a document from her. It is for this reason that these questions do not at all arise. **Both the questions Nos. (ii) and (VI) are not involved in this appeal and are not required to be answered.**

43. So far as substantial question of law No. (iv) is concerned, learned Counsel for the plaintiff has emphasized its importance and advanced some submissions. The learned Counsel for the defendants, on the other hand, says that this question is hardly a substantial question of law and is not required to be decided, for the substance of it, would be well taken care of by the answer to substantial question of law No. (i).

44. This Court is inclined to agree with the learned Counsel for the defendants for the reason that substantial question of law No. (iv) runs into too many disjunct details, rendering it an awkward exercise to answer. Also, on the terms of it, the Court may be unnecessarily invited to venture into the prohibited field of a purely factual evaluation of e*vide*nce, unrelated to any principle, that we have dealt with here may deal with in the course of answering this question. Quite apart, the substance of the question is entirely taken care of by substantial question of law No. (i). Thus, this Court may safely conclude that **substantial question of law No. (iv) is not involved** in the present appeal and not required to be answered for the purpose of its effective disposition.

45. Now, turning attention to substantial question of law No. (i), it must be said at once that in view of our answer to substantial question of law No. (V), it

does not require any elucidation that the Lower Appellate Court has not proceeded to record findings on irrelevant considerations. It has been held in answer to question No. (V) that the Lower Appellate Court has rightly applied the principle about reversal of burden in the face of a plea of *non est factum* raised by the defendants, who are both illiterate and rustic women. What, therefore, still requires to be evaluated is whether the Lower Appellate Court, in adopting an approach that this Court has countenanced, has effectively and validly reversed findings to the contrary recorded by the Trial Court. This would also charge this Court with the task of ascertaining whether the Trial Court at all considered the principle, by which the issues arising between parties had to be judged, and if it has, whether to the facts and e*vide*nce, that principle has been correctly applied.

46. Issue No. 3 framed by the Trial Court has been extracted hereinabove and paraphrased. It says, whether the suit agreement is one that is vitiated by the defendants' fraud in procuring it. This issue has been answered with reference to findings recorded in relation to issue No.1. But, in clear words, the principle that the Trial Court applied, is expressed in the following words:

"But, as discussed under issue No.1, the defendant failed to establish any fraud or misrepresentation."

47. While recording findings on issue No.1, which is the principal issue about the fact whether the plaintiff and the defendants entered into the suit agreement, with the defendants taking the earnest of Rs.35,000/-, the principle that the Trial Court has applied, is e*vide*nt from these findings:

"In the above circumstances in my opinion when the agreement is admitted and registered the prima-facie presumption lies in favour of plaintiff and heavy burden lies on the defendants to prove that the agreement has been obtained by fraud and misrepresentation. The defendant failed to show any circumstances, under which, it can be said that any fraud and misrepresentation has been played on the defendant. By the statement of D.W.1, Raj Dayee, who is the defendant herself, it is clear that the defendant no.1, Raj Dayee and defendant no.3, Sukh Dayee, who was representing as guardian to minor; defendant no.2 went to the Office of Sub-registrar, Meja, in absence of any male member. According to D.W.1 her husband Uma Shankar was in service outside of State and her father-in-law Shiv Mohan was away in Mirzapur at that time. Accordingly it is clear that the defendants nos.1 and 3 chose herself to visit the Tehsil Head Quarter Sub-Registrar, Meja, in absence of her husband and her father-in-law knowingly that they are going to execute an agreement so they cannot plead that they are ignorant and the plaintiff has taken undue advantage for their illiteracy and ignorance."

48. It is clear from the Trial Court's approach that the learned Judge had in mind fraud and misrepresentation as the defendants' pleas to assess whether the transaction is vitiated or valid. No doubt, fraud and misrepresentation are pleas that have to be pleaded with all necessary particulars and strictly proved. The burden to prove these pleas is also generally upon the person who sets up the plea. The same does not hold true in case of *non est factum* when raised by an illiterate and rustic woman. A reading of the Trial Court's findings shows that the Trial Court never had in mind the distinction between a plea of *non est factum* on one hand and fraud

and misrepresentation on the other; particularly in the context of an illiterate and rustic woman *vis-à-vis* the principle of reversal of burden. The Lower Appellate Court has also not spoken about *non est factum* in express words. But, throughout the length and breadth of the impugned judgment, one finds the conscious application of the principle, obliging the party, who happens to be the plaintiff here, to effectively prove that the defendants, who are illiterate and rustic woman, understood the contents and the nature of the transaction that the suit agreement embodied.

49. The Lower Appellate Court, therefore, on an application of the right principle of law to judge the rights of parties, including reversal of burden, in the opinion of this Court, has, validly and effectively, reversed the Trial Court. It must also be remarked that in view of the wholesome and trite application of the principle, by which the rights of parties have to be judged, it is not a case where it may be said, even remotely, that the Lower Appellate Court has proceeded to decide a case culled by itself or what is popularly called a third case. In the considered opinion of this Court, the Lower Appellate Court has decided the case of parties within the precise parameters of the pleadings and e*vide*nce.

50. In the opinion of this Court, therefore, substantial question of law No. (i) must be answered in the **negative.**

51. In the result, this appeal fails and is **dismissed with costs** to the defendants in all Courts.

52. Let a decree be drawn up accordingly.

(2022)03ILR A833
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.02.2022

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Writ C No. 3000106 of 1994

Jogendra Singh ...Petitioner
Versus
Addl. Commissioner & Ors. ...Respondents

Counsel for the Petitioner:
V.K. Pandey, J.P. Tiwari

Counsel for the Respondents:
C.S.C.

A. Civil Law – U.P. Imposition of Ceiling on Land Holdings Act, 1960 - Sections 11(2) & 13 - U.P.C.H. Act, 1953 - Section 9 – if an entry is made in the revenue record and the said entry is not fictitious or is found to have been made surreptitiously, then it cannot be said that such an entry would have no legal effect. Even an incorrect entry in law, would not lead to the conclusion that it ceases to be an entry. Once the entry is in existence in the khasra or khatauni of Fasli Year 1356, that would govern the question as to who is entitled to take or retain possession of the and to which the entry relates. (Para 19)

B. U.P.Z.A.& L.R. Act, 1950 - Sections 229-B, 209 & 210 U.P.Z.A. & L.R. Act, 1950 - If Sections 209 & 210 are read together, it would be found that if a person has retained possession of the land otherwise than in accordance with the provisions of law without consent of the owner of the land (bhumidhar, sirdar or asami) or the Gram Sabha as the case may be, he can be ejected on a suit filed u/s 209. If, however, the suit is not filed u/s 209 or a decree obtained in any other such suit is not executed before

limitation or execution of the decree, the person taking or retaining the possession without the consent of the tenure holder or the Gram Sabha would acquire the right, title and interest of an asami and the rights of the tenure holder would get extinguished. The person in possession becomes asami by virtue of operation of law and the proceedings u/s 229-B would not be required to be filed by him. (Para 22)

In the present case, when the entries in khatauni have not been found to be fictitious or made fraudulently by two authorities below and the petitioner's name was recorded in Class-IX of khatauni from 1371 - 1391 Faslis, it was the duty of the prescribed authority to decide the validity of entry by allowing the petitioner to lead evidence. (Para 23)

Writ petition allowed. Remanded back to prescribed authority. (E-4)

Precedent followed:

1. Wali Mohammad (deceased) by LRs Vs. Ram Surat & ors., (1989) 4 SCC 574 (Para 19)

Present petition challenges orders dated 08.02.1993, passed by prescribed authority and 24.06.1994, passed by appellate authority.

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

1. Heard Sri V.K. Pandey, learned counsel for the petitioner and Sri J.P. Maurya, learned Additional Chief Standing Counsel for the State-opposite parties.

2. The present writ petition has been filed seeking quashing of the orders dated 8.2.1993 passed by the prescribed authority and 24.6.1994 passed by the appellate authority under the provisions of the U.P. Imposition of Ceiling on Land Holdings Act, 1960 (for short ?the Act, 1960?).

3. The dispute relates to Gata No.9/1/1M measuring 45.36 acres belonging to Amar Singh, opposite party no.7. Gata No.9/1/1/ along with some other gatas was jointly recorded in the name of Gur Bux Singh, Resham Singh and Trilochan Singh sons of Kartar Singh, Ratan Singh and Amar Singh. Total area of Gata No.9/1 was 136.09 acres, in which Amar Singh had share of 35.36 acres. It is said that all these tenure holders on the basis of mutual partition came into possession over their respective shares without any hindrance. Ceiling proceedings under the Act, 1960 were commenced against Amar Singh in the year 1982. Vide order dated 30.8.1982, the prescribed authority declared the said land of Amar Singh as surplus beyond the ceiling limit.

4. It is also said that when the ceiling authority tried to take possession of the said land in May, 1999, the petitioner could know about the order dated 30.8.1982 passed by the prescribed authority declaring the aforesaid land of the petitioner as surplus. The petitioner on 9.5.1989 filed objection under Section 11(2) of the Act, 1960 before the prescribed authority. The prescribed authority dismissed the objection vide order dated 15.5.1989 on the ground of limitation.

5. Against the said order dated 15.5.1989, the petitioner filed Appeal No.276 of 1988-89 before the appellate authority. The appeal was allowed vide order dated 6.1.1990 and the matter was remanded back to the prescribed authority for deciding the objection afresh on merit in accordance with law.

6. In the objection, the petitioner claimed that he was recorded as tenant in Class-IX in khatauni of 1369 Fasli and as

per the law, he became sirdar of the aforesaid land prior to 1375 Fasli, which corresponds to the year 1968. Further contention of the petitioner was that before the due date i.e. 24.1.1971/8.6.1973 by virtue of operation of law, the petitioner had become sirdar on the ground that he was in adverse possession for the period of six years i.e. in the year 1376 Fasli and, therefore, the said land could not have been included in the land holding of Amar Singh.

7. The prescribed authority framed the following issues for the decision:-

(i) Whether the objector/petitioner had become bhumidhar of the land in question on the ground of his adverse possession before coming into force the Act, 1960? If yes, then what would be the effect?

(ii) Whether the objector/petitioner is entitled for any other relief.

8. The prescribed authority held that the petitioner?s possession was not recorded in any of khasras of Fasli years 1371 to 1391. His name was recorded in Class-IX of khatauni for 1371-1391 Fasli. The prescribed authority did not believe the claim of the petitioner that he was in possession of the land in question since 1369 Fasli inasmuch as he did not produce any documentary evidence to substantiate the said claim. The prescribed authority further was of the view that if the petitioner was recorded in possession of the land, then he would have filed a case under Section 229-B of U.P.Z.A.& L.R. Act to establish his right.

9. The prescribed authority also held that the consolidation proceedings were going on in the village and in khasra partal, in PA2 Ka in Class-IX, the disputed land is mentioned. The Chakbandi Lekhpal in his statement has specifically said that in Column Nos.7, 8 and 9 of PA2 Ka, name of the petitioner was not mentioned against the disputed land, whereas Column Nos.7 and 8 of PA2 Ka, name of persons, who are in possession and sikmi persons are mentioned. The prescribed authority also find that name of the lease holders after the said land was declared as surplus land of Amar Singh, got recorded from 1386 Fasli itself. The prescribed authority held that petitioner had never been in possession of the said land and thus, rejected the objection of the petitioner vide order dated 8.2.1993.

10. Aggrieved by the said order passed by the prescribed authority, petitioner filed Appeal No.289/92-93/94035 under Section 13 of the Act, 1960. The appellate authority vide impugned order dated 26.4.1994 did not find any substance in the claim of the petitioner over the land in question on the ground of his alleged adverse possession and thus, affirmed the order passed by the prescribed authority. The appellate authority was of the view that when it was not shown that the petitioner was in possession in khasras of 1371-1391 Fasli, entry of his name in Class-IX would not have any legal effect in favour of the petitioner.

11. Sri V.K. Pandey, learned counsel for the petitioner submits that as per Para 911 of the Land Records Manual, Class-IX entry in khatauni Para-II gives rise to judicial proceedings. Error/omission in the entry recording possession of a person shall be corrected after hearing the contending parties taking evidence and recording

findings. It postulates judicial determination and is subject to scrutiny by the competent authority in exercise of his revisional power.

12. Learned counsel for the petitioner further submits that the omission/error in not recording the possession of the petitioner despite entry of his name in Class-IX of the khatauni, was required to be decided in the proceedings that whether the entries were correct or not correct as per the Land Records Manual. The said determination should have taken place on the basis of evidence and proper opportunity to the petitioner to lead evidence on the point of showing validity of recording entry of his name in Class-IX of the khatauni.

13. Learned counsel for the petitioner also submits that petitioner's claim has been rejected merely on the ground that in corresponding khasra, there was no entry of his possession and, therefore, mere entry in Class-IX would not be sufficient. He further submits that the said finding has not been recorded after scrutinizing the omission/error of recording the possession of the petitioner in corresponding khasra as is mandated under the Land Records Manual.

14. Learned counsel for the petitioner further submits that petitioner's entry in Class-IX of khatauni is sufficient proof of his adverse possession and it was sufficient evidence to prove his adverse possession. He further submits that petitioner was not required to file proceedings under Section 229-B of U.P.Z.A.& L.R. Act. If the stipulated period of adverse possession get completed, then the original tenure holder cannot initiate proceedings under Section 209 U.P.Z.A. & L.R. Act and, as per Section 210 of U.P.Z.A. & L.R. Act, the person having adverse possession, would obtain the right of those person against that property, if he has completed the stipulated period of adverse possession.

15. Learned counsel for the petitioner also submits that there has been no finding recorded by the prescribed authority or by the appellate authority that petitioner used fraudulent means or fabricated the record of khatauni. Entry in Class-IX of a person, is an entry of recording his possession. He, therefore, submits that the orders passed by the prescribed authority and the appellate authority are bad in law and are liable to be quashed.

16. On the other hand, Sri J.P. Maurya, learned Additional Chief Standing Counsel has supported the orders passed by the two authorities below and has submitted that petitioner could not prove his claim of adverse possession. He did not file the khasra (record of possession) of the relevant years before the prescribed authority. The petitioner did not file objection under Section 9 of the U.P.C.H. Act during the consolidation proceedings in the village claiming to be sirdar on the basis of adverse possession of the land in question. It appears that by influence/fraudulent means, he could get his name recorded in Part-II of Class-IX of khatauni and such an entry in the khatauni, would not vest any right in favour of the petitioner.

17. Sri J.P. Maurya has further submitted that two authorities below have concurrently held that petitioner could not prove his adverse possession over the land in question before the due date and, therefore, this Court may not interfere with the findings of fact recorded by the two

authorities below. He has also submitted that after the said land of Amar Singh was declared as surplus, leases had been executed in favour of the landless persons. The petitioner was never in possession of the said land. Therefore, the writ petition being without any merit and substance, is liable to be dismissed.

18. I have considered the submissions advanced on behalf of the learned counsel for the petitioner as well as by the learned Additional Chief Standing Counsel and perused the record of the writ petition.

19. This Court in the case of ***Wali Mohammad (deceased) by LRs vs. Ram Surat and others, (1989) 4 SCC 574*** has held that if an entry is made in the revenue record and the said entry is not fictitious or is found to have been made surreptitiously, then it cannot be said that such an entry would have no legal effect. Even an incorrect entry in law, would not lead to the conclusion that it ceases to be an entry. Once the entry is in existence in the khasra or khatauni of Fasli Year 1356, that would govern the question as to who is entitled to take or retain possession of the and to which the entry relates. Paragraph 6 of the aforesaid judgement reads as under :-

"*6. Coming to the present case, although the Additional Commissioner has held that the entry was fictitious, that conclusion seems to have arrived at merely on the basis that Wali Mohammad was in possession in Fasli Year in question, with the result that the entry in the Khasra or Khatauni showing Ram Kumar as the occupant could not be correct. There is nothing to show that the said entry was fictitious or was made fradulently or was incorrectly introduced by reason of iII-will or hostility towards Wali Mohammad. In these circumstances, the entry may not be correct but it could not be said to be fictitious or regarded as non est. Merely because the entry might be incorrect, that would not make any difference to the determination of the question as to who is entitled to be declared to be the Adhivasi of the land under the provisions of section 20(b) of the said Act. We agree with the conclusion and reasoning of the High Court.*"

20. In the present case, two authorities below have not recorded any finding that entry of the petitioner in Class-IX of khatauni was a fictitious or was made fraudulently.

21. Sections 209 and 210 of the U.P.Z.A. & L.R. Act, which have bearing in the present case, read as under :-

"***209. Ejectment of persons occupying land without title.-****[(1)]A person taking or retaining possession of land otherwise than in accordance with the provisions of the law for the time being in force; and-*

(a) where the land forms part of the holding of a bhumidhar,[* *]or asami without the consent of such bhumidhar,[* * *]or asami;*

(b) where the land does not form part of the holding of a bhumidhar,[* *]or asami without consent of the[Gaon Sabha],*

shall be liable to ejectment on the suit in cases referred to in Clause (a) above of the bhumidhar,[* *]or asami concerned and in cases referred to in Clause (b) above of the[Gaon Sabha][* * *]and shall also be liable to pay damages.*

[(2) To every suit relating to a land referred to in Clause (a) of sub-section (1) the State Government shall be impleaded as a necessary party.]

210. Consequence of failure to the suit under Section 209.- If a suit for eviction

from any land under Section 209 is not instituted by a bhumidhar or asami, or a decree for eviction obtained in any such suit is not executed within the period of limitation provided for institution of such suit or the execution of such decree, as the case may be, the person taking or retaining possession shall-

(a) where the land forms pail of the holding of a bhumidhar with transferable rights, become a bhumidhar with a transferable rights of such land and the right, title and interest of an asami, if any, in such land shall be extinguished;

(b) where the land forms part of the holding of a bhumidhar with non-transferable rights, become a bhumidhar with non-transferable rights I and the right, title and interest of an asami, if any, in such land shall be I extinguished;

(c) where the land forms part of the holding of an asami on behalf of the Gaon Sabha, become an asami of the holding from year to year.]

[Provided that the consequences mentioned in Clauses (a) to (c) shall not ensue in respect of any land held by a bhumidhar or asami belonging to a Scheduled Tribe.]"

22. If Sections 209 and 210 of the U.P.Z.A. & L.R. Act are read together, it would be found that if a person has retained possession of the land otherwise than in accordance with the provisions of law without consent of the owner of the land (bhumidhar, sirdar or asami) or the Gram Sabha as the case may be, he can be ejected on a suit filed under Section 209 of U.P.Z.A.&L.R. Act. If, however, the suit is not filed under Section 209 of U.P.Z.A.&L.R. Act or a decree obtained in any such suit is not executed before limitation or execution of the decree, the person taking or retaining the possession without the consent of the tenure holder or the Gram Sabha would acquire the right, title and interest of an asami and the rights of the tenure holder would get extinguished. The person in possession becomes asami by virtue of operation of law and the proceedings under Section 229-B of U.P.Z.A. & L.R. Act would not be required to be filed by him.

23. Thus, this Court finds that when the entries in khatauni have not been found to be fictitious or made fraudulently by two authorities below and the petitioner's name was recorded in Class-IX of khatauni from 1371-1391 Faslis, it was the duty of the prescribed authority to decide the validity of entry by allowing the petitioner to lead evidence.

24. In view thereof, the present writ petition is ***allowed*** and the impugned orders dated 8.2.1993 and 24.6.1994 passed by the prescribe authority and the appellate authority are hereby quashed. The case is remanded back to the prescribed authority to decide the case afresh in accordance with law expeditiously, preferably, within a period of six months from today. Petitioner should appear before the prescribed authority on 4.4.2022 along with this order.

(2022)03ILR A838
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.01.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE VIVEK VARMA, J.

First Appeal From Order No.155 of 2022

United India Insurance Co. Ltd.
...Appellant
Versus
Smt. Shashi Prabha & Ors. ...Respondents

Counsel for the Appellant:
Sri Saurabh Srivastava

Counsel for the Respondents:
Sri Sunil Kumar, Sri Amar Chandra

Civil Law - Motor Vehicle Act, 1988 – Quantum of compensation- the principle of contributory – burden of proving reasonable care on defendants – Income taxed amount was considered by court u/s 194A (3) (ix) of the Income Tax Act, 1961 – Insurance company to deposit amount at 7% interest.

Appeal partly allowed. (E-9)

List of Cases cited:

1. Bajaj Allianz General Insurance Co.Ltd. Vs Smt. Renu Singh & ors. First Appeal From Order No. 1818 of 2012

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

3. Khenyei Vs New India Assurance Co. Ltd. & ors., 2015 LawSuit (SC) 469

4. T.O. Anthony Vs Karvarnan & ors. [2008 (3) SCC 748]

5. Challa Bharathamma & Nanjappan

6. Khenyei Vs New India Assurance Company Limited & ors., 2015 Law Suit (SC) 469

7. Malarvizhi & ors. Vs United India Insurance Co. Ltd. & anr., 2020 (4) SCC 228

8. United India Insurance Co. Ltd. Vs Indiro0 Devi & ors. 2018 (7) SCC 715

9. The Oriental Insurance Co.Ltd. Vs Mangey Ram & ors., 2019 0 Supreme (All) 1067

10. New India Assurance Company Vs Urmila Shukla MANU/SCOR/24098/2021

11. Kirti & ors. Vs Oriental Insurance Co. ltd 2021(1) TAC 1

12. Vimal Kanwar & ors. Versus Kishore Dan & ors. (2013) 7 SCC 476

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

14. Smt. Sudesna & ors. Vs Hari Singh & anr. : Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001

15. Tej Kumari Sharma Vs Chola Mandlam M.S. General Insurance Co. Ltd. First Appeal From Order No.2871 of 2016
16.

16. A.Vs Padma Vs Venugopal, Reported in 2012 (1) GLH (SC), 442

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

1. Heard Sri Saurabh Srivastava, learned counsel for the appellant and Sri Amar Chandra, learned counsel for the respondent-Claimants. This appeal mainly relates to compensation and therefore the owner, driver of the tempo and car owner and driver will not be concerned and therefore by consent of both the learned counsels we propose to dispose of this appeal as it relates to submission on negligence and only quantum.

2. This appeal, at the behest of the appellant-Insurance Company challenges the award dated 04.10.2001 passed by Motor Accident Claims Tribunal, Shahjahanpur, (hereinafter referred to as 'Tribunal') in M.A.C.P. No. 254 of 2018.

3. Brief facts as culled out from the record are that on 14.05.2018 at about 8:00 p.m Indresh Kumar Singh was traveling in a tempo bearing no. U.P-32 CN-9011, at the same time driver of a car coming from opposite side bearing no. U.P.-32 HN-2292 driving his car negligently and rashly hits the tempo in which Indresh Kumar Singh was traveling and as a result of which Indresh Kumar Singh fell on the road and driver of the car drove the wheel of the car

on his head and the deceased sustained grievous injuries . Injured Indresh Kumar Singh was taken to the Trauma Centre by the police where he was declared dead by the doctors.

4. The deceased was 41 years and 6 months of age at the time of accident. He was working as a Sub-Inspector in Police department and was earning Rs. 48, 159/- p.m. He was survived by his father, widow and a son. The Tribunal has considered his income to be Rs. 48,159/-p.m, deducted 1/3rd towards personal expenses of the deceased, granted multiplier of 14, granted Rs.40,000/- towards love and affection, granted Rs. 15,000/- towards loss of property and granted Rs.15,000/- towards funeral expenses and ultimately assessed the total compensation to be Rs. 70,81,956/-.

5. 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.

6. 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.

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 inference to be drawn from proved facts. Negligence is not an absolute term, but is a relative one. It is rather a comparative term. What may be negligence in one case may not be so in another. Where there is no duty to exercise care, negligence in the popular sense has no legal consequence. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which would be reasonably foreseen likely to caused physical injury to person. The degree of care required, of course, depends upon facts in each case. On these broad principles, the negligence of drivers is required to be assessed.

17. It would be seen that burden of proof for contributory negligence on the part of deceased has to be discharged by the opponents. It is the duty of driver of the offending vehicle to explain the accident. It is well settled law that at intersection where two roads cross each other, it is the duty of a fast moving vehicle to slow down and if driver did not slow down at intersection, but continued to proceed at a high speed without caring to notice that

another vehicle was crossing, then the conduct of driver necessarily leads to conclusion that vehicle was being driven by him rashly as well as negligently.

18. 10th Schedule appended to Motor Vehicle Act contain statutory regulations for driving of motor vehicles which also form part of every Driving License. Clause-6 of such Regulation clearly directs that the driver of every motor vehicle to slow down vehicle at every intersection or junction of roads or at a turning of the road. It is also provided that driver of the vehicle should not enter intersection or junction of roads unless he makes sure that he would not thereby endanger any other person. Merely, because driver of the Truck was driving vehicle on the left side of road would not absolve him from his responsibility to slow down vehicle as he approaches intersection of roads, particularly when he could have easily seen, that the car over which deceased was riding, was approaching intersection.

19. In view of the fast and constantly increasing volume of traffic, motor vehicles upon roads may be regarded to some extent as coming within the principle of liability defined in Rylands V/s. Fletcher, (1868) 3 HL (LR) 330. From the point of view of pedestrian, the roads of this country have been rendered by the use of motor vehicles, highly dangerous. 'Hit and run' cases where drivers of motor vehicles who have caused accidents, are unknown. In fact such cases are increasing in number. Where a pedestrian without negligence on his part is injured or killed by a motorist, whether negligently or not, he or his legal representatives, as the case may be, should be entitled to recover damages if principle of social justice should have any meaning at all.

22. By the above process, the burden of proof may ordinarily be cast on the defendants in a motor accident claim petition to prove that motor vehicle was being driven with reasonable care or that there is equal negligence on the part the other side." emphasis added

8. The Apex Court in **Khenyei Vs. New India Assurance Company Limited & Others, 2015 LawSuit (SC) 469** has held as under:

"4. It is a case of composite negligence where injuries have been caused to the claimants by combined wrongful act of joint tort feasors. In a case of accident caused by negligence of joint tort feasors, all the persons who aid or counsel or direct or join in committal of a wrongful act, are liable. In such case, the liability is always joint and several. The extent of negligence of joint tort feasors in such a case is immaterial for satisfaction of the claim of the plaintiff/claimant and need not be determined by the by the court. However, in case all the joint tort feasors are before the court, it may determine the extent of their liability for the purpose of adjusting inter-se equities between them at appropriate stage. The liability of each and every joint tort feasor vis a vis to plaintiff/claimant cannot be bifurcated as it is joint and several liability. In the case of composite negligence, apportionment of compensation between tort feasors for making payment to the plaintiff is not permissible as the plaintiff/claimant has the right to recover the entire amount from the easiest targets/solvent defendant.

14. There is a difference between contributory and composite negligence. In the case of contributory negligence, a person who has himself contributed to the extent cannot claim compensation for the injuries sustained by him in the accident to the extent of his own negligence;whereas in the case of composite negligence, a person who has suffered has not contributed to the accident but the outcome of combination of negligence of two or more other persons. This Court in T.O. Anthony v. Karvarnan & Ors. [2008 (3) SCC 748] has held that in case of contributory negligence, injured need not establish the extent of responsibility of each wrong doer separately, nor is it necessary for the court to determine the extent of liability of each wrong doer separately. It is only in the case of contributory negligence that the injured himself has contributed by his negligence in the accident. Extent of his negligence is required to be determined as damages recoverable by him in respect of the injuries have to be reduced in proportion to his contributory negligence. The relevant portion is extracted hereunder :

"6. 'Composite negligence' refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrong doers, it is said that the person was injured on account of the composite negligence of those wrong-doers. In such a case, each wrong doer, is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrong-doer separately, nor is it necessary for the court to determine the extent of liability of each wrong-doer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence of the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stands reduced in proportion to his contributory negligence.

7. Therefore, when two vehicles are involved in an accident, and one of the drivers claims compensation from the other driver alleging negligence, and the other driver denies negligence or claims that the injured claimant himself was negligent, then it becomes necessary to consider whether the injured claimant was negligent and if so, whether he was solely or partly responsible for the accident and the extent of his responsibility, that is his contributory negligence. Therefore where the injured is himself partly liable, the principle of 'composite negligence' will not apply nor can there be an automatic inference that the negligence was 50:50 as has been assumed in this case. The Tribunal ought to have examined the extent of contributory negligence of the appellant and thereby avoided confusion between composite negligence and contributory negligence. The High Court has failed to correct the said error."

18. This Court in Challa Bharathamma &Nanjappan (supra) has dealt with the breach of policy conditions by the owner when the insurer was asked to pay the compensation fixed by the tribunal and the right to recover the same was given to the insurer in the executing court

*concerned if the dispute between the insurer and the owner was the subject-matter of determination for the tribunal and the issue has been decided in favour of the insured. The same analogy can be applied to the instant cases as the liability of the joint tort feasor is joint and several. In the instant case, there is determination of inter se liability of composite negligence to the extent of negligence of 2/3rd and 1/3rd of respective drivers. Thus, the vehicle - trailor-truck which was not insured with the insurer, was negligent to the extent of 2/3rd. It would be open to the insurer being insurer of the bus after making payment to claimant to recover from the owner of the trailor-truck the amount to the aforesaid extent in the execution proceedings. Had there been no determination of the inter se liability for want of evidence or other joint tort feasor had not been impleaded, it was not open to settle such a dispute and to recover the amount in execution proceedings but the remedy w*ould be to file another suit or appropriate proceedings in accordance with law.

What emerges from the aforesaid discussion is as follows :

(i) In the case of composite negligence, plaintiff/claimant is entitled to sue both or any one of the joint tort feasors and to recover the entire compensation as liability of joint tort feasors is joint and several.

(ii) In the case of composite negligence, apportionment of compensation between two tort feasors vis a vis the plaintiff/claimant is not permissible. He can recover at his option whole damages from any of them.

(iii) In case all the joint tort feasors have been impleaded and evidence is sufficient, it is open to the court/tribunal to determine inter se extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint tort feasors is only for the purpose of their inter se liability so that one may recover the sum from the other after making whole of payment to the plaintiff/claimant to the extent it has satisfied the liability of the other. In case both of them have been impleaded and the apportionment/ extent of their negligence has been determined by the court/tribunal, in main case one joint tort feasor can recover the amount from the other in the execution proceedings.

(iv) It would not be appropriate for the court/tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of impleadment of other joint tort feasors. In such a case, impleaded joint tort feasor should be left, in case he so desires, to sue the other joint tort feasor in independent proceedings after passing of the decree or award." emphasis added

9. The latest decision of the Apex Court in **Khenyei Vs. New India Assurance Company Limited & Others, 2015 Law Suit (SC) 469** has laid down one further aspect about considering the negligence more particularly composite/contributory negligence. The deceased was not the driver of the car or of the tempo. P.W.-1 is not the eye witness but P.W-2 was the eye witness. In that view of the matter the finding of the fact as far as negligence is concerned cannot be found fault with.

10. This takes this Court to the issue of compensation. The Apex court decision

in **Malarvizhi & Ors Vs. United India Insurance Company Limited and Another, 2020 (4) SCC 228 and United India Insurance Co. Ltd. Vs. Indiro0 Devi & Ors, 2018 (7) SCC 715. and in The Oriental Insurance Company Ltd. Vs. Mangey Ram and others, 2019 0 Supreme (All) 1067** and the recent judgment of the Apex Court in **New India Assurance Company Vs. Urmila Shukla decided by the Apex Court on 6.8.2021 reported in MANU/SCOR/24098/2021 and Kirti and others vs oriental insurance company ltd reported in 2021(1) TAC 1It could not be culled out from record that** It is submitted by the counsel for the appellant that tribunal has committed manifest error in not deducting the income tax from salary of the deceased and the amount which was paid as kit maintenance allowance is Rs. 1200/-, Rs. 700/- towards conveyance. Rs. 2208/- should have been deducted and amount of income tax payable on his salary was supposed to be deducted. It is further submitted that the amount of pension received by the widow should also be deducted. The other prayer that the amount under other heads would be also deducted cannot be accepted in view of the judgment of the Apex Court in case of **Vimal Kanwar and Others Versus Kishore Dan and others (2013) 7 SCC 476**. We cannot accept the submission of the Sri Saurabh Srivastava, learned counsel for the appellant that the amount for personal expenses requires to be deducted, it cannot have been deducted and it has been rightly not deducted by the tribunal. It is no doubt a accepted position of law that income tax has to be deducted and certain amounts can be deducted from the salary of the deceased. The judgments on which reliance has been placed by the learned tribunal cannot be found fault with and are applicable to the facts of this case except the fact that income tax has to be deducted if the deceased was a income tax payer. The income tax according to the learned counsel for the appellant was Rs. 10,862/- p.m. The same is to be multiplied by multiplier of 14, this would be the amount which would not be available to the legal heirs of the deceased.

11. The amount of income tax being 10,862/- was added with 30% as future loss of income and was calculated in the salary which has to be deducted. We deduct a lum-sum of Rs. 2,00,00/- and certain amounts not to be added.

12. We direct the Insurance Co. to recalculate the amount and deposit the rest of the amount with 7% rate of interest. We reject the oral request of counsel of respondent to enhance the rate of interest to 12% as the matter is disposed in a conciliatory manner, we retain the rate on interest at 7%.

13. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansagori P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291** and this High Court in, total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount

without producing the certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 **(Smt. Sudesna and others Vs. Hari Singh and another) and in First Appeal From Order No.2871 of 2016 (Tej Kumari Sharma v. Chola Mandlam M.S. General Insurance Co. Ltd.)** decided on 19.3.2021 while disbursing the amount.

14. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of **A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442**, the order of investment is not passed because applicants /claimants are neither illiterate or rustic villagers.

15. Fresh Award be drawn accordingly in the above petition by the tribunal as per the modification made herein. The Tribunals in the State shall follow the direction of this Court as herein aforementioned as far as disbursement is concerned, it should look into the condition of the litigant and the pendency of the matter and not blindly apply the judgment of **A.V. Padma (supra)**. The same is to be applied looking to the facts of each case.

16. The amount of Rs. 25,000/- deposited in the Registry of this High Court be remitted back to the tribunal. The recalculated amount be deposited within eight weeks from today.

17. We are thankful to Sri Saurabh Srivastava, learned counsel for the appellant and Sri. Amar Chandra, learned counsel for the respondents-claimants that they got this matter disposed of at this stage only. We disposed of this appeal without the record of the tribunal as nothing remains to be done.

18. This appeal is partly allowed. Awarded decree shall stand modify to the aforesaid extent. On depositing the amount the tribunal shall follow the aforesaid directions.

(2022)03ILR A845
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.01.2022

BEFORE

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

First Appeal From Order No.184 of 1996

Shiv Shanker & Anr. ...Appellants
Versus
Jagat Prakash Sharma & Ors. ...Respondents

Counsel for the Appellants
Sri Rakesh Kumar Porwal

Counsel for the Respondents:
Sri A.K. Sinha

Civil Law - Motor Vehicle Act, 1988- Section 166-The negligence is proved beyond reasonable doubt - once the charge sheet, FIR is filed, involvement of the vehicle is prima facie proved - trappings of civil procedure should not be made fully applicable to the proceedings in the Tribunal – Insurance Company has to indemnify appellant – payment of Rs. 1, 56,000/- within a period of 12 weeks with 6% interest.

Appeal was partly allowed. (E-9)

List of Cases cited:

1. Ajai Prakash Vs M/s National Insurance Comp. Ltd. & ors., (2010) 2 ALJ 1787

2. Anita Sharma Vs New India Assurance Co. Ltd., (2021) 1 SCC 171

3. Om Pal Singh Vs National Insurance Co. Ltd. & 2 ors.First Appeal From Order No. 4022 of 2017

4. National Insurance Comp. Ltd. Vs Mt.Param Pal Singh, 2008(3) T.A.C. 378 (Del.)

5. Smt. K. Mallika Vs Executive Engineer, Potteru Irrigation Division, Balimela, 2000(1) T.A.C. 549 (Ori)

6. Smt. Jagriti & ors. Vs The New India Assurance Comp. Ltd. & ors. First Appeal From Order No.3380 of 2003

7. A.Vs Padma Vs Venugopal, Reported in 2012 (1) GLH (SC), 442

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

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

1. Heard learned counsel for the appellant and learned counsel for Insurance Company.

2. This appeal challenges the judgment and order dated 28.11.1995 passed by Motor Accidents Claim Tribunal/VIII Additional District Judge, Etawah (hereinafter referred to as 'Tribunal') in claim petition No.76 of 1994.

3. The accident in question occurred on the fateful date when the young child of the appellant breathed last while being treated.

4. The Tribunal dismissed the claim petition on the ground that it was not proved that the motorcycle was involved in the accident. The fact that the driver was nabbed at the spot and he took the child to the hospital got admitted and that he was the owner of Hero Honda motor cycle No. UP-78 E-6622, against whom the charge sheet is laid.

5. The principles for proving an accident are not as stringer as mentioned by the learned Tribunal under Section 166 of the Motor Vehicle Act, 1988. The filing of charge sheet would make the owner and driver are liable as it was prima facie prove involvement of the vehicle. The judgment of Ajai Prakash Vs. M/s National Insurance Company Limited and others, (2010) 2 ALJ 1787 would come to the aid of the appellants. The provision of Motor Vehicles Act, 1988 have to be read so as to further beneficial legislation.

6. In our case the Tribunal has totally mislead itself into not believing the testimony of PW-1 and 2 who have withstood the cross examination. Just because the name of the driver was not mentioned in the FIR, cannot be ground to dismissing the petition. The driver was taken to Dr. Suresh Sharma also dismissal of claim petition is bad in eye of law.

7. The judgment of Supreme Court in **Anita Sharma Vs. New India Assurance Company Limited , (2021) 1 SCC 171** will apply to the facts of this case. The negligence is proved beyond reasonable doubt by the evidence led before the Tribunal. The record and oral and documentary evidence led before the Tribunal below while dismissing the claim petition for claiming compensation for death of a minor son of the claimants by assigning reasons which are not germane to the facts and one of the reason is that the claimants did not examine the person who

caught hold of the driver on spot had not been examined. This is a a hyper technical stand taken by the Tribunal in holding that the claimants had failed to prove the involvement of the vehicle. The accident which took place on 17.2.1994 can be said to have been proved as the driver of the motorcycle was nabbed at the place of the accident. The chick report was also on record. Charge sheet was led on 23.2.1994. The deceased died on 19.2.1994. The fact that Vijay Kumar took the child at the Etawah Hospital. Just because name of the owner was not given it cannot be said that the accident did not take place with the said motorcycle. PW-2 has deposed on oath and has proved the contends of FIR. PW-1 was an eye witness who has deposed manner in which the accident took place. PW-1 and PW-2 have corroborated each other. The fact that neither the motorcycle's driver and the owner have not stepped into the witness box to prove the contents of the reply. Thus the finding is perverse cannot be sustained.

Once the charge sheet, FIR is filed , involvement of the vehicle is prima facie proved it goes without saying that in absence of pleadings by the respondent - driver who has not stepped into witness box it will be have to be held that the driver was involved in committing the accident.

8. Recently in **First Appeal From Order No. 4022 of 2017 (Om Pal Singh Vs. National Insurance Company Ltd. & 2 others)**, decided on 19.12.2017, this Court has held that Commissioner and Motor Accident Tribunal are not civil Court and trappings of civil procedure should not be made fully applicable to the proceedings in the Tribunal. I am supported in my view, on the decision of Apex Court in United India Insurance Company Ltd. Vs. Anwari and another report in 2000(38) Alld page 761, thus the question whether the deceased died out of accident injuries is proved. The Insurance Company has though heavily relied on the FIR and has relied on the decision of Apex Court in **National Insurance Company Ltd. Vs. Mt.Param Pal Singh, 2008(3) T.A.C. 378 (Del.)** and on the decision of **Orrisa High Court in Smt. K. Mallika Vs. Executive Engineer, Potteru Irrigation Division, Balimela, 2000(1) T.A.C. 549 (Or**i) cannot be invoked as there is perversity in finding of the Tribunal below that the deceased did not die out of accidental injuries.

9. Recently the Division Bench of this High Court in First Appeal From Order No.3380 of 2003 (Smt. Jagriti and others Vs. The New India Assurance Company Limited and others) decided on 12.12.2021 has laid down the law in such matter which will also be applied to the facts of this case. The operative portion of paragraph No.13 of the judgment dated 12.12.2021 read as follows : -

"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."

10. As the appeal has remained pending for more than two decades before this High Court and the accident having taken place when the appellants (parents-father and mother) of the deceased were in the prime of their youth and were aged 28 and 25 years respectively and lost aged about seven years who have been left without any compensation for the untimely death of their only child. The Courts in 1994 for a death of seven year old child were granting a sum of Rs.1,56,000/- as award with 6% rate of interest. The same requires to be done in this matter also. This Court has perused the documents and the detail copy of registration of the vehicle, the copy of policy which is invoked on the date of accident. Driving licence of Jagat Prakash is also on record it can be seen and it is proved that the vehicle was insured and was plied as per the principles which would not permit the Insurance Company to avoid its liability and they would have to indemnify the third party and the vehicle was plied by authorized driver and that the vehicle was insured with them.

11. The appeal is partly allowed. The respondent-Insurance Company shall deposit the amount of Rs. 1,56,000/- within a period of 12 weeks from today with interest at the rate of 6% from the date of filing of the claim petition till the amount is deposited. The record and proceedings be sent back to the Tribunal forthwith.

12. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of **A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442,** the order of investment is not passed because applicants /claimants are neither illiterate or rustic villagers.

13. 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.

14. Fresh Award be drawn accordingly in the above petition by the tribunal as per the modification made herein. The Tribunals in the State shall follow the direction of this Court as herein aforementioned as far as disbursement is concerned, it should look into the condition of the litigant and the pendency of the matter and not blindly apply the judgment of **A.V. Padma (supra).** The same is to be applied looking to the facts of each case.

(2022)03ILR A849
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.03.2022

BEFORE

THE HON'BLE J.J. MUNIR, J.

First Appeal From Order No.460 of 2021

Moradabad Development Authority ...Appellant
Versus
M/S V.R. Construction & Engineering Co., Moradabad ...Respondent

Counsel for the Appellant:
Sri Krishna Mohan Asthana

Counsel for the Respondent:
Sri Manu Khare

Civil Law - Arbitration & Conciliation Act-1996 - Section 34(2) - Limitation Act - Section 5-Appeal against order refusing to condone the delay-in making Application u/s 34(2)-Application u/s 5 of limitation Act-incompetent-as limitation is governed by section 34(3) of Act,1996 and condonation by its proviso-not by section 5 of Limitation Act.

Appeal dismissed. (E-9)

Held, the principle above indicated and the terms of section 14 of the Limitation Act show that Section 14 would not come to the Appellant's rescue. The prescribed period of limitation under section 34 (3) , together with its proviso is three months & anr. 30 days of time, that may be condoned by the Court**.** (para 30)

List of Cases cited:

1. Gulbarga University Vs Mallikarjun S. Kodagali & anr. (2008) 13 SCC 539

2. U.O.I. Vs Popular Construction Co. [(2001) 8 SCC 470 : AIR 2001 SC 4010]

3. St.of Goa Vs Western Builders [(2006) 6 SCC 239]

4. National Aluminium Co. Ltd. Vs Pressteel & Fabrications (P) Ltd. [(2004) 1 SCC 540]

5. U.O.I. Vs Bhavna Engg. Co. [(2008) 13 SCC 546

6. U.O.I. Vs Popular Construction Co. (2001) 8 SCC 470

7. Consolidated Engineering Enterprises Vs Principal Secretary, Irrigation Department & ors. (2008) 7 SCC 169

8. P. Radha Bai & ors. Vs P. Ashok Kumar & anr. (2019) 13 SCC 445

9. National Spot Exchange Limited Vs Anil Kohli AIR 2021 SC 4339

10. M.P. Steel Corporation Vs Commissioner of Central Excise (2015) 7 SCC 58

(Delivered by Hon'ble J.J. Munir, J.)

1. Heard Mr. K.M. Asthana, learned Counsel for the appellant and Mr. Manu Khare, learned Counsel appearing on behalf of the respondent.

2. This is an appeal from an order of the Presiding Officer, Commercial Court, Moradabad dated 05.03.2020, refusing to condone the delay in making an application by the appellant under Section 34(2) of the Arbitration and Conciliation Act, 19961.

3. The facts leading to the present appeal are these:

The Moradabad Development Authority, Moradabad, hereinafter referred to as 'the appellant', entered into an agreement with M/s. V.R. Construction and Engineering Company for a civil works contract on 28.03.2009. The subject matter

of the contract was construction of a 'Sourcing Hub and Warehouse' in Sector 4, Naya Moradabad Yojna, Delhi-Moradabad Road. The project subject matter of the contract is said to be worth Rs.26,03,84,722.93 only. The project was to be completed within a period of two years w.e.f. 03.03.2009. The said period would end on 02.03.2011, but was extended from time to time, as the appellant say, on the request of M/s. V.R. Construction and Engineering Company, hereinafter referred to as 'the respondent'.

4. It is the appellant's claim that the time for completion of the contracted project was last extended up to 31.03.2016 subject to a penalty of Rs.7.20 lakhs. It is the appellant's case that the respondent submitted an affidavit, saying that they were A-Category contractors and also submitted a certificate of experience dated 10.02.2009 issued by a certain M/s. Arch Add Consultants, New Delhi certifying them as A-Class contractors. Besides, other testimonials were also attached in response to the tender notice for the works contract in question that was published on 27.02.2009. It appears that on 02.03.2009, a letter was issued by the appellant to the respondent that the respondent's tender has been approved, with a specific condition that if the experience certificate submitted by the respondent is found to be false upon verification, the earnest money deposited shall be forfeited and appropriate proceedings drawn in accordance with law.

5. It is the appellant's further case that the contract, that was later on executed, carried an arbitration clause, being Clause No.32. Clause 32(b) provides that if the respondent is dissatisfied with the final decision of the Engineer-in-Charge taken under Clause 32(a), the respondent may, within twenty-eight days of receipt of the decision, give notice in writing, requiring the matter to be submitted to arbitration, furnishing detailed particulars of the dispute or differences. The notice would clearly indicate the point(s) in issue. It was further a term in the contract that if the respondent failed to serve a notice of arbitration within the time stipulated, the decision of the Engineer-in-Charge of the appellant, shall be conclusive and binding on the respondent. The appellant say that upon inquiries made from M/s. Arch Add Consultants, New Delhi with regard to the letter dated 27.01.2016 issued by the Managing Director of a certain Kashi Vishwanath Steel Private Limited, the appellant were informed that the experience certificate under reference was never issued by M/s. Arch Add Consultants, New Delhi.

6. It is also said that the respondent committed various irregularities of a serious nature in the execution of the works contract. The appellant issued a letter dated 09.02.2016 to the Secretary, Awas Evam Sahari Niyojan, Anubhag-3 of the State Government, requesting him to institute an inquiry into the irregularities committed by the respondent in the construction of Sourcing Hub and Warehouse Complex in Sector-4 of the Moradabad Residential Scheme under the works contract.

7. On 10.05.2016, the State Government constituted an Inquiry Committee to go into the allegations of irregularities committed by the respondent vis-à-vis the execution of the contracted work. The Inquiry Committee, after notice to the respondent and the appellant, as the appellant say, visited the site and held inquiry. The Committee is said to have submitted a report to the Secretary to the Government in the appropriate Department. The appellant say that the certificate of

experience submitted by the respondent, upon verification, was found to be false and fabricated. This verification is said to have been made from the company that had issued the certificate of experience.

8. The Committee are also claimed to have said that the respondent carried out work according to their whims, bereft of any directions by the Engineering Department of the appellant. The Committee are also said to have found that though a sum of Rs.26,01,55,764/- has been spent on the project, it was still incomplete and not in a state where it could be put to use for the public purpose that it was meant for. The Committee are also claimed to have made a report to debar the respondent from doing any further work from the appellant and also recommending that final payment be made for the work that the respondent had validly executed.

9. It was in this background that a dispute arose between the appellant and the respondent, stemming from execution of the works contract entered into between parties.

10. In consequence, the respondent served a notice of arbitration under Section 11(5) of the Act of 1996. Thereafter, the Vice-Chairman of the appellant appointed a sole Arbitrator on 22.04.2017. It is the appellant's case that on 10.07.2017, the Commissioner of the Moradabad Division, taking cognizance of the irregularities committed by the respondent, directed the appellant to initiate proceedings against the respondent by lodging a First Information Report. The direction was issued in view of the fact that the respondent's testimonials, entitling them to the contract, were found by the appellant and the Inquiry Committee appointed by the State Government to be forged.

11. On 19.07.2017, the appellant say they issued a show cause notice, calling upon the respondent to submit a reply why they may not be blacklisted from obtaining future contracts by the appellant. An FIR was lodged on 21.07.2017 by the appellant against the respondent, giving rise to Case Crime No.769, under Sections 420, 467, 471 IPC, Police Station Civil Lines, District Moradabad. It is not in dispute that the FIR aforesaid was challenged before this Court vide Criminal Misc. Writ Petition No.1470 of 2017 and was quashed vide a judgment and order dated 02.02.2018.

12. On the 21st July, 2017, an order was passed by the Vice-Chairman of the appellant, cancelling the appointment of the sole Arbitrator with a further stipulation that since the contract was obtained on the basis of a forged and fabricated document, the same is null and void, and that the respondent is not entitled to invoke proceedings for arbitration. It is the appellant's case that the order cancelling the appointment of the sole Arbitrator dated 21.07.2017 was served upon the Arbitrator, Mr. Bal Kishan Gupta on 22.07.2017 and upon his refusal to receive it, the order was affixed on the Arbitrator's residential premises on 22.07.2017. It is also the appellant's case that the sole Arbitrator was also delivered the order cancelling his appointment through registered post on 22.07.2017. Further, the cancellation of appointment was published in the Daily Newspaper Hindustan, published from Moradabad on 22.07.2017. The appellant say that the order dated 21.07.2017 passed by the Vice-Chairman of the appellant cancelling the appointment of the sole

Arbitrator was not challenged before any Court or competent Authority and the same has attained finality.

13. On 31.07.2017, the sole Arbitrator addressed a letter to the appellant's Secretary, which says that the letter sent by the appellant cancelling the Arbitrator's appointment was received by him on 24.07.2017. The arbitral proceedings, according to the Arbitrator, were concluded on 22.07.2017 and opinion was reserved. It transpires from the record that the award was made on 23.07.2017, which carries a complete record of the proceedings. The award shows in paragraph no.9 that in all, six hearings were held between 05.05.2017 and 22.07.2017. It appears that in these proceedings, the appellant did not participate and the proceedings went ex-parte. The award too was pronounced ex parte. It is the appellant's case that the letter dated 31.07.2017 does not mention the fact that the award was pronounced on 23.07.2017, though, later on, it purports to have been pronounced on 23.07.2017. It is the appellant's contention that the award is ante-timed and one made after communication of the letter cancelling the Arbitrator's appointment by the appellant. Admittedly, the award was served upon the appellant on 03.08.2017. It appears that on 05.08.2017 and 14.08.2017, upon receipt of the Arbitrator's award, the Vice-Chairman of the appellant addressed orders to the respondent and the sole Arbitrator, saying that the award pronounced on 23.07.2017 was without jurisdiction and void, inasmuch as the Arbitrator's appointment had been cancelled on 22.07.2017.

14. It is the appellant's case that they were bona fide under the impression that since the award has been delivered by the sole Arbitrator after cancellation of his appointment, the award pronounced is without jurisdiction and a nullity. It is inexucatble. The respondent filed an execution case under Section 36 of the Act of 1996, that was registered as Arbitration Case No.41 of 2019 before the Court of the District Judge, Moradabad. The application sought execution of the sole Arbitrator's award dated 23.07.2017 against the appellant for a sum of Rs.4,73,93,012/-. The appellant say that upon knowledge of the institution of execution proceedings, they filed objection supported by affidavit under Section 47 CPC before the District Judge, that were registered as Misc. Case No.2 of 2019. It was prayed that the award was inexecutable, as the sole Arbitrator had acted without jurisdiction and made the award on 23.07.2017, after his appointment as Arbitrator had been cancelled by the appellant on 21.07.2017. The award was assailed as ante-timed.

15. The appellant's objection stood transferred along with the execution case from the court of the District Judge, Moradabad to the Commercial Court, before whom it came up for determination on 31.08.2019. The Commercial Court rejected the objection vide order dated 31.08.2019, holding that the question about the Arbitrator passing an award without jurisdiction was something that could be gone into on an application by the appellant under Section 34(2) of the Act of 1996, but not under Section 47 CPC. The Commercial Court has remarked that the objection under Section 47 CPC had been brought two years after the award was passed and the remedy of the appellant was under Section 34(2) of the Act of 1996.

16. Aggrieved by the order passed by the Commercial Court, Moradabad dated 31.08.2019 rejecting the appellant's

objection under Section 47 CPC, the appellant preferred Misc. Petition (Civil) No.67 of 2020 before this Court under Article 227 of the Constitution. The aforesaid petition was dismissed on 19.02.2020 on ground that the appellant had an alternative remedy of moving this Court in Revision under Section 115 CPC. The appellant then moved Civil Revision No.18 of 2020 challenging the order of the Commercial Court dated 31.08.2019, rejecting the appellant's objection under Section 47 CPC. In the said revision, the delay condonation application made has been allowed vide order dated 28.09.2020 and a regular number has been assigned to the revision, which is now pending before this Court, questioning the order dated 31.08.2019. The appellant, notwithstanding the challenge laid to the order dated 31.08.2019 passed by the Commercial Court last mentioned, on legal advice received, also filed an application under Section 34(2) of the Act of 1996 on 05.02.2020, along with an application under Section 5 of the Indian Limitation Act, 1963 seeking to set aside the award.

17. This application was registered as Arbitration Petition No.1 of 2020 on the file of the Commercial Court. The Commercial Court, by the order impugned, has held that it has no jurisdiction to condone the delay in making the application under Section 34(2) of the Act of 1996, inasmuch as it was moved on 05.02.2022, whereas the impugned award was served upon the appellant on 03.08.2017. The Commercial Court was of opinion that the limitation to challenge an award of the Arbitrator under Section 34(2) of the Act of 1996 was governed by sub-Section (3) of Section 34, where the limitation to make such an application was three months from the date on which the party making the application had received the award, and further that by the proviso to sub-Section (3) of Section 34, the Court had jurisdiction to condone the delay in making such an application within a further period of 30 days, but no more. It was on the aforesaid reasoning that the Commercial Court declined to condone the delay holding that it had no jurisdiction to do so.

18. Mr. K.M. Asthana, learned Counsel for the appellant submits that the Commercial Court has committed a manifest error of law, inasmuch as the appellant's application, though worded as one purely for condonation of delay invoking Section 5 of the Indian Limitation Act, was, in substance, an application seeking to exclude the period of time that the appellant spent in pursuing remedies bona fide. Mr. Asthana submits that the application ought to have been considered bereft of its label as one under Section 14 of the Limitation Act that squarely applies to proceedings under the Act of 1996. He submits that Section 14 of the Limitation Act is applicable to the rights of parties, who move the Court under Section 34, in the event they have pursued in good faith another remedy, which the other Court on account of lack of jurisdiction or other cause of a like nature was unable to entertain.

19. The submission before this Court on behalf of the appellant, therefore, proceeds on the basis that the application seeking to condone the delay must be construed as an application excluding the period of limitation spent in the bona fide pursuit of other remedies/ remedy against the Arbitrator's award. The remedies, Mr. Asthana points out, that the appellant pursued against the impugned award, on

the foot of which he wants a substantial period of limitation to be excluded, are an FIR that was ultimately quashed by this Court on 02.02.2018 by an order made in Criminal Misc. Writ Petition No.1470 of 2017 and the objection that was filed under Section 47 CPC in the execution brought by the respondent in the year 2019. The objection under Section 47 CPC being rejected, this Court was approached in the first instance under Article 227 of the Constitution and that remedy being held to be barred in view of the remedy of a civil revision, a revision was preferred, which is pending. It is, thus, pointed out that the appellant have pursued remedies in good faith before the competent fora, which ultimately, on account of holding want of jurisdiction in themselves, declined relief. Mr. Asthana has placed reliance upon the decision of the Supreme Court in ***Gulbarga University v. Mallikarjun S. Kodagali and another2*** to submit that the provisions of Section 14 of the Limitation Act would apply to arbitral proceedings under Section 34 of the Act of 1996. It is his case that unlike Section 5 of the Limitation Act, that may be held excluded in view of the provisions of sub-Section (3) of Section 34, Section 14 of the Limitation Act applies to proceedings under Section 34 of the Act of 1996 in the same manner as it does to suits. He has drawn the attention of the Court to the following holding of their Lordships in **Gulbarga University** *(supra):*

"8. Dr. M.P. Raju, learned counsel appearing on behalf of the appellant, would contend that the earlier decision of this Court in Union of India v. Popular Construction Co. [(2001) 8 SCC 470 : AIR 2001 SC 4010] whereupon reliance has been placed by the High Court has since been revisited by this Court in State of Goa v. Western Builders [(2006) 6 SCC 239] holding : (SCC p. 246, paras 14-18)

"14. The question is whether Section 14 of the Limitation Act has been excluded by this special enactment i.e. the Arbitration and Conciliation Act, 1996. Section 43 of the Arbitration and Conciliation Act, 1996 clearly says that the Limitation Act, 1963 shall apply to arbitration as it applies to the proceedings in the court.

15. Therefore, general proposition is by virtue of Section 43 of the Act of 1996 the Limitation Act, 1963 applies to the Act of 1996 but by virtue of sub-section (2) of Section 29 of the Limitation Act, if any other period has been prescribed under the special enactment for moving the application or otherwise then that period of limitation will govern the proceedings under that Act, and not the provisions of the Limitation Act. In the present case under the Act of 1996 for setting aside the award on any of the grounds mentioned in sub-section (2) of Section 34 the period of limitation has been prescribed and that will govern. Likewise, the period of condonation of delay i.e. 30 days in the proviso.

16. But there is no provision made in the Arbitration and Conciliation Act, 1996 that if any party has bona fide prosecuted its remedy before the other forum which had no jurisdiction then in that case whether the period spent in prosecuting the remedy bona fidely in that court can be excluded or not. As per the provision, sub-section (3) of Section 34 which prescribes the period of limitation (3 months) for moving the application for setting aside the award before the court then that period of limitation will be

applicable and not the period of limitation prescribed in the Schedule under Section 3 of the Limitation Act, 1963. Thus, the provision of moving the application prescribed in the Limitation Act, shall stand excluded by virtue of sub-section (2) of Section 29 as under this special enactment the period of limitation has already been prescribed. Likewise the period of condonation of delay i.e. 30 days by virtue of the proviso.

17. Therefore, by virtue of sub-section (2) of Section 29 of the Limitation Act what is excluded is the applicability of Section 5 of the Limitation Act and under Section 3 read with the Schedule which prescribes the period for moving application.

18. Whenever two enactments are overlapping each other on the same area then the courts should be cautious in interpreting those provisions. It should not exceed the limit provided by the statute. The extent of exclusion is, however, really a question of construction of each particular statute and general principles applicable are subordinate to the actual words used by legislature."

Referring to Popular Construction [(2001) 8 SCC 470 : AIR 2001 SC 4010] and National Aluminium Co. Ltd. v. Pressteel & Fabrications (P) Ltd. [(2004) 1 SCC 540] it was held : (Western Builders case [(2006) 6 SCC 239] , SCC pp. 248-49, para 25)

"25. Therefore, in the present context also it is very clear to us that there are no two opinions in the matter that the Arbitration and Conciliation Act, 1996 does not expressly exclude the applicability of Section 14 of the Limitation Act. The prohibitory provision has to be construed strictly. It is true that the Arbitration and Conciliation Act, 1996 intended to expedite commercial issues expeditiously. It is also clear in the Statement of Objects and Reasons that in order to recognise economic reforms the settlement of both domestic and international commercial disputes should be disposed of quickly so that the country's economic progress be expedited. The Statement of Objects and Reasons also nowhere indicates that Section 14 of the Limitation Act shall be excluded. But on the contrary, intendment of the legislature is apparent in the present case as Section 43 of the Arbitration and Conciliation Act, 1996 applies the Limitation Act, 1963 as a whole. It is only by virtue of sub-section (2) of Section 29 of the Limitation Act that its operation is excluded to that extent of the area which is covered under the Arbitration and Conciliation Act, 1996. Our attention was also invited to the various decisions of this Court interpreting sub-section (2) of Section 29 of the Limitation Act with reference to other Acts like the Representation of the People Act or the provisions of the Criminal Procedure Code where separate period of limitation has been prescribed. We need not overburden the judgment with reference to those cases because it is very clear to us by virtue of sub-section (2) of Section 29 of the Limitation Act that the provisions of the Limitation Act shall stand excluded in the Act of 1996 to the extent of area which is covered by the Act of 1996. In the present case under Section 34 by virtue of sub-section (3) only (sic for) the application for filing and setting aside the award a period has been prescribed as 3 months and delay can be condoned to the extent of 30 days. To this extent the applicability of Section 5 of the Limitation Act will stand excluded but there is no provision in the Act of 1996

which excludes operation of Section 14 of the Limitation Act. If two Acts can be read harmoniously without doing violation to the words used therein, then there is no prohibition in doing so."

The ratio laid down in the said decision has since been reiterated in Union of India v. Bhavna Engg. Co. [(2008) 13 SCC 546 : (2007) 5 Raj 458] stating : (SCC pp. 546-47, para 2)

"2. This Court in a recent judgment rendered in State of Goa v. Western Builders [(2006) 6 SCC 239] held that Section 14 of the Limitation Act, 1963 is applicable in the arbitration and conciliation proceedings. Having gone through the various facts, we are of the view that the mistake committed by the appellant in approaching the Madhya Pradesh High Court and the Bombay High Court is bona fide. We, therefore, condone the delay. In the facts of this case and in the interest of justice, we, however, think it proper that the Section 34 application pending before the Additional District Judge, Gwalior be transferred to the Bombay High Court. The application will be decided on merits expeditiously. Parties are at liberty to urge all the contentions before that Court."

9. There cannot be any doubt whatsoever that in terms of sub-section (2) of Section 34 of the Act, an arbitral award may be set aside only if one of the conditions specified therein is satisfied. Sub-section (3) of Section 34 provides for the period of limitation within which an application under Section 34 of the Act is to be filed. The proviso appended thereto empowers the court to entertain an application despite expiry of the period of limitation specified therein, namely, three months. No provision, however, exists as regards application of Section 14 of the Limitation Act. This Court, as noticed hereinbefore in Western Builders [(2006) 6 SCC 239] opined that sub-section (2) of Section 29 thereof would apply to an arbitration proceedings and consequently Section 14 of the Limitation Act would also be applicable. We are bound by the said decision. Once it is held that the provisions of Section 14 of the Limitation Act, 1963 would apply, it must be held that the learned trial Judge as also the High Court had committed an error in not applying the said provisions."

20. Mr. Manu Khare, learned Counsel for the respondent, on the other hand, refuting the submissions of the learned Counsel for the appellant, has submitted that the application made in aid of the substantive application under Section 34 of the Act of 1996 is, in substance, one that is under Section 5 of the Limitation Act, seeking condonation of delay and not merely one that goes by that label. Mr. Khare submits that there is nothing said in the application to indicate that the appellant ever urged a case based on exclusion of the period spent in bona fide prosecution of a remedy before another Court or forum that was ultimately found to be incompetent. He urges that so far as an application under Section 5 of the Limitation Act is concerned, the said provision does not apply at all to proceedings under Section 34 of the Act of 1996, in view of the proviso to sub-Section (3) of Section 34 of the Act of 1996. Learned Counsel for the respondent has placed reliance upon the guidance of the Supreme Court in **Union of India v. Popular Construction Co.3, Consolidated Engineering Enterprises v. Principal Secretary, Irrigation Department and others4, P. Radha Bai**

and others v. P. Ashok Kumar and another5 and National Spot Exchange Limited v. Anil Kohli6.

21. In **Union of India v. Popular Construction Co.** *(supra*), it has been held:

"16. Furthermore, Section 34(1) itself provides that recourse to a court against an arbitral award may be made only by an application for setting aside such award "in accordance with" sub-section (2) and sub-section (3). Sub-section (2) relates to grounds for setting aside an award and is not relevant for our purposes. But an application filed beyond the period mentioned in Section 34, sub-section (3) would not be an application "in accordance with" that sub-section. Consequently by virtue of Section 34(1), recourse to the court against an arbitral award cannot be made beyond the period prescribed. The importance of the period fixed under Section 34 is emphasised by the provisions of Section 36 which provide that

"where the time for making an application to set aside the arbitral award under Section 34 has expired ... the award shall be enforced under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the court".

This is a significant departure from the provisions of the Arbitration Act, 1940. Under the 1940 Act, after the time to set aside the award expired, the court was required to "proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow" (Section 17). Now the consequence of the time expiring under Section 34 of the 1996 Act is that the award becomes immediately enforceable without any further act of the court. If there were any residual doubt on the interpretation of the language used in Section 34, the scheme of the 1996 Act would resolve the issue in favour of curtailment of the court's powers by the exclusion of the operation of Section 5 of the Limitation Act."

22. So far as the decision in **Consolidated Engg. Enterprises v. Irrigation Deptt.** *(supra)* is concerned, it brings out the distinction that while Section 5 of the Limitation Act would not apply to an application under Section 34(2) of the Act of 1996, Section 14 of the Limitation Act would still apply. In **Consolidated Engg. Enterprises v. Irrigation Deptt.,** it has been held:

"19. A bare reading of sub-section (3) of Section 34 read with the proviso makes it abundantly clear that the application for setting aside the award on the grounds mentioned in sub-section (2) of Section 34 will have to be made within three months. The period can further be extended, on sufficient cause being shown, by another period of 30 days but not thereafter. It means that as far as application for setting aside the award is concerned, the period of limitation prescribed is three months which can be extended by another period of 30 days, on sufficient cause being shown to the satisfaction of the court.

20. Section 29(2) of the Limitation Act inter alia provides that where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period of limitation prescribed by the Schedule, the provisions of Section 3 shall apply as if such period was 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 Sections 4 to 24 shall apply only insofar as, and to the extent, they are not expressly excluded by such special or local law. When any special statute prescribes certain period of limitation as well as provision for extension up to specified time-limit, on sufficient cause being shown, then the period of limitation prescribed under the special law shall prevail and to that extent the provisions of the Limitation Act shall stand excluded. As the intention of the legislature in enacting sub-section (3) of Section 34 of the Act is that the application for setting aside the award should be made within three months and the period can be further extended on sufficient cause being shown by another period of 30 days but not thereafter, this Court is of the opinion that the provisions of Section 5 of the Limitation Act would not be applicable because the applicability of Section 5 of the Limitation Act stands excluded because of the provisions of Section 29(2) of the Limitation Act. However, merely because it is held that Section 5 of the Limitation Act is not applicable to an application filed under Section 34 of the Act for setting aside an award, one need not conclude that provisions of Section 14 of the Limitation Act would also not be applicable to an application submitted under Section 34 of the Act of 1996.

21. Section 14 of the Limitation Act deals with exclusion of time of proceeding bona fide in a court without jurisdiction. On analysis of the said section, it becomes evident that the following conditions must be satisfied before Section 14 can be pressed into service:

(1) Both the prior and subsequent proceedings are civil proceedings prosecuted by the same party;

(2) The prior proceeding had been prosecuted with due diligence and in good faith;

(3) The failure of the prior proceeding was due to defect of jurisdiction or other cause of like nature;

(4) The earlier proceeding and the latter proceeding must relate to the same matter in issue and;

(5) Both the proceedings are in a court.

22. The policy of the section is to afford protection to a litigant against the bar of limitation when he institutes a proceeding which by reason of some technical defect cannot be decided on merits and is dismissed. While considering the provisions of Section 14 of the Limitation Act, proper approach will have to be adopted and the provisions will have to be interpreted so as to advance the cause of justice rather than abort the proceedings. It will be well to bear in mind that an element of mistake is inherent in the invocation of Section 14. In fact, the section is intended to provide relief against the bar of limitation in cases of mistaken remedy or selection of a wrong forum. On reading Section 14 of the Act it becomes clear that the legislature has enacted the said section to exempt a certain period covered by a bona fide litigious activity. Upon the words used in the section, it is not possible to sustain the interpretation that the principle underlying the said section, namely, that the bar of limitation should not affect a person honestly doing his best to get his case tried on merits but failing because the court is unable to give him such a trial, would not be applicable to an application filed under Section 34 of the Act of 1996. The principle is clearly applicable not only to a case in which a litigant brings his application in the court, that is, a court having no jurisdiction to

entertain it but also where he brings the suit or the application in the wrong court in consequence of bona fide mistake or (sic of) law or defect of procedure. Having regard to the intention of the legislature this Court is of the firm opinion that the equity underlying Section 14 should be applied to its fullest extent and time taken diligently pursuing a remedy, in a wrong court, should be excluded.

27. The contention that in view of the decision of the Division Bench of this Court in Union of India v. Popular Construction Co. [(2001) 8 SCC 470] the Court should hold that the provisions of Section 14 of the Limitation Act would not apply to an application filed under Section 34 of the Act, is devoid of substance. In the said decision what is held is that Section 5 of the Limitation Act is not applicable to an application challenging an award under Section 34 of the Act. Section 29(2) of the Limitation Act inter alia provides that where any special or local law prescribes, for any application, a period of limitation different from the period prescribed by the Schedule, the provisions contained in Sections 4 to 24 shall apply only insofar as, and to the extent to which, they are not expressly excluded by such special or local law. On introspection, the Division Bench of this Court held that the provisions of Section 5 of the Limitation Act are not applicable to an application challenging an award. This decision cannot be construed to mean as ruling that the provisions of Section 14 of the Limitation Act are also not applicable to an application challenging an award under Section 34 of the Act. As noticed earlier, in the Act of 1996, there is no express provision excluding application of the provisions of Section 14 of the Limitation Act to an application filed under Section 34 of the Act for challenging an award.

28. Further, there is fundamental distinction between the discretion to be exercised under Section 5 of the Limitation Act and exclusion of the time provided in Section 14 of the said Act. The power to excuse delay and grant an extension of time under Section 5 is discretionary whereas under Section 14, exclusion of time is mandatory, if the requisite conditions are satisfied. Section 5 is broader in its sweep than Section 14 in the sense that a number of widely different reasons can be advanced and established to show that there was sufficient cause in not filing the appeal or the application within time. The ingredients in respect of Sections 5 and 14 are different. The effect of Section 14 is that in order to ascertain what is the date of expiration of the "prescribed period", the days excluded from operating by way of limitation, have to be added to what is primarily the period of limitation prescribed. Having regard to all these principles, it is difficult to hold that the decision in Popular Construction Co. [(2001) 8 SCC 470] rules that the provisions of Section 14 of the Limitation Act would not apply to an application challenging an award under Section 34 of the Act.

31. To attract the provisions of Section 14 of the Limitation Act, five conditions enumerated in the earlier part of this judgment have to co-exist [Ed.: See para 21, above.] . There is no manner of doubt that the section deserves to be construed liberally. Due diligence and caution are essential prerequisites for attracting Section 14. Due diligence cannot be measured by any absolute standards. Due diligence is a measure of prudence or activity expected from and ordinarily exercised by a reasonable and prudent person under the particular circumstances.

The time during which a court holds up a case while it is discovering that it ought to have been presented in another court, must be excluded, as the delay of the court cannot affect the due diligence of the party. Section 14 requires that the prior proceeding should have been prosecuted in good faith and with due diligence. The definition of good faith as found in Section 2(h) of the Limitation Act would indicate that nothing shall be deemed to be in good faith which is not done with due care and attention. It is true that Section 14 will not help a party who is guilty of negligence, lapse or inaction. However, there can be no hard-and-fast rule as to what amounts to good faith. It is a matter to be decided on the facts of each case. It will, in almost every case be more or less a question of degree. The mere filing of an application in wrong court would not prima facie show want of good faith. There must be no pretended mistake intentionally made with a view to delaying the proceedings or harassing the opposite party. In the light of these principles, the question will have to be considered whether the appellant had prosecuted the matter in other courts with due diligence and in good faith."

23. There is little doubt, in view of consistent authority, that Section 34(3) provides for a special rule of limitation and Sections 4 to 24 of the Limitation Act, though applicable generally to an application under Section 34 of the Act of 1996, is governed by a special law, that is to say, the Act, where the period of limitation for making such an application is differently prescribed. Section 29(2) of the Limitation Act permits the application of Sections 4 to 24 of the Limitation Act, applying it to a differently prescribed period of limitation at variance with that prescribed under the Schedule to the Limitation Act, but only so far and to the extent that any particular provision or provisions of the Limitation Act are not expressly excluded. Not only a particular period of limitation is prescribed under sub-Section (3) of Section 34 of the Act of 1996, but the proviso further mandates that the Court, upon being satisfied about the sufficiency of cause relating to the delay in making an application under Section 34(2), may condone the delay beyond the prescribed period of three months and entertain the application, but that period of time, during which the delay can be condoned, has been limited to 30 days after expiry of the prescribed period of limitation, under sub-Section (3) of Section 34. After the period of three months prescribed under sub-Section (3) of Section 34 of the Act of 1996 has expired, the Court, on sufficient cause being shown by the applicant, may entertain an application within a further period of 30 days, but "not thereafter" to employ the precise words of the Statute. It is this provision, which high authority has consistently held to exclude the application of Section 5 of the Limitation Act with an open ended discretion to the Court to condone, without reference to the period of delay involved.

24. The question here is: Whether the delay that has been occasioned in making the application under Section 34(2) of the Act of 1996 can be regarded as one seeking benefit of Section 14 of the Limitation Act, without expressly saying so or praying in those terms? The other is that: Do the course of events, the proceedings taken and the conduct of the appellant entitle the appellant to claim exclusion of limitation under Section 14 of the Limitation Act?

25. The answer to the first question is to be amply found in **M.P. Steel**

Corporation v. Commissioner of Central Excise7, where, in dealing with an objection by the other side that at no point of time the appellant in that case had taken up a plea based on Section 14, it was held:

"8. Shri A.K. Sanghi, learned Senior Counsel appearing on behalf of the Department has stated that at no point of time has the appellant taken up a plea based on Section 14. Neither has the appellant met with any of the five conditions set out in para 21 of Consolidated Engg. Enterprises v. Irrigation Deptt. [(2008) 7 SCC 169] , which reads as follows : (SCC p. 181)

21. "Section 14 of the Limitation Act deals with exclusion of time of proceeding bona fide in a court without jurisdiction. On analysis of the said section, it becomes evident that the following conditions must be satisfied before Section 14 can be pressed into service:

(1) Both the prior and subsequent proceedings are civil proceedings prosecuted by the same party;

(2) The prior proceeding had been prosecuted with due diligence and in good faith;

(3) The failure of the prior proceeding was due to defect of jurisdiction or other cause of like nature;

(4) The earlier proceeding and the latter proceeding must relate to the same matter in issue; and

(5) Both the proceedings are in a court."

9. Technically speaking, Shri A.K. Sanghi, may be correct. However, in an application for condonation of delay the appellant pointed out that they were pursuing a remedy before another appellate forum which ought to be excluded. We deem this averment sufficient for the appellant to contend that Section 14 of the Limitation Act or principles laid down under it would be attracted to the facts of this case.

26. Elsewhere also, in the holding of their Lordships in **M.P. Steel Corporation** *(supra)*, what is emphasized is the substance of facts entitling a litigant to raise a plea under Section 14 of the Limitation Act, subject to fulfillment of other conditions required by the aforesaid provision. Section 14 has been regarded as a provision that embodies a principle meant to further the ends of justice. It is designed to come to the aid of a litigant, who bona fide in the quest of justice has treaded a wrong path. Time spent in proceedings taken in error by a litigant before a wrong forum or hit by a similar technical flaw, that remain inconsequential or abortive, has to be added to the prescribed period of limitation. The principle embodied in Section 5 of the Limitation Act, or for that matter, in the proviso to Section 43(3) of the Act of 1996, is generically and essentially different from that in Section 14 of the Limitation Act. The former envisages condonation of delay with the period of limitation running its course, whereas the latter postulates an addition to the period of limitation. In determining the character of the application made to overcome the delay, it is the substance of the matter that is important, rather than the formality of the plea or the terms of the prayer, much less the label of the application.

27. It must, therefore, be held that that merely because the application made by the

appellant does not formally invoke Section 14 of the Limitation Act, the Court below could not have turned its face away from considering the appellant's case, invoking benefit of the provisions of Section 14 of the Limitation Act, if that is otherwise made out on the terms of the Statute and the facts and evidence. It has been noticed while referring to the decision in **Consolidated Engg. Enterprises v. Irrigation Deptt.** *(supra)* that five facts are to be established in order to invoke the provisions of Section 14 that are enumerated in paragraph No.21 of the report. It postulates that both the prior and subsequent proceedings are civil proceedings prosecuted by the same party; the prior proceeding had been prosecuted with due diligence and in good faith; the failure of the earlier proceeding was due to defect of jurisdiction or other similar cause; the earlier and the later proceeding relate to the same matter in issue; and both the proceedings were in a Court. These principles have been further explained with greater precision in **M.P. Steel Corporation**. But, for the purpose of the present case, that need not be dwelt upon.

28. The facts here indicate that the award was pronounced on 23.07.2017. It was communicated to the appellant on 03.08.2017. The appellant, no doubt, lodged an FIR on 21.07.2017 against the respondent, that was quashed by this Court on 02.02.2018. It was a step that was taken before communication of the award. In any case, lodging of an FIR are not prior civil proceedings pursued by the appellant against the respondent, that ended with being quashed by this Court. The lodging of the FIR was an act setting the criminal law into motion, alleging fraud on the respondent's part and possibly, the FIR cannot be regarded as civil proceedings by the appellant that could undo the award passed by the Arbitrator without jurisdiction, as the appellants say. The belief of the appellant that since the appointment of the sole Arbitrator had been cancelled by the Vice-Chairman of the appellant on 21.07.2017, the award rendered by him on 23.07.2017 was a nullity, also do not constitute prior civil proceedings prosecuted by the appellant in good faith and with due diligence, that would lead to the desired remedy.

29. The earliest that the appellant moved against the award was by way of an objection under Section 47 CPC in the execution case brought by the respondent and that was on 08.05.2019. There is nothing tangible on record to show that anything was done prior to 08.05.2019 by the appellant through any kind of civil proceedings, may be before a wrong forum or before the right forum in the wrong frame. Absolutely nothing was done by the appellant until 08.05.2019 by way of steps taken to set aside the award made by the sole Arbitrator. It is true that after rejection of the objection under Section 47 CPC, it may legitimately be said that the appellant has prosecuted with due diligence and in good faith their remedies by moving this Court under Article 227. Further, upon dismissal of the petition under Article 227 on the ground of alternative remedy, the appellant had moved this Court under Section 115 CPC, where they have been granted a condonation of delay in moving the civil revision. The challenge to the order refusing objections under Section 47 CPC is still pending before this Court. The inference is that after 08.05.2019, the appellant has pursued their remedy, may be before the wrong forum and subsequently brought this application correctly advised, under Section 34(2) of the Act of 1996.

But, there is a gaping void in time and a continuously running limitation between the service of the impugned award on 03.08.2017 and 08.05.2019, when for the first time the appellant put in objections under Section 47 CPC to the execution levied by the respondent for enforcement of the award. Can the subsequent action, that is to say, after 08.05.2019, in prosecuting the remedies against the award under Section 47 CPC, that may or may not be without jurisdiction or flawed for a similar defect, be regarded as a condition fulfilling the essential postulates that attract Section 14 of the Limitation Act? In the opinion of this Court, the proceedings taken after 08.05.2019 would not avail for the purpose of Section 14 of the Limitation Act. In **M.P. Steel Corporation,** it has been held:

"52. As has been already noticed, Sarathy case [(2000) 5 SCC 355 : 2000 SCC (L&S) 699] has also held that the court referred to in Section 14 would include a quasi-judicial tribunal. There appears to be no reason for limiting the reach of the expression "prosecuting with due diligence" to institution of a proceeding alone and not to the date on which the cause of action for such proceeding might arise in the case of appellate or revisional proceedings from original proceedings which prove to be abortive. Explanation (a) to Section 14 was only meant to clarify that the day on which a proceeding is instituted and the day on which it ends are also to be counted for the purposes of Section 14. This does not lead to the conclusion that the period from the cause of action to the institution of such proceeding should be left out. In fact, as has been noticed above, the Explanation expands the scope of Section 14 by liberalising it. Thus, under Explanation (b) a person resisting an appeal is also deemed to be prosecuting a proceeding. But for Explanation (b), on a literal reading of Section 14, if a person has won in the first round of litigation and an appeal is filed by his opponent, the period of such appeal would not be liable to be excluded under the section, leading to an absurd result. That is why a plaintiff or an applicant resisting an appeal filed by a defendant shall also be deemed to prosecute a proceeding so that the time taken in the appeal can also be the subject-matter of exclusion under Section 14. Equally, Explanation (c) which deems misjoinder of parties or a cause of action to be a cause of a like nature with defect of jurisdiction, expands the scope of the section. We have already noticed that the India Electric Works Ltd. [(1971) 1 SCC 24] judgment has held that strictly speaking misjoinder of parties or of causes of action can hardly be regarded as a defect of jurisdiction or something similar to it. Therefore properly construed, Explanation (a) also confers a benefit and does not by a side wind seek to take away any other benefit that a purposive reading of Section 14 might give. We, therefore, agree with the decision of the Madhya Pradesh High Court that the period from the cause of action till the institution of appellate or revisional proceedings from original proceedings which prove to be abortive are also liable to exclusion under the section. The view of the Andhra Pradesh High Court is too broadly stated. <u>The period prior to institution of the initiation of any abortive proceeding cannot be excluded for the simple reason that Section 14 does not enable a litigant to get a benefit beyond what is contemplated by the section--that is to put the litigant in the same position as if the abortive proceeding had never taken place."</u>

(Emphasis by Court)

30. The principle above indicated and the terms of Section 14 of the Limitation Act show that Section 14 would not come to the appellant's rescue. The prescribed

period of limitation under Section 34(3), together with its proviso, is three months and another 30 days of time, that may be condoned by the Court. The commencement of this period of time is from the date of communication of the award, which in this case is 03.08.2017. The period of limitation would, therefore, expire on 02.11.2017. The further period of time that could have been condoned by the Court under the proviso to Section 34(3) of the Act of 1996 is another thirty days, that would take it to 02.12.2017. Admittedly, during this period of time, no civil proceedings were instituted or prosecuted by the appellant to set aside the award on the ground of fraud or lack of jurisdiction or on any other ground that they seek to impeach it. The earliest challenge, as already noted through competent proceedings, that would qualify for the purpose of Section 14 is 08.05.2019, when objections under Section 47 CPC were filed before the Executing Court. Therefore, in the considered opinion of this Court, this is not a case where the appellant is entitled to the benefit of addition of the period of limitation spent in pursuing in good faith and with due diligence, a remedy that failed because of defect of jurisdiction or other like cause. The application under Section 5 of the Limitation Act is clearly incompetent because limitation is governed by Section 34(3) of the Act of 1996 and condonation by its proviso; not by Section 5 of the Limitation Act, as rightly held by the Commercial Court.

31. In this view of the matter, this Court does not find any merit in this appeal. The appeal fails and is hereby **dismissed.**

32. Costs easy.

(2022)03ILR A864
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.02.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE VIVEK VARMA, J.

First Appeal From Order No.686 of 2007

Suman Singh & Ors. ...Appellants
Versus
Mahaveer Tarachand Bafana & Ors. ...Respondents

Counsel for the Appellants:
Sri A.K. Rai, Sri Vishnu Kumar Singh

Counsel for the Respondents:
Sri Brijesh Chandra Naik

Civil Law - Motor Vehicle Act, 1988- Deceased was self employed-income assessed by court below is modified-40% of income to be added in future prospects-Multiplier of 18 applied-award modified.

Appeal partly allowed. (E-9)

List of Cases cited:

1. National Insurance Co. Ltd.Vs Pranay Sethi & ors., (2017) 16 SCC 680

2. Sarla Verma Vs Delhi Transport Corporation, (2009) 6 SCC 121

3. Vimal Kanwar & ors. Vs Kishore Dan & ors., 2013 (3) T.A.C. 6 (S.C.)

4. Vimla Devi & ors. Vs National Insurance Company Limited & anr., (2019) 2 SCC 186

5. National Insurance Co. Ltd. Vs Pranay Sethi & ors., (2017) 16 SCC 680

6. Civil Appeal No.242/243 of 2020 (National Insurance Co. Ltd. vs Birender & ors.)

7. A.Vs Padma Vs Venugopal, Reported in 2012 (1) GLH (SC), 442

8. Smt. Hansaguti P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291

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

1. Heard Sri Vishnu Kumar Singh, learned counsel for the appellants, Sri Brijesh Chandra Naik, learned counsel for the respondents and perused the record.

2. This appeal, at the behest of the claimants, challenges the judgment and award dated 29.1.2007 passed by the Motor Accident Claims Tribunal/Additional District Judge, Court No.1, Varanasi (hereinafter referred to as 'Tribunal') in M.A.C.P No.306 of 1999 (Suman Singh and others vs. Mahaveer Tarachand Bafana and others) awarding a sum of Rs.6,86,000/- as compensation with interest at the rate of 6% per annum.

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

4. It is submitted by learned counsel for the appellant that an accident took place on 13.9.1999 wherein Sanjai Singh, who was self employed person earning Rs.3,86,495/- per annum, met with accidental death leaving behind him his widow wife of 22 years, daughter of one and half years and parents aged about 55 and 50 years. The Tribunal has considered his income to be Rs.5,000/- per month did not add any amount towards future loss of income granted multiplier of 17 and granted only Rs. 6,000/- towards non pecuniary damages. It is further submitted that the Tribunal has not granted any amount towards future loss of income of the deceased which should be 40% of the income in view of the decision in **National Insurance Company Limited Vs. Pranay Sethi and Others, (2017) 16 SCC 680.** It is further submitted that the multiplier of 17 awarded by the Tribunal is on the lower side and it should be 18 in view of the decision of the Apex Court in **Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 12**1. It is also submitted that the amount for non-pecuniary damages and the interest awarded by the Tribunal are on the lower side and require enhancement. The deduction towards personal expenses of the deceased should be 1/3rd as the deceased died leaving behind him his widow, minor daughter and parents. Leaned counsel for the appellant has also relied on the decision in **Vimal Kanwar and Others Vs. Kishore Dan and others, 2013 (3) T.A.C. 6**

5. As against this, Sri Brijesh Chandra Naik, learned counsel for the respondents has submitted that the income of the deceased does not require any enhancement as the income which has not been proved cannot be granted. It is further submitted that the compensation awarded by the Tribunal is just and proper and does not call for any interference.

6. Having heard the counsels for the parties and considered the factual data, this Court finds that the accident occurred on 13.9.1999 causing death of Sanjai Singh who was 24 years of age at the time of accident. The Tribunal has considered the income tax return which was for Rs.

61,000/- and therefore,certain additions can be made to his income. We consider his income Rs.8,000/- per month but are unable to accept the submission of counsel for the appellant that his income should be considered to be Rs.3,86,495/- as the deceased was self employed person. We are even supported in our view by the decision of the Apex Court in **Vimla Devi and others Vs. National Insurance Company Limited and another, (2019) 2 SCC 186.**

7. As far as addition of future prospects is concerned, the deceased being below 40 years of age, 40% of the income will have to be added in view of the decision of the Apex Court in **National Insurance Company Limited Vs. Pranay Sethi and Others, (2017) 16 SCC 680.** The multiplier applicable would be 18 and Rs.1,00,000/- requires to be granted under the head of non-pecuniary damages. As far as deduction towards personal expenses of the deceased is concerned, it would be 1/3rd as the deceased was survived by his widow, one daughter and parents.

8. Hence, the total compensation payable to the appellants is computed herein below:

i. Income: Rs.8,000/-

ii. Percentage towards future prospects : 40% namely Rs.3200/-

iii. Total income : Rs.8000 + 3200 = Rs.11,200/-

iv. Income after deduction of 1/3rd towards personal expenses : Rs.7467/-

v. Annual income : Rs.7467 x 12 = Rs.89,604/-

vi. Multiplier applicable : 18

vii. Loss of dependency: Rs.89,604 x 18 = Rs.16,12,872/-

viii. Amount under non pecuniary heads : Rs.1,00,000/-

ix. Total compensation : Rs.17,12,872/-

9. As far as issue of rate of interest is concerned, it should be 7.5% in view decision of the Apex Court in **Civil Appeal No.242/243 of 2020 (National Insurance Company Ltd. vs Birender and others)** decided on 13 January, 2020 which is the latest in point of time.

10. No other grounds are urged orally when the matter was heard.

11. In view of the above, the appeal is partly allowed. Judgment and decree passed by the Tribunal shall stand modified to the aforesaid extent. The amount be deposited by the respondent-Insurance Company 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 award and 6% thereafter till the amount is deposited. The amount already deposited be deducted from the amount to be deposited. Record be transmitted to Tribunal.

12. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of **A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442**, the order of investment is not passed because applicants /claimants are neither illiterate or rustic villagers.

13. 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.

14. 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.

15. This Court is thankful to both the counsels for getting this old matter decided.

(2022)03ILR A867
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.02.2022

BEFORE
THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

THE HON'BLE AJAI TYAGI, J.

First Appeal From Order No. 1039 of 2021

Uttar Pradesh Rajya Sadak Parivahan Nigam ...Appellant
Versus
Smt. Anamika Deo & Ors. ...Respondents

Counsel for the Appellant
Sri Dharmendra Dhar Dubey, Sri Awadhesh Kumar Saxena

Counsel for the Respondents:

Civil Law - Motor Vehicle Act, 1988 - Claimants filed documentary evidence - principle of contributory negligence- computation of the compensation -retain the interest of 7% from the date of filing of the claim petition till the amount is deposited - Tribunal to recalculate the amount and return the excess amount to the appellant.

Appeal is partly allowed. (E-9)

List of Cases cited:

1. UPSRTC Vs Km. Mamta & ors., reported in AIR 2016 SC 948

2. Bajaj Allianz General Insurance Co.Ltd. Vs Smt. Renu Singh & ors. First Appeal From Order No. 1818 of 2012

3. Khenyei Vs New India Assurance Company Limited & ors., 2015 LawSuit (SC) 469

4. T.O. Anthony Vs Karvarnan & ors. [2008 (3) SCC 748]

5. Regional Manager U.P. State Road Transport Corporation Vs Smt. Nisha Dubey & ors., 2017 (2008) AICC 1056

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

1. Heard Sri Awadhesh Kumar Saxena, learned counsel for the appellant and perused the record. None is present for

the respondents who are deemed to be served.

2. This appeal, at the behest of Uttar Pradesh Rajya Sadak Parivahan Nigam, challenges the judgment and award dated 16.01.2021 passed by Motor Accident Claims Tribunal, Bareilly (hereinafter referred to as 'Tribunal') in M.A.C. P. No. 776 of 2014.

3. Claimants are the legal heirs of the deceased-Brahmdev Gupta. He was driving his Car from Bareilly to Badaun and when he reached village-Kheda, Tehshil Aonla, the bus of U.P.S.R.T.C. bearing No. U.P. 25 AT/1037, which was being driven rashly and negligently by its driver, dashed with the car which was being driven by deceased-Brahmdev Gupta, though the deceased tried to save himself and bring the car to its left side namely on pathway. Before the deceased could be taken to the hospital, he breathed his last. He was 56 years of age, was working in Jila Yuva Samanwaya Nehru Yuva Kendra Sangthan, U.P. and Uttrakhand and was earning Rs.95,960/- per month. The legal heirs were dependent on him and, therefore, have claimed sum of Rs.1,80,00,000/- with interest.

4. The U.P.S.R.T.C. filed its reply which was one of denial. It has denied the fact that the bus was being driven against the Traffic Rules. The driver of bus has contended that it was the driver of the Maruti Car namely deceased who came on the wrong side and dashed with the bus. It is submitted that the First Information Report was filed against the driver of said bus but the facts narrated are far from truth. The driver of bus has also filed his reply of denial.

5. The claimants examined Shreey Dev and P.W.1, Sukhchain who was the eye witness as P.W.2. P.W.3, Dinesh Yadav and P.W.4, Dev Dhwani Gupta has also been examined on oath. The claimants filed documentary evidence so as to bring home the case that the accident caused the death of the deceased.

6. The appellant herein examined D.W.1, Jay Prakash and D.W.2, Sushil Kumar and D.W. 3, Rajesh Kumar. All of them have supported the case of U.P.S.R.T.C. The main grounds urged before this Court by U.P.S.R.T.C. through its counsel are that the accident occurred due to negligence of the deceased, the award is bad in the eye of law as the amount awarded is arbitrary and on the higher side. It is submitted by learned counsel for the appellant that the presence of the witnesses relied by claimants at place of incident is highly doubtful and the evidence of the driver of the bus has been wrongly disbelieved by the Tribunal.

7. The Apex Court in **UPSRTC Vs. Km. Mamta and others,** reported in **AIR 2016 SC 948**, has held that all the issues raised in the memo of appeal are required to be addressed and decided by the first appellate court. While dealing with submission on issue of negligence raised by the learned counsel for the appellant, it would be relevant to discuss the principles for deciding contributory negligence and for that the principles for considering negligence will also have to be looked into.

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 though it is normally accidental. More particularly, it connotes reckless driving and the injured must always prove that the either side is

negligent. If the injury rather death is caused by something owned or controlled by the negligent party then he is directly liable otherwise the principle of "res ipsa loquitur" meaning thereby "the things speak for itself" would apply.

9. The principle of contributory negligence has been discussed time and again. A person who either contributes or is co author of the accident would be liable for his contribution to the accident having taken place and that amount will be deducted from the compensation payable to him if he is injured and to legal representatives if he dies in the accident.

10. The Division Bench of this Court in **First Appeal From Order No. 1818 of 2012 (Bajaj Allianz General Insurance Co.Ltd. Vs. Smt. Renu Singh And Others)** decided on 19.7.2016 has held as under :

"16. Negligence means failure to exercise required degree of care and caution expected of a prudent driver. Negligence is the omission to do something which a reasonable man, guided upon the considerations, which ordinarily regulate conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Negligence is not always a question of direct evidence. It is an inference to be drawn from proved facts. Negligence is not an absolute term, but is a relative one. It is rather a comparative term. What may be negligence in one case may not be so in another. Where there is no duty to exercise care, negligence in the popular sense has no legal consequence. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which would be reasonably foreseen likely to caused physical injury to person. The degree of care required, of course, depends upon facts in each case. On these broad principles, the negligence of drivers is required to be assessed.

17. It would be seen that burden of proof for contributory negligence on the part of deceased has to be discharged by the opponents. It is the duty of driver of the offending vehicle to explain the accident. It is well settled law that at intersection where two roads cross each other, it is the duty of a fast moving vehicle to slow down and if driver did not slow down at intersection, but continued to proceed at a high speed without caring to notice that another vehicle was crossing, then the conduct of driver necessarily leads to conclusion that vehicle was being driven by him rashly as well as negligently.

18. 10th Schedule appended to Motor Vehicle Act contain statutory regulations for driving of motor vehicles which also form part of every Driving License. Clause-6 of such Regulation clearly directs that the driver of every motor vehicle to slow down vehicle at every intersection or junction of roads or at a turning of the road. It is also provided that driver of the vehicle should not enter intersection or junction of roads unless he makes sure that he would not thereby endanger any other person. Merely, because driver of the Truck was driving vehicle on the left side of road would not absolve him from his responsibility to slow down vehicle as he approaches intersection of roads, particularly when he could have easily seen, that the car over which deceased was riding, was approaching intersection.

19. In view of the fast and constantly increasing volume of traffic, motor vehicles upon roads may be

regarded to some extent as coming within the principle of liability defined in Rylands V/s. Fletcher, (1868) 3 HL (LR) 330. From the point of view of pedestrian, the roads of this country have been rendered by the use of motor vehicles, highly dangerous. 'Hit and run' cases where drivers of motor vehicles who have caused accidents, are unknown. In fact such cases are increasing in number. Where a pedestrian without negligence on his part is injured or killed by a motorist, whether negligently or not, he or his legal representatives, as the case may be, should be entitled to recover damages if principle of social justice should have any meaning at all.

20. These provisions (sec.110A and sec.110B of Motor Act, 1988) are not merely procedural provisions. They substantively affect the rights of the parties. The right of action created by Fatal Accidents Act, 1855 was 'new in its species, new in its quality, new in its principles. In every way it was new. The right given to legal representatives under Act, 1988 to file an application for compensation for death due to a motor vehicle accident is an enlarged one. This right cannot be hedged in by limitations of an action under Fatal Accidents Act, 1855. New situations and new dangers require new strategies and new remedies.

*21. In the light of the above discussion, we are of the view that even if courts may not by interpretation displace the principles of law which are considered to be well settled and, therefore, court cannot dispense with proof of negligence altogether in all cases of motor vehicle accidents, it is possible to develop the law further on the following lines; when a motor vehicle is being driven with reasonable care, it would ordinarily not meet with an accident and, therefore, rule of res-ipsa loquitor as a rule of evidence may be invoked in motor accident cases with greater frequency than in ordinary civil suits (**per three-Judge Bench in Jacob Mathew V/s. State of Punjab, 2005 0 ACJ(SC) 1840).***

22. By the above process, the burden of proof may ordinarily be cast on the defendants in a motor accident claim petition to prove that motor vehicle was being driven with reasonable care or that there is equal negligence on the part the other side." *emphasis added*

11. The Apex Court in **Khenyei Vs. New India Assurance Company Limited & Others, 2015 LawSuit (SC) 469** has held as under:

"4. It is a case of composite negligence where injuries have been caused to the claimants by combined wrongful act of joint tort feasors. In a case of accident caused by negligence of joint tort feasors, all the persons who aid or counsel or direct or join in committal of a wrongful act, are liable. In such case, the liability is always joint and several. The extent of negligence of joint tort feasors in such a case is immaterial for satisfaction of the claim of the plaintiff/claimant and need not be determined by the by the court. However, in case all the joint tort feasors are before the court, it may determine the extent of their liability for the purpose of adjusting inter-se equities between them at appropriate stage. The liability of each and every joint tort feasor vis a vis to plaintiff/claimant cannot be bifurcated as it is joint and several liability. In the case of composite negligence, apportionment of compensation between tort feasors for making payment to the plaintiff is not permissible as the plaintiff/claimant has the

right to recover the entire amount from the easiest targets/solvent defendant.

14. There is a difference between contributory and composite negligence. In the case of contributory negligence, a person who has himself contributed to the extent cannot claim compensation for the injuries sustained by him in the accident to the extent of his own negligence;whereas in the case of composite negligence, a person who has suffered has not contributed to the accident but the outcome of combination of negligence of two or more other persons. This Court in ***T.O. Anthony v. Karvarnan & Ors. [2008 (3) SCC 748]*** *has held that in case of contributory negligence, injured need not establish the extent of responsibility of each wrong doer separately, nor is it necessary for the court to determine the extent of liability of each wrong doer separately. It is only in the case of contributory negligence that the injured himself has contributed by his negligence in the accident. Extent of his negligence is required to be determined as damages recoverable by him in respect of the injuries have to be reduced in proportion to his contributory negligence. The relevant portion is extracted hereunder :*

"6. 'Composite negligence' refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrong doers, it is said that the person was injured on account of the composite negligence of those wrong-doers. In such a case, each wrong doer, is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrong-doer separately, nor is it necessary for the court to determine the extent of liability of each wrong-doer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence of the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stands reduced in proportion to his contributory negligence.

7. Therefore, when two vehicles are involved in an accident, and one of the drivers claims compensation from the other driver alleging negligence, and the other driver denies negligence or claims that the injured claimant himself was negligent, then it becomes necessary to consider whether the injured claimant was negligent and if so, whether he was solely or partly responsible for the accident and the extent of his responsibility, that is his contributory negligence. Therefore where the injured is himself partly liable, the principle of 'composite negligence' will not apply nor can there be an automatic inference that the negligence was 50:50 as has been assumed in this case. The Tribunal ought to have examined the extent of contributory negligence of the appellant and thereby avoided confusion between composite negligence and contributory negligence. The High Court has failed to correct the said error."

18. This Court in ***Challa Bharathamma &Nanjappan (supra)*** *has dealt with the breach of policy conditions by the owner when the insurer was asked to*

pay the compensation fixed by the tribunal and the right to recover the same was given to the insurer in the executing court concerned if the dispute between the insurer and the owner was the subject-matter of determination for the tribunal and the issue has been decided in favour of the insured. The same analogy can be applied to the instant cases as the liability of the joint tort feasor is joint and several. In the instant case, there is determination of inter se liability of composite negligence to the extent of negligence of 2/3rd and 1/3rd of respective drivers. Thus, the vehicle - trailor-truck which was not insured with the insurer, was negligent to the extent of 2/3rd. It would be open to the insurer being insurer of the bus after making payment to claimant to recover from the owner of the trailor-truck the amount to the aforesaid extent in the execution proceedings. Had there been no determination of the inter se liability for want of evidence or other joint tort feasor had not been impleaded, it was not open to settle such a dispute and to recover the amount in execution proceedings but the remedy would be to file another suit or appropriate proceedings in accordance with law.

What emerges from the aforesaid discussion is as follows :

(i) In the case of composite negligence, plaintiff/claimant is entitled to sue both or any one of the joint tort feasors and to recover the entire compensation as liability of joint tort feasors is joint and several.

(ii) In the case of composite negligence, apportionment of compensation between two tort feasors vis a vis the plaintiff/claimant is not permissible. He can recover at his option whole damages from any of them.

(iii) In case all the joint tort feasors have been impleaded and evidence is sufficient, it is open to the court/tribunal to determine inter se extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint tort feasors is only for the purpose of their inter se liability so that one may recover the sum from the other after making whole of payment to the plaintiff/claimant to the extent it has satisfied the liability of the other. In case both of them have been impleaded and the apportionment/ extent of their negligence has been determined by the court/tribunal, in main case one joint tort feasor can recover the amount from the other in the execution proceedings.

(iv) It would not be appropriate for the court/tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of impleadment of other joint tort feasors. In such a case, impleaded joint tort feasor should be left, in case he so desires, to sue the other joint tort feasor in independent proceedings after passing of the decree or award." *emphasis added*

12. The latest decision of the Apex Court in **Khenyei (Supra)** has laid down one further aspect about considering the negligence more particularly composite/contributory negligence. The deceased or the person concerned should be shown to have contributed either to the accident and the impact of accident upon the victim could have been minimised if he had taken care.

13. The factual scenario goes to show that the respondent examined D.W.1 to

D.W.3. We have perused the oral testimony of the driver. The driver of the bus has categorically mentioned that the deceased was also driving the car in rash and negligent manner. The bus was being plied from Agra to Bareilly. The incident occurred at about 1.30 in the afternoon when the bus was at Village Kheda. It is also the case of the respondent that the Maruti car was being driven rashly and negligently and the Maruti car driver hit the bus on the side of the driver. The driver was all alone in the car. It was also mentioned by the driver of the bus that he had seen the care from about 200-300 meters. Looking to the facts that the bus which is a bigger vehicle had to be more cautious. The instantaneous death of the driver of the car goes to show that the vehicle driven by the respondent was being driven in rash and negligent manner but the driver of the car is also considered to be negligent. The driver of the Maruti Car died on the spot. In our case, looking to the judgments on which reliance was placed by the learned Trial Judge more particularly decision in **Regional Manager U.P. State Road Transport Corporation v. Smt. Nisha Dubey and others, 2017 (2008) AICC 1056**, the charge-sheet which was laid against the driver of the bus and the site plan, we hold the driver of the Maruti Car 25% negligent. The decision in **Khenyei (Supra),** will not apply to the facts of this case.

14. As far as compensation is concerned, there is no cross objection and none has appeared for the claimant-respondents though notice has been served at this juncture. We hold that that the computation of the amount is in consonance with the judgment of the Apex Court. We do not disturb the finding of the Tribunal. However, the finding that if the U.P.S.R.T.C. does not make payment within 30 days then only it will be liable for interest. Such an order could not have been passed. We retain the interest of 7% from the date of filing of the claim petition till the amount is deposited. If the amount has already been deposited, the same may be disbursed to the claimants. On recalculation, if the amount is on lower side, the same shall be refunded to U.P.S.R.T.C.

15. In view of the above, this appeal is partly allowed. The Tribunal to recalculate the amount and return the excess amount to the appellant. Record and proceedings be sent back to the Tribunal forthwith.

(2022)03ILR A873
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.02.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE VIVEK VARMA, J.

First Appeal From Order No.1070 of 2017

Smt. Upasana & Ors. ...Appellants
Versus
National Insurance Co. Ltd. & Ors. ...Respondents

Counsel for the Appellants:
Sri Nigamendra Shukla

Counsel for the Respondents:
Sri Om Prakash Mishra

Civil Law - Motor Vehicle Act, 1988 - Quantum of compensation awarded in question - Tribunal has not granted any amount towards future loss of income of the deceased - Registry is directed to first deduct the amount of deficit court fees, if any - -Insurance Company shall

deposit the amount along with additional amount within a period of 12 - with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited.

Appeal partly allowed. (E-9)

List of Cases cited:

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

2. Saead Bashir Ahmad Vs Md. Zamil 2009 (1) TAC 794

3. Laxmi Devi Vs Md. Tabyar 2006 (2) TAC 394

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

5. Anita Sharma Vs New India Assurance Co. Ltd. (2021), 1 SCC 171

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

7. Sarla Verma Vs Delhi Transport Corporation, (2009) 6 SCC 121

8. A.Vs Padma Vs Venugopal, Reported in 2012 (1) GLH (SC), 442

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

10. Smt. Sudesna & ors. Vs Hari Singh & anr. Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001

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

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

1. Heard Shri Nigamendra Shukla, learned counsel for the appellants; Shri Om Prakash Mishra, learned counsel for the respondents; and perused the record.

2. This appeal, at the behest of the claimants, challenges the judgment dated 4.10.2016 passed by Motor Accident Claims Tribunal/Additional District Judge, Court No.15, Ghaziabad (hereinafter referred to as 'Tribunal') in Motor Accident Claim Petition No.313 of 2012 awarding a sum of Rs.4,52,000/- with interest at the rate of 6% as compensation.

3. The accident is not in dispute. The issue of negligence decided by the Tribunal is not in dispute. The respondent concerned has not challenged the liability imposed on them. The only issue to be decided is, the quantum of compensation awarded.

4. It is submitted by learned counsel for the appellants that the Tribunal has not granted any amount towards future loss of income of the deceased which is required to be granted in view of the decision in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050**. It is further submitted that amount under non-pecuniary heads granted and the interest awarded by the Tribunal are on the lower side and require enhancement and learned counsel submitted that deceased was Senior Technician in Moser Baer India Ltd, Greater Noida by profession and was getting Rs.14,512/- per month. It is also submitted that as the deceased was survived by his widow, two minor children, mother and father and hence the deduction towards personal expenses of the deceased as 1/4 is not in dispute. The multiplier has to be as per age of deceased should have been granted 16 is also not in dispute.

5. Learned counsel for the respondents, has vehemently objected the contentions raised by the learned counsel for the appellants and has submitted that

the compensation awarded by the Tribunal is just and proper and does not call for any enhancement.

6. Having heard learned counsel for the parties and considered the factual data, this Court found that the accident occurred on 16.5.2013 causing death of Rajeev Kumar Sharma who was 31 years of age and left behind him, widow, two minor children, mother and father. The Tribunal has assessed the income of the deceased to be Rs.3000/- per month. The deceased was Senior Technician by profession. The tribunal has committed grave error in not considering that the appellants had proved the income of the deceased by proper evidence. The witness was also examined so as to bring whom the contention that the deceased was a Senior Technician. The documentary evidence showing the income starts from Ex.40, PW-2 Raj Kumar Singh who is the Manager, Baer India Ltd. has been examined and he has also conveyed the income. The Tribunal has hyper technical stand in relying on the judgment of *Saead Bashir Ahmad v. Md. Zamil 2009 (1) TAC 794* and thereafter has gone to decide the matter on the basis of the decision of the Apex Court in *Laxmi Devi v. Md. Tabyar 2006 (2) TAC 394* and decide that he was earning Rs.3000/- p.m.. This is again fallacious as the documentary evidence on record just because the original was not brought. The evidence of the witnesses has not been accepted which is also against the Judgment in the case of the Apex Court in Vimla Devi and others Vs. National Insurance Company Limited and another, (2019) 2 SCC 186, and, therefore, we are obliged to hold that the deceased died due to the accidental injuries.

7. The judgment of the Apex Court in **Anita Sharma v. New India Assurance Co. Ltd. (2021), 1 SCC 171** would also apply to the facts of this case.

8. As far as beneficial difference of limitation is concerned, the strict rules of civil procedure and evidence act are no required to adhered to.

9. In our case, prima facie it was proved that his income was Rs.14,512/- out of certain amounts were deducted and he was getting Rs.13,020/-. In view of the judgment of **Vimal Kanwar and others v. Kishore Dan and others, AIR 2013 SC 3830** except income Tax no amount could have been deducted by the tribunal in the year of question, i.e., 2012, his income was below taxable income and hence we will have to consider his income Rs.14,500/- per month. The tribunal cannot take a stand that as the officer who was examined had not brought the original records, his evidence is totally unbelievable. The tribunal has erred itself in not considering the income of the deceased and has deducted amount which it could not deduct holding that they were personal benefits to the deceased. We cannot concur with the tribunal as far as holding that the deceased was earning Rs.3000/- per month. The income has to be considered to be Rs.14,500/- per month, would be the income of the deceased. The deceased was below the age of 40 years as Senior Technician, 50% of the income will have to be added as future prospects in view of the decision of the Apex Court in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050**. The multiplier of 16 granted is just and proper as per the judgment in Pranay Sethi (supra) where awarded sum of Rs.70,000+10% increase, we round up the same figure Rs.1,00,000/- instead of Rs.91,000/-.

10. In this backdrop were evaluate the income in view of the judgment of **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050 and Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121** and, the recalculation of compensation would be as follows:

i. Income Rs.14,500/- p.m.

ii. Percentage towards future prospects : 50% namely Rs.7250/-

iii. Total income : Rs. 14,500 + 7,250 = Rs.21,750/-

iv. Income after deduction of 1/4 : Rs.16,313/-

v. Annual income : Rs.16,313 x 12 = Rs.1,95,750/-

vi. Multiplier applicable : 16 (as the deceased was in the age bracket of 31-35 years)

vii. Loss of dependency: Rs.1,95,750 x 16 = Rs.31,32,000/-

viii. Amount under non pecuniary heads (Rs.70,000+30,000) = 1,00,000/-

ix. Total compensation : **Rs.32,32,000/-.**

11. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case o**f A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442,** the order of investment is not passed because applicants /claimants are neither illiterate or rustic villagers.

12. 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.

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 decree passed by the Tribunal shall stand modified to the aforesaid extent. The respondent-Insurance Company shall deposit the amount along with additional amount within a period of 12 weeks from today with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited. The amount already deposited be deducted from the amount to be deposited.

15. We are thankful to learned counsels for the parties for ably assisted the Court.

16. Record be sent back to court below forthwith, if any.

17. We are thankful to learned counsels for the parties for ably assisted the Court.

(2022)03ILR A877
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.12.2021

BEFORE

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

First Appeal From Order No. 1493 of 2013

Smt. Rani @ Raj Kumari & Ors.
...Appellants
Versus
Kamlakat Gupta & Ors. ...Respondents

Counsel for the Appellants:
Sri A.K. Ojha, Sri Harish Chandra Mishra

Counsel for the Respondents:
Sri Rahul Sahai, Sri Harish Chandra Mishra, Sri Rahul Sahai, Sri Om Prakash Tripathi

Civil Law - Motor Vehicle Act, 1988 - Principle of Contributory negligence-age of deceased-35 years-deduction of ¼-amount of non-pecuniary damages be 70,000/-multiplier be 15- Judgment and award passed by the Tribunal modified.

Appeal partly allowed. (E-9)

List of Cases cited:

1. Bajaj Allianz General Insurance Co.Ltd. Vs Smt. Renu Singh & ors. First Appeal From Order No. 1818 of 2012

2. Khenyei Vs New India Assurance Co. Ltd. & ors., 2015 LawSuit (SC) 469

3. T.O. Anthony Vs Karvarnan & ors. [2008 (3) SCC 748]

4. Malarvizhi & ors. Vs United India Insurance Co. Ltd. & anr., 2020 (4) SCC 228

5. United India Insurance Co. Ltd. Vs Indiro Devi & ors. 2018 (7) SCC 715

6. The Oriental Insurance Co. Ltd. Vs Mangey Ram & ors., 2019 0 Supreme (All) 1067

7. New India Assurance Co. Vs Urmila Shukla decided by the Apex Court on 6.8.2021 reported in MANU/SCOR/24098/2021

8. Kirti & ors. Vs Oriental Insurance Co. Ltd. reported in 2021(1) TAC

9. Sarla Verma & ors.Vs Delhi Transport Corp. & anr., 2009, Law Suit (SC) 613

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

11. Smt. Sudesna & ors. Vs Hari Singh & anr. Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001

12. Tej Kumari Sharma Vs Chola Mandlam M.S. General Insurance Co. Ltd. First Appeal From Order No.2871 of 2016

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

1. Heard learned counsel for the appellant and learned counsel for the respondent-Insurance Company.

2. This appeal, at the behest of the claimants, challenges the judgment and award dated 30.4.2012 passed by Motor Accident Claims Tribunal/Additional District and Sessions Judge(Ex/ Cadre) Jhansi, (hereinafter referred to as 'Tribunal') in M.A.C. No. 668 of 2009 (Smt. Rani @ Raj Kumari and others Vs. Kamlakant Gupta and others).

3. Brief facts as culled out from the record are that on 02.09.2009 deceased Sobran Singh was returning to his home Kot from Jhansi on his motorcycle bearing no. U.P. 93 K-4069, at 7:00 p.m. near bridge ahead of village Bhojla. The driver of a jeep Gypsy bearing no. U.P. 93 Q-6471 coming from opposite direction was driving the jeep rashly and negligently and dashed into the motorcycle of deceased Sobran Singh as a result of which Sobran Singh sustained grievous injuries in his head and leg. The deceased was taken to Medical College Jhansi for treatment from where he was referred to Gwalior and during treatment at Gwalior Hospital he succumbed to his injuries on 10.09.2009 i.e after about 8 days.

4. The deceased was 33 years of age at the time of accident. He was working in a crusher machine company and earning Rs. 6000/- p.m and also maintaining agriculture field of his own. He was survived by his mother, father, widow, three daughters and a son. The Tribunal has considered his income to be Rs. 45,00/- p.m, deducted 1/4th towards personal expenses of the deceased, granted multiplier of 17, granted Rs.10,000/- towards medical expenses, granted Rs.5,000/- towards funeral expenses, Rs. 25,000/- as compensation for loss of love and affection and ultimately assessed the total compensation to be Rs. 7,28,500/-.

5. Learned counsel for the appellant has submitted that the amount deducted towards personal expenses should be one-fifth and not one-fourth. It is further submitted that income of Rs. 45,00/- p.m is on the lower side. Multiplier of 17 is on the lower side. He was young person of 35 years who had left behind him three daughters and a son, mother, father and his widow.

6. As against this, Shri Rajiv Ojha, learned counsel for the respondent-Insurance Company opposed the fact that deductions towards personal expenses should be one-third as the wife alongwith four children would have their own share as they are minor and the father who is alive would be looking after his wife, however, it is prudent to deduct one-fourth. It is further submitted that the quantum of compensation awarded by the Tribunal is just and proper and does not call for any interference by this Court.

7. As this appeal is of the year 2013. The learned counsel for the respondent requested that the matter be settled as per Pranay Shetty. The learned cousnel for the appellant who is holding brief refused to do

the same. Hence, this Court is obliged to decide this matter. The deceased was a worker in crusher machine, his income was not proved in the year of accident i.e 2009. This Court cannot accept that the amount of Rs. 6,000/- as his income in absence of any proof. However, the tribunal has committed an error in not adding 40% to his annual income as he was below 40 years of age.

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 i**n First Appeal From Order No. 1818 of 2012 (Bajaj Allianz General Insurance Co.Ltd. Vs. Smt. Renu Singh And Others)** decided on 19.7.2016 has held as under: :

"16. Negligence means failure to exercise required degree of care and caution expected of a prudent driver. Negligence is the omission to do something which a reasonable man, guided upon the considerations, which ordinarily regulate conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Negligence is not always a question of direct evidence. It is an inference to be drawn from proved facts. Negligence is not an absolute term, but is a relative one. It is rather a comparative term. What may be negligence in one case may not be so in another. Where there is no duty to exercise care, negligence in the popular sense has no legal consequence. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which would be reasonably foreseen likely to caused physical injury to person. The degree of care required, of course, depends upon facts in each case. On these broad principles, the negligence of drivers is required to be assessed.

17. It would be seen that burden of proof for contributory negligence on the part of deceased has to be discharged by the opponents. It is the duty of driver of the offending vehicle to explain the accident. It is well settled law that at intersection where two roads cross each other, it is the duty of a fast moving vehicle to slow down and if driver did not slow down at intersection, but continued to proceed at a high speed without caring to notice that another vehicle was crossing, then the conduct of driver necessarily leads to conclusion that vehicle was being driven by him rashly as well as negligently.

18. 10th Schedule appended to Motor Vehicle Act contain statutory regulations for driving of motor vehicles which also form part of every Driving License. Clause-6 of such Regulation clearly directs that the driver of every motor vehicle to slow down vehicle at every

intersection or junction of roads or at a turning of the road. It is also provided that driver of the vehicle should not enter intersection or junction of roads unless he makes sure that he would not thereby endanger any other person. Merely, because driver of the Truck was driving vehicle on the left side of road would not absolve him from his responsibility to slow down vehicle as he approaches intersection of roads, particularly when he could have easily seen, that the car over which deceased was riding, was approaching intersection.

19. In view of the fast and constantly increasing volume of traffic, motor vehicles upon roads may be regarded to some extent as coming within the principle of liability defined in Rylands V/s. Fletcher, (1868) 3 HL (LR) 330. From the point of view of pedestrian, the roads of this country have been rendered by the use of motor vehicles, highly dangerous. 'Hit and run' cases where drivers of motor vehicles who have caused accidents, are unknown. In fact such cases are increasing in number. Where a pedestrian without negligence on his part is injured or killed by a motorist, whether negligently or not, he or his legal representatives, as the case may be, should be entitled to recover damages if principle of social justice should have any meaning at all.

22. By the above process, the burden of proof may ordinarily be cast on the defendants in a motor accident claim petition to prove that motor vehicle was being driven with reasonable care or that there is equal negligence on the part the other side." emphasis added

11. The Apex Court in **Khenyei Vs. New India Assurance Company Limited & Others, 2015 LawSuit (SC) 469** has held as under:

"4. It is a case of composite negligence where injuries have been caused to the claimants by combined wrongful act of joint tort feasors. In a case of accident caused by negligence of joint tort feasors, all the persons who aid or counsel or direct or join in committal of a wrongful act, are liable. In such case, the liability is always joint and several. The extent of negligence of joint tort feasors in such a case is immaterial for satisfaction of the claim of the plaintiff/claimant and need not be determined by the by the court. However, in case all the joint tort feasors are before the court, it may determine the extent of their liability for the purpose of adjusting inter-se equities between them at appropriate stage. The liability of each and every joint tort feasor vis a vis to plaintiff/claimant cannot be bifurcated as it is joint and several liability. In the case of composite negligence, apportionment of compensation between tort feasors for making payment to the plaintiff is not permissible as the plaintiff/claimant has the right to recover the entire amount from the easiest targets/solvent defendant.

14. There is a difference between contributory and composite negligence. In the case of contributory negligence, a person who has himself contributed to the extent cannot claim compensation for the injuries sustained by him in the accident to the extent of his own negligence;whereas in the case of composite negligence, a person who has suffered has not contributed to the accident but the outcome of combination of negligence of two or more other persons. This Court in T.O. Anthony v. Karvarnan & Ors. [2008 (3) SCC 748] has held that in case of contributory negligence, injured

need not establish the extent of responsibility of each wrong doer separately, nor is it necessary for the court to determine the extent of liability of each wrong doer separately. It is only in the case of contributory negligence that the injured himself has contributed by his negligence in the accident. Extent of his negligence is required to be determined as damages recoverable by him in respect of the injuries have to be reduced in proportion to his contributory negligence. The relevant portion is extracted hereunder :

"6. 'Composite negligence' refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrong doers, it is said that the person was injured on account of the composite negligence of those wrong-doers. In such a case, each wrong doer, is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrong-doer separately, nor is it necessary for the court to determine the extent of liability of each wrong-doer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence of the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stands reduced in proportion to his contributory negligence.

7. Therefore, when two vehicles are involved in an accident, and one of the drivers claims compensation from the other driver alleging negligence, and the other driver denies negligence or claims that the injured claimant himself was negligent, then it becomes necessary to consider whether the injured claimant was negligent and if so, whether he was solely or partly responsible for the accident and the extent of his responsibility, that is his contributory negligence. Therefore where the injured is himself partly liable, the principle of 'composite negligence' will not apply nor can there be an automatic inference that the negligence was 50:50 as has been assumed in this case. The Tribunal ought to have examined the extent of contributory negligence of the appellant and thereby avoided confusion between composite negligence and contributory negligence. The High Court has failed to correct the said error."

18. This Court in Challa Bharathamma &Nanjappan (supra) has dealt with the breach of policy conditions by the owner when the insurer was asked to pay the compensation fixed by the tribunal and the right to recover the same was given to the insurer in the executing court concerned if the dispute between the insurer and the owner was the subject-matter of determination for the tribunal and the issue has been decided in favour of the insured. The same analogy can be applied to the instant cases as the liability of the joint tort feasor is joint and several. In the instant case, there is determination of inter se liability of composite negligence to the extent of negligence of 2/3rd and 1/3rd of respective drivers. Thus, the vehicle - trailor-truck which was not insured with the insurer, was negligent to the extent of 2/3rd. It would be open to the

insurer being insurer of the bus after making payment to claimant to recover from the owner of the trailor-truck the amount to the aforesaid extent in the execution proceedings. Had there been no determination of the inter se liability for want of evidence or other joint tort feasor had not been impleaded, it was not open to settle such a dispute and to recover the amount in execution proceedings but the remedy would be to file another suit or appropriate proceedings in accordance with law.

What emerges from the aforesaid discussion is as follows :

(i) In the case of composite negligence, plaintiff/claimant is entitled to sue both or any one of the joint tort feasors and to recover the entire compensation as liability of joint tort feasors is joint and several.

(ii) In the case of composite negligence, apportionment of compensation between two tort feasors vis a vis the plaintiff/claimant is not permissible. He can recover at his option whole damages from any of them.

(iii) In case all the joint tort feasors have been impleaded and evidence is sufficient, it is open to the court/tribunal to determine inter se extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint tort feasors is only for the purpose of their inter se liability so that one may recover the sum from the other after making whole of payment to the plaintiff/claimant to the extent it has satisfied the liability of the other. In case both of them have been impleaded and the apportionment/ extent of their negligence has been determined by the court/tribunal, in main case one joint tort feasor can recover the amount from the other in the execution proceedings.

(iv) It would not be appropriate for the court/tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of impleadment of other joint tort feasors. In such a case, impleaded joint tort feasor should be left, in case he so desires, to sue the other joint tort feasor in independent proceedings after passing of the decree or award." emphasis added

12. The latest decision of the Apex Court in **Khenyei Vs. New India Assurance Company Limited & Others, 2015 Law Suit (SC) 469** has laid down one further aspect about considering the negligence more particularly composite/contributory negligence. The deceased or the person concerned should be shown to have contributed either to the accident and the impact of accident upon the victim could have been minimised if he had taken care. In this case the deceased was not the author or the co-author of the accident. Hence, the oral prayer that deduction of 50% from the compensation be made is rejected.

13. This takes this Court to the issue of compensation. The Apex court decision in **Malarvizhi & Ors Vs. United India Insurance Company Limited and Another, 2020 (4) SCC 228 and United India Insurance Co. Ltd. Vs. Indiro0 Devi & Ors, 2018 (7) SCC 715. and in The Oriental Insurance Company Ltd. Vs. Mangey Ram and others, 2019 0 Supreme (All) 1067 and the recent judgment of the Apex Court in New India Assurance Company Vs. Urmila**

Shukla decided by the Apex Court on 6.8.2021 reported in MANU/SCOR/24098/2021 and Kirti and others vs oriental insurance company ltd reported in 2021(1) TAC 1It could not be culled out from record that on what basis, the Tribunal has deducted the pecuniary benefits from the income cannot be fathomed. The income of the deceased in the year of accident and looking to his profession can be considered to be Rs.45,00/- per month, 40% as future loss of income requires to be added in view of the decision of the Apex Court in **Pranay Sethi (Supra)**. Deduction should be 1/4th as he was 35 years as per the judgement of Sarla Verma & Others Vs. Delhi Transport Corporation and Another, 2009, Law Suit (SC) 613. As far as amount under the head of non-pecuniary damages are concerned, it should be Rs.70,000/- as non-pecuniary damages. As far as multiplier is concerned, it is 15 as his date of birth shows that he was about 35 and a half years.

14. Hence, the total compensation payable to the appellants is computed herein below:

i. Income Rs 45,00/-p.m

ii. Percentage towards future prospects : 40% namely Rs.18,00/-

iii. Total income : Rs. 45,00 + Rs. 18,00 = Rs.6300/-

iv. Income after deduction of 1/4th : Rs. 4,725/-

v. Annual Income : 4,725 x 12 = 56,700/-

vi. Multiplier applicable : 15

vii. Loss of dependency: Rs.56,700 x 15 = Rs.8,50,500/-

viii. Amount under non-pecuniary head : 70,000/-

ix. Total compensation : Rs. 9,20,500/-

15. As far as issue of rate of interest is concerned, it is maintained as granted by the tribunal as respondent wanted this settlement but it is adamancy of the counsel for the appellant that though these are parameters which are considered by the Insurance Company, he refused to settle and wanted the judgment on merits. It should be 6% from the date of filing of the petition till judgment and 5% thereafter as the matter is pending and record is also not before this Court.

16. In view of the above, the appeal is partly allowed. Oral cross are allowed and compensation is recalculated. Judgment and award passed by the Tribunal shall stand modified to the aforesaid extent. The respondent-Insurance Company shall deposit the amount within a period of 12 weeks from today with interest at the rate of 7% from the date of filing of the claim petition till the amount is deposited. The amount already deposited be deducted from the amount to be deposited. The Insurance Company will deposit the entire amount can have their right to recover the amount from owner and the Insurance Company of the other vehicle. As far as deceased is concerned, it is a case of composite negligence, hence, the amount cannot be deducted from the compensation awarded to the claimants who are the heirs of a non tort-feasor.

17. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansagori P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291** and this High Court in, total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/ owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount without producing the certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 **(Smt. Sudesna and others Vs. Hari Singh and another) and in First Appeal From Order No.2871 of 2016 (Tej Kumari Sharma v. Chola Mandlam M.S. General Insurance Co. Ltd.)** decided on 19.3.2021 while disbursing the amount.

18. This Court is thankful to both the learned Advocates for ably assisting this Court.

(2022)03ILR A884
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.03.2022

BEFORE

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

First Appeal From Order No. 1902 of 2010

Ranjeet Singh ...Appellant
Versus
The Oriental Insurance Co. & Anr. ...Respondents

Counsel for the Appellant:
Sri Nipun Singh

Counsel for the Respondents:
Sri Sushil Kumar Mehrotra

Civil Law - Motor Vehicle Act, 1988- 10th schedule-Final report not conclusive prove for vehicle not involved - Clause-6 of such Regulation clearly directs that the driver of every motor vehicle to slow down vehicle at every intersection or junction - court cannot dispense with proof of negligence altogether - rule of res-ipsa loquitor as a rule of evidence may be invoked in motor accident cases - matter is remanded to the Tribunal for deciding the issue of compensation only.

Appeal allowed. (E-9)

List of Cases cited:

1. Varinderjit Singh Vs Tajinder Singh & ors., 2008 (4) TAC 250 Punjab and Haryana

2. Devi Prasad Vs Zahur Khan, 2001 (2) TAC 419 Madhya Pradesh

3. Hanwar Lal Verma Vs Sharad Dholiya, 2007 ACJ 52

4. Kusum Lata & ors. Vs Satbir & ors., 2011 (2) Supreme 207

5. Saroj & ors. Vs Het Lal & ors., (2011) 1 SCC 388

6. Vimla Devi & ors. Vs National Insurance Co. Ltd. & ors., 2019 (133) ALR 768

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

1. Sri Nipun Singh appearing for the appellant and Sri S.K. Mehrotra for the respondents.

2. Once the owner admits before the Tribunal to dispose of the claim when it was not proved by the Insurance Company that they were in collusion, this is the main issue involved in this appeal.

3. The brief facts as culled out from the record are that the appellant met with an accident on 25.1.2007 at about 11:45 hrs. when he was driving the motorcycle along with his nephew and was travelling between Delhi to Ghaziabad and when he came near I.P.M. College and he entered the railway flyover, one unknown truck being driven rashly and negligently came on the wrong side and dashed with him. He sustained injuries and he had one of his put amputated. The truck could not be named as his nephew and he both were busy in getting him admitted into the hospital. On 29.1.2007 one of the witnesses came and conveyed to him the number of the truck being numbered as DL-01-GB-5913. The owner of the truck gave him some money so that he may not file criminal case. On notice being issued, the Insurance company appeared and filed their reply. The driver and owner accepted the accident having taken place but contended that the accident occurred due to negligence of the appellant herein.

4. The Tribunal framed about 4 issues and rejected the claim petition holding that it was not proved that the accident occurred with the truck in question. The Tribunal disbelieved PW-1, who is claimant and eye witness. Just because there is 2 days delay, the Tribunal on the basis that the police had filed the summary, it is not conclusively proved that the vehicle was not involved in the accident. The claimant was examined at Yashoda Hospital. PW2 - Subhash Kumar has been disbelieved. The F.I.R. categorically mentions about the truck. Just because the final report was filed will not conclusively prove that the vehicle was not involved. The Tribunal on surmises and conjectures disbelieved PW1 and PW2 only on the ground that there was a delay in filing the F.I.R. The written statement of the owner ought to have been looked into by the Tribunal before brushing aside the judgment and not relying on the authoritative pronouncements in ***Varinderjit Singh Vs. Tajinder Singh & others, 2008 (4) TAC 250 Punjab and Haryana, Devi Prasad Vs. Zahur Khan, 2001 (2) TAC 419 Madhya Pradesh, and Bhanwar Lal Verma Vs. Sharad Dholiya, 2007 ACJ 52.***

5. The appellant has challenged impugned award and decision dated 8.3.2010 on the following amongst grounds:

(i) The order passed by the Tribunal is illegal, arbitrary, without application of mind, cyclostyle manner and cannot be sustained in the eyes of law.

(ii) The court below has failed to consider, while passing the impugned order, that the owner of the vehicle/ respondent no.2 himself admitted that the accident took place by his vehicle.

(iii) There is no negligence on the part of the applicant and the accident took place due to negligence driving of the respondent no.2.

(iv) The court below has failed to consider, while passed the impugned order, that in the statement of PW-2 - Subhash Kumar, who is an eye witness of the

aforesaid accident supported the view taken by the appellant.

(v) At the time of accident the appellant is earning Rs.6,500/- per month by generalize and after the accident he got 70% disable and lost his earning capacity.

6. Learned Counsel Sri Nipun Singh has relied on the following decisions:-

(i) Kusum Lata and others Vs. Satbir and others, 2011 (2) Supreme 207;

(ii) Saroj and others Vs. Het Lal and others, (2011) 1 SCC 388; and

(iii) Vimla Devi and others Vs. National Insurance Company Limited and others, 2019 (133) ALR 768;

so as to contend that the petition has been dismissed by assigning reasons which are not germane.

7. It is submitted by Sri S.K. Mahrotra that the petition was rightly dismissed as the F.I.R. culminated into a report and there was no objection raised to that. The owner has colluded with the petitioners and, therefore, also there is no reason to not concur with the Tribunal. The owner did not stepped into the witness box. The Insurance company did not examine in person nor was the owner of the vehicle, which is alleged to be involved in the accident, put to any cross-examination as he did not appear before the Tribunal nor did the Insurance company examine him as its witness. The Tribunal dismissed the claim petition holding that it was not proved by cogent evidence that the accident occurred with the vehicle in question.

8. The evidence on record conclusively proves that the vehicle was involved in the accident. The findings of the Tribunal that the vehicle was not involved in the accident is perverse and against the tenet of evidence and deserves to be reversed. The findings of fact that the truck was not involved in the accident is absurd. The driver of the truck has nowhere stated that the vehicle was not involved in the accident. Filing of final report is not a conclusive proof in view of the judgment of V***arinderjit Singh Vs. Tajinder Singh & others, 2008 (4) TAC 250 Punjab and Haryana***. The Insurance company could not have summoned the owner and the driver and cross-examined them but nothing in evidence it has been brought on record that the vehicle was not brought on record. Just because protest petition was not filed, it does not mean that the vehicle was not involved in the accident. The judgment of Vastu Ram Vs. Anant Ram and others, reported in 1990 ACJ 323, Himanchal Pradesh of the High Court would apply to the facts of this case. An owner may not like to file protest petition as it would be in his favour. The claimant would not be even aware about whether he was summoned to file protest or not it has not been brought on record. The medical evidence speaks volume just because the doctor, who had treated the appellant, is not examined. It cannot be said that the vehicle was not involved. The Tribunal believes that the injuries were due to accident and, therefore, dismissing the claim petition is bad in the eye of law. There was amputation also and, therefore, it cannot be said that it was a planted vehicle.

9. As far as issue of contributory negligence is concerned as alleged by the appellant, I will have to consider the principles for deciding the negligence. 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.

10. 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.

11. 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.

12. 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.

13. 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.

14. 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 ACJ (SC) 1840).

15. 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 of driver of another vehicle.

16. We cannot concur with the learned Judge that it was not proved that the truck driver had not driven the truck rashly and negligently. The injuries suggest that the truck driver on the bridge was driving the vehicle rashly and negligently. Hence, the said issue is answered in the positive and in favour of the appellant. The appreciation of evidence as held by the Apex Court in the case of Kusum Lata, Saroj and Vimla Devi (supra) will not permit us to concur with the learned Tribunal. The finding is perverse. They have been decided by the Tribunal in favour of the appellant herein.

17. As far as issue nos. 2 and 3 are concerned, they have been decided by the Tribunal.

18. The appeal is allowed. The matter is remanded to the Tribunal for deciding the issue of compensation only and, therefore, presence of the claimants and the Insurance company will alone be necessary and they may be heard on the quantum of compensation to be awarded. The record be sent back to the Tribunal. The Tribunal to decide the matter within 8 weeks from today after hearing the Counsel for the Insurance company and the Counsel for the claimants. No fresh evidence is required in the matter.

(2022)03ILR A888
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.02.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE VIVEK VARMA, J.

First Appeal From Order No. 2063 of 2011

Smt. Raj Kumari & Anr. ...Appellants
Versus
Sri Surendra Kumar & Anr. ...Respondents

Counsel for the Appellants:
Anju Shukla, Sri Nigmendra Shukla, Sri Anuj Shukla

Counsel for the Respondents:

Civil Law - Motor Vehicle Act, 1988 - Quantum of compensation awarded - deceased - a student of B.D.S. 1st year, -income be at least Rs.10,000/- per month - applicable multiplier would be 18 - Rs. 1,00,000/- for non pecuniary damages - -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.

Appeal partly allowed. (E-9)

List of Cases cited:

1. Sakti Devi Vs New India Assurance Co. Ltd. reported in 2010 (1) TAC page 4
2. Smt. Meena Pawaia & ors.Vs Ashraf Ali & ors. 2021 0 Supreme (SC) 694

3. Santosh Devi Vs National Insurance Co. Ltd. (2012) 6 SCC 421

4. National Insurance Co. Limited Vs Pranay Sethi & ors., AIR 2017 (SC) 5157

5. Reshma Kumari Vs Madan Mohan, (2013) 9 SCC 65

6. Sarla Verma Vs Delhi Transport Corporation, (2009) 6 SCC 121

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

8. A.Vs Padma Vs Venugopal, Reported in 2012 (1) GLH (SC), 442

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

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

1. As per office report dated 10.09.2019, notice dispatched to the respondent nos.1 and 2 by registered post AD has been returned undelivered. It is also reported that as sufficient period has elapsed from the date of issuance of notice, hence service of notice upon respondent nos. 1 and 2 is deemed sufficient in view of Chapter VIII Rule 12 of the High Court Rules.

2. Heard Sri Anuj Shukla and Sri Nigmendra Shukla, learned counsels for the appellants and perused the record.

3. This appeal, at the behest of the claimants, challenges the judgment and award dated 28.01.2011 passed by the Motor Accident Claims Tribunal/Additional District Judge, Court No.9, Bulandshahr (hereinafter referred to as 'Tribunal') in M.A.C. Case No. 73 of 2006 awarding a sum of Rs.1,52,000/- as compensation with interest at the rate of 6%.

4. The accident is not in dispute. The issue of negligence decided by the Tribunal is also not in dispute. The only issue to be decided is the quantum of compensation awarded.

5. It is submitted by learned counsel for the appellant that the deceased was 21 years of age at the time of accident and was a student of BDS first year. The Tribunal has considered the income of deceased to be Rs.15,000/- per annum. The Tribunal deducted 1/3 towards personal expenses, considered the dependency as Rs. 10,000/- per annum, granted multiplier of 15 and added Rs. 2,000/- towards funeral expenses. The Tribunal on the basis of above calculation granted Rs.1,52,000/- to the claimants. The decision in the case of ***Sakti Devi Vs. New India Assurance Co. Ltd. reported in 2010 (1) TAC page 4*** has been relied upon by the Tribunal and that is why the Tribunal has come to the conclusion that income of the deceased can

be considered to be Rs. 15,000/- per annum. The said view cannot stand scrutiny by this Court is the submission of learned counsel for the appellants.

6. In support of his submission, learned counsel for the appellants has relied upon a decision of the Supreme Court in the case of ***Smt. Meena Pawaia & others Vs. Ashraf Ali and others 2021 0 Supreme (SC) 694*** wherein the Apex Court has considered the income of the deceased who was in the age group of 21-22 years and was 3rd year student in civil engineering to be Rs. 10,000/- per month, even under the Minimum Wages Act in the year 2012 and granted the amount under the head of future rise in income, though the income was considered to be on notional side. The Apex Court after considering the judgment of ***Santosh Devi Vs. National Insurance Co. Ltd. (2012) 6 SCC 421, National Insurance Company Limited Vs. Pranay Sethi and others, AIR 2017 (SC) 5157, Reshma Kumari Vs. Madan Mohan, (2013) 9 SCC 65 and Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121,*** added 40% towards future loss of income of the deceased.

7. It is further submitted by learned counsel for the appellants that the multiplier, amount loss of income and the interest awarded by the Tribunal are on the lower side and are required to be enhanced in view of the above decisions of the Apex Court.

8. Having heard the learned counsel for the appellant and considered the decisions of the Apex Court, we are of the view that the income of the deceased who was a student of B.D.S. 1st year, would be at least Rs.10,000/- per month. To which, as the deceased was below 40 years of age, 40% should be added towards future loss of income of the deceased. As the deceased was bachelor and had mother and father, he would be spending 50% of the said amount for his personal expenses hence, deduction towards personal expenses of the deceased would be 1/2 and not 1/3rd as has been done by the Tribunal. The multiplier of 15 applied by the Tribunal on the basis of age of the parents is bad, as it should be on the basis of the age of the deceased who was in the age bracket of 21-25 years. Hence, the applicable multiplier would be 18. We are supported in our view by the decision of the Apex Court in **Smt. Meena Pawaiwa (Supra)**. The Tribunal added only Rs. 2000/- and has not granted any amount under the head of Funeral and consortium to the parents. We see no reason why the principle enunciated by the Apex Court in **Smt. Meena Pawaia (supra) and Pranay Sethi (supra)** should not be made applicable wherein the Apex Court has granted Rs.70,000/- towards non pecuniary damages. We grant Rs.70,000/- towards non pecuniary damages on which the claimants shall also be entitled to 10% rise in every three years as held by the Apex Court in **Pranay Sethi (Supra)** and, therefore, we make the figure to Rs. 1,00,000/- for non pecuniary damages.

9. Hence, the total compensation payable to the appellants is computed herein below:

i. Income: Rs.10,000/-

ii. Percentage towards future prospects : 40% namely Rs.4000/-

iii. Total income : Rs.10,000 + 4000 = Rs.14,000/-

iv. Income after deduction of 1/2 towards personal expenses : Rs.7,000/-

v. Annual income : Rs.7,000 x 12 = Rs.84,000/-

vi. Multiplier applicable : 18

vii. Loss of dependency: Rs.84,000 x 18 = Rs.15,12,000/-

viii. Amount under non pecuniary heads : Rs.1,00,000/-

ix. Total compensation : Rs.16,12,000/-

10. 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."

11. No other grounds are urged orally when the matter was heard.

12. In view of the above, the appeal is partly allowed. Judgment and decree passed by the Tribunal shall stand modified to the aforesaid extent. The respondent-Insurance Company shall deposit the amount within a period of 12 weeks from today with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited. The amount already deposited be deducted from the amount to be deposited. Record be transmitted to Tribunal.

13. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of **A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442,** the order of investment is not passed because applicants /claimants are neither illiterate or rustic villagers.

14. 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.

15. Fresh Award be drawn accordingly in the above petition by the tribunal as per the modification made herein. The Tribunals in the State shall follow the direction of this Court as herein aforementioned as far as disbursement is concerned, it should look into the condition of the litigant and the pendency of the matter and judgment of **A.V. Padma (supra).** The same is to be applied looking to the facts of each case.

16. This Court is thankful to both the counsels for getting this old matter decided.

(2022)03ILR A892
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.02.2022

BEFORE

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

First Appeal From Order No.2629 of 2005

Smt. Mushtari Begum & Ors. ...Appellants
Versus
National Insurance Company Ltd. & Ors. ...Respondents

Counsel for the Appellants:
Sri Arun Prakash, Sri Ram Singh

Counsel for the Respondents:

Civil Law - Motor Vehicle Act, 1988 - Appeal for enhancement – amount for loss of consortium and for funeral expenses- are on very lower side - it is admitted fact that the age of the deceased was 40 years - his assessed income is on lower side - Tribunal has not added any percentage of amount towards future loss of income - grave error - rate of interest as 7.5%.

Appeal partly allowed. (E-9)

List of Cases cited:

1. Mushtari Begum & ors. Vs Kamla Shankar & ors. M.A.C.P. No. 308 of 1999

2. National Insurance Company Vs Pranay Sethi [2014 (4) TAC 637 (SC)

3. Sarla Verma & ors. Vs Delhi Transport Corporation & anr., 2009 Lawsuit (SC) 613

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

5. Smt. Hansagori P. Ladhani Vs The Oriental Insurance Company Ltd., [2007(2) GLH 291]

6. Smt. Sudesna & ors. Vs Hari Singh & anr. Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001

7. Tej Kumari Sharma Vs Chola Mandlam M.S. General Insurance Co. Ltd. First Appeal From Order No.2871 of 2016

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

1. This appeal has been preferred by the claimants-appellants against the judgment and award dated 19.07.2005 passed by Motor Accident Claims Tribunal/Additional District Judge, Court No.1, Azamgarh (hereinafter referred to as "Tribunal') in M.A.C.P. No. 308 of 1999 (Mushtari Begum and others Vs. Kamla Shankar and others), whereby the learned Tribunal has awarded a sum of Rs.3,67,000/- as compensation to the claimants with interest at the rate of 6% per annum.

2. The claimants-appellants have preferred this appeal for enhancement of quantum.

3. The brief facts of the case are that claimants-appellants filed a Motor Accident Claim Petition before the Tribunal for claiming the compensation under Motor Vehicles Act, 1988 for the death of Rijwan @ Machhan in a road accident with the averments that on 16.08.1999 the deceased was going from his house to his brick-kiln in Azamgarh by car bearing no. U.P. E 928 at 10:20 AM, when he reached village Alipur within the jurisdiction of Tehsil Sagri, a bus bearing no. U.P. 53 A 6885 was coming from opposite direction, which was being driven very rashly and negligently by its driver. The aforesaid bus being driven in such a manner dashed the deceased's car. In this accident, deceased sustained very serious injuries and died on the way to hospital.

4. Aggrieved mainly with the compensation awarded, the appellants preferred this appeal.

5. Heard learned counsel for the parties and perused the record.

6. The accident is not in dispute. The Oriental Insurance Company Limited (hereinafter referred to as "Insurance Company') has not challenged the liability on it. Now the only issue to be decided is the quantum of compensation awarded by the Tribunal. As no other argument was advanced by any of the parties when the matter was heard, the details of case except for deciding the compensation are not being narrated.

7. Learned counsel for the appellants-claimants has submitted that the the age of the deceased was 40 years at the time of accident. He was owner of brick-kiln and having agriculture farm also. It is also submitted that income of the deceased was not less than Rs.5,000/-per month but learned Tribunal has assessed his income only Rs.3,000/- per month, which is on the lower side. It is next submitted that learned Tribunal has not awarded any sum towards future loss of income and has deducted 1/3rd towards personal expenses of the deceased while deceased has left seven dependents, hence deduction towards personal expenses should have been 1/5th of the income.

8. Learned counsel for the appellants-claimants did not disagree with the multiplier of 15 as applied by the learned Tribunal but it is contended that learned Tribunal has awarded only Rs. 5,000/- towards loss of consortium and Rs.2,000/- for funeral expenses, which are on very lower side. No other argument was placed by the appellants-claimants on the issue of amount of compensation.

9. Learned counsel for the Insurance Company vehemently opposed the arguments placed by the appellants and submitted that learned Tribunal has not committed any error or illegality in fixing the compensation. Tribunal has made correct assessment of income of the deceased and sufficient compensation has been awarded in accordance with law. Hence, it needs no interference by this Court.

10. Perusal of record shows that it is admitted fact that the age of the deceased was 40 years at the time of accident but learned Tribunal has assessed his income Rs. 3,000/ per month-, which is on lower side. Keeping in view of the fact that deceased was brick-kiln owner and having agriculture income also, we assess the monthly income of the deceased as Rs.5,000/- per month i.e. Rs.60,000/- per annum.

11. The Tribunal has not added any percentage of amount towards future loss of income, which, in our opinion, is grave

error. Since, the deceased will fall within the category of self-employed and his age was 40 years at the time of accident, 25% 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)***. As the number of dependents is seven, 1/5 will be deducted for personal expenses of the deceased. The age of the deceased was 40 years, therefore, as per judgement of Hon'ble the Apex Court in Sarla Verma and others Vs. Delhi Transport Corporation and another, 2009 Lawsuit (SC) 613, multiplier of 15 shall be applied. Tribunal has awarded only 5,000/- for loss of consortium and Rs.2,000/- for funeral expenses, which are on very lower side. According to the judgement of the *Apex Court* ***Pranay Sethi (supra) and Sarla Verma (supra),*** appellants shall be entitled to get Rs.15,000/- towards funeral expenses and Rs.15,000/- towards loss of estate. Apart from it, the wife of the deceased shall be entitled to get Rs.40,000/- for loss of consortium with increase of 10% every three years. Hence, we grant Rs.1,00,000/- under non-pecuniary head.

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

(i) Annual Income : 60,000/- Per annum (Rs.5,000 X 12)

(ii) Percentage towards future prospects 25% : Rs. 15,000/-

(iii) Total income : Rs. 60,000/- + Rs.15,000/- = Rs. 75,000/-

(iv) Income after deduction 1/5th : Rs.60,000/-

(v) Multiplier applicable : 15

(vi) Loss of Dependency : Rs. 60,000 X 15 = Rs.9,00,000/-

(vii) Amount under non pecuniary head : Rs.1,00,000/-

(ix) Total compensation : Rs.9,00,000 + 1,00,000/- = Rs.10,00,000/-

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. 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.

15. In view of the above, the appeal is **partly allowed**. Judgment and award passed by the Tribunal shall stand modified to the aforesaid extent. The respondent-Insurance Company. shall deposit the amount within a period of 08 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.

16. 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)03ILR A895
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.01.2022

BEFORE

THE HON'BLE J.J.MUNIR, J.

First Appeal From Order No. 2705 of 2015

Jiuti Devi & Ors. ...Appellants
Versus
Manoj Kumar Rai & Ors. ...Respondents

Counsel for the Appellants:
Sri Shrawan Kumar Ojha, Sri Hemant Kumar

Counsel for the Respondents:
Sri Pranjal Mehrotra, Sri Pawan Kumar Mishra

Civil Law - Motor Vehicle Act, 1988- Seeking enhancement– Tribunal held a multiplier of 'Five' would apply - first to be encountered is the age of the deceased - Rs.40,000/- towards spousal consortium shall be set apart and paid exclusively to Smt. Jiuti Devi - 70% whereas the balance 30% shall be divided equally amongst claimant-appellant nos. 2, 3 and 4 - compensation to be distributed amongst the claimant-appellants.

Appeal partly allowed. (E-9)

List of Cases cited:

1. Ramachandrappa Vs Manager, Royal Sundaram Alliance Insurance Co. Ltd. (2011) 13 SCC 236

2. Sarla Verma (Smt) & ors. Vs Delhi Transport Corporation & anr. (2009) 6 SCC 121

3. National Insurance Co. Ltd. Vs Pranay Sethi & ors. (2017) 16 SCC 680

4. United India Insurance Co. Ltd. Vs Satinder Kaur @ Satwinder Kaur & ors. 2020 SCC OnLine SC 410

5. General Manager, Kerala S.R.T.C., Trivandrum Vs Susamma Thomas, (1994) 2 SCC 176

6. U.P.S.R.T.C. Vs Trilok Chandra, (1996) 4 SCC 362

7. New India Assurance Co. Ltd. Vs Charlie, (2005) 10 SCC 720

8. Reshma Kumari Vs Madan Mohan, (2013) 9 SCC 65 : (2013) 4 SCC (Civ) 191 : (2013) 3 SCC (Cri) 826

9. Puttamma Vs K.L. Narayana Reddy, (2013) 15 SCC 45 : (2014) 4 SCC (Civ) 384 : (2014) 3 SCC (Cri) 574

10. Rajesh Vs Rajbir Singh, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149

11. Santosh Devi Vs National Insurance Co. Ltd., (2012) 6 SCC 421 : (2012) 3 SCC (Civ) 726 : (2012) 3 SCC (Cri) 160 : (2012) 2 SCC (L&S) 167

12. Jagmala Ram Vs Sohi Ram, 2017 SCC OnLine Raj 3848 : (2017) 4 RLW 3368

13. Uttarakhand High Court in Rita Rana Vs Pradeep Kumar, 2013 SCC OnLine Utt 2435 : (2014) 3 UC 1687

14. Lakshman Vs Susheela Chand Choudhary, 1996 SCC OnLine Kar 74 : (1996) 3 Kant LJ 570

15. National Insurance Co. Ltd. (To be represented by Senior Divisional Manager) Vs Pratibha Das & ors. 2021 SCC OnLine Tri 226

(Delivered by Hon'ble J.J. Munir, J.)

1. This is an Appeal by the claimants, seeking enhancement of the award made by the Motor Accidents Claims Tribunal/ District Judge, Ballia in M.A.C.P. No.21 of 2015.

2. The appellants, who shall hereinafter be referred to as 'the claimants', are the widow and the three sons of the late Hira Lal, who died in a motor accident on 24.01.2015. The Tribunal has thought that looking to the age of Hira Lal and his station in life, that serve as the index of his income, the claimants are entitled to a compensation of Rs.1 lakh alone. The claimants feel that the compensation awarded is atrociously low and have, therefore, appealed the Tribunal's award through the present Appeal under Section 173 of the Motor Vehicles Act, 19881.

3. The facts giving rise to the Appeal, in some detail, are these:

On 24.01.2015, Hira Lal had left home for some kind of a pathological test along with a relative. He was buying at the greengrocer's, who had put up shop by the roadside at Nagra Road, Ballia. A truck, bearing registration No. UP-61J-7671, driven rashly and negligently by Yogendra Kushwaha, respondent no.3, was proceeding from Belthra towards Rasra. The greengrocer's shop was located on the western pavement of the road, where the deceased and his relative were buying vegetables. The rashly driven truck hit the deceased. In consequence of the injuries sustained, Hira Lal died on the spot. Hira Lal is survived by the claimants, where Jiuti Devi is his widow, whereas Laxmikant Chauhan, Jagdish Chauhan and Ramesh are his sons. The sons are all adults. The deceased was self-employed as a casual labourer, and according to the claimants, he earned a sum of Rs.250/- per day, which would work out to a figure of Rs.7500/- per month. The claimants say that they have lost their dependency to the extent of the income that the deceased contributed to the household. The claimants, therefore, petitioned the Tribunal under Section 166 of the Act, seeking compensation in the sum of Rs.15 lakhs.

4. Manoj Kumar, respondent no.1, is the owner of the offending vehicle, that was driven by Yogendra Kushwaha. Manoj Kumar Rai is respondent no.1 to this Appeal. The Chola MS General Insurance Company Limited, Marie Gold Road, Hazratganj, Lucknow are the insurers of the offending vehicle and they have been impleaded to this appeal, like the claim petition, through the Manager of the Insurance Company as respondent no.2.

The Manager, Chola MS General Insurance Company Limited, Marie Gold Road, Hazratganj, Lucknow, respondent no.2 to this Appeal, shall hereinafter be referred to as 'the insurers'. Manoj Kumar Rai, respondent no.1, shall hereinafter be referred to as the owner, whereas Yogendra Kushwaha shall be called 'the driver'.

5. The owner and the insurers filed their separate written statements, denying the factum of involvement of the offending truck in the accident.

6. The Tribunal, on the pleadings of parties, framed the following issues:

"1- Whether on 24-01-2015 at about 01.00, P.M. in Nagra market, P.S. Nagra, District Ballia, an accident took place due to rash and negligent driving of vehicle Truck bearing Registration No. UP-61 J-7671, in which, Hira Lal Chauhan sustained injuries and died? If so, its effect?

2- Whether the driver of the offending vehicle No. UP-61 J-7671 was not having a valid and effective driving licence at the time of accident? If so, its effect?

3- Whether the aforesaid vehicle bearing Registration No. UP-61 J-7671 was not validly and effectively insured with opposite party No. 2, Chola Mandalam M/S General Insurance Co. Ltd.? If so, its effect?

4- Whether the aforesaid vehicle was not being plied under the terms and conditions of insurance policy? If so, its effect?

5. To what amount of compensation, are the petitioners entitled? And from whom?"

7. Issue Nos.1 to 4 have been answered in favour of the claimants and against the respondents. There is no dispute about these issues in the present Appeal, that is confined to the quantum of compensation, subject matter of Issue No.5.

8. The Tribunal allowed the claim in part, granting a total compensation of Rs.1 lakh with interest at the rate of 6% *per annum*, payable from the date of institution of the petition until realization.

9. Aggrieved, the claimants have appealed the Tribunal's award, seeking enhancement of the compensation to the figure claimed, that is, Rs.15 lakhs.

10. Heard Mr. Hemant Kumar, Advocate along with Mr. S.K. Ojha, learned Counsel for the claimants and Mr. Pawan Kumar Mishra, Advocate holding brief of Mr. Pranjal Mehrotra, learned Counsel for the insurers. The impugned award and the record have been perused.

11. A perusal of the impugned award shows that the Tribunal has taken note of the fact that the deceased's age, pleaded by the claimants, is 55 years and coalesces with the opinion of the autopsy Doctor. The Tribunal has then taken into consideration the evidence of Jiuti Devi in her cross-examination on 20.05.2015, where she has said that her elder son, Laxmikant is aged about 40 years. The Tribunal has accepted the age of the deceased's elder son as 40 years and, on the basis of that fact, has opined that it is impossible that a son would have been born to the deceased at the age of 15 years. It has been remarked that it appears that in order to maximize compensation, the deceased's age has been understated. It is also concluded by the Tribunal that the circumstances show that

at the time of death, the deceased was aged 60 years or more. It has then been opined that going by that age, it is difficult to accept that the deceased's income can be anything more than Rs.3000/- per month. It has been concluded that bearing in mind the deceased's age, it would be just to assess his income at a figure of Rs.75/- per day. The monthly income has, therefore, been assessed at a figure of Rs. 2,250/- and the annual income a sum of Rs.27,000/-. Making allowance for a deduction of 1/3rd on personal expenditure, the Tribunal has held that the claimants' annual dependency is Rs.18,000/-. The Tribunal has also opined that the three sons being adults, the sole dependent is the widow.

12. Based on the aforesaid parameters, the Tribunal has resorted to the Second Schedule, appended to the Act framed under Section 163-A, and on the basis of that Schedule, held that the deceased being in the age bracket of 60-65 years, a multiplier of 'Five' would apply. Applying the multiplier of 'Five' to the annual dependency of Rs.18,000/-, a substantive compensation of Rs.90,000/- has been determined. In addition, Rs.5000/- has been awarded towards funeral expenses and Rs.5000/- towards loss of consortium. Thus, adding to the substantive compensation of Rs.90,000/-, a sum of Rs.10,000/- awarded under the non-pecuniary heads, a total compensation of Rs.1,00,000/- has been awarded by the Tribunal, that would carry an annual interest of 6% from the date of presentation of the claim petition.

13. Criticizing the aforesaid quantification of compensation, Mr. Hemant Kumar submits that the sum of Rs.1,00,000/- awarded for the accidental death of an adult and a productive person is too inadequate. He submits that going by the decision of the Supreme Court in **Ramachandrappa v. Manager, Royal Sundaram Alliance Insurance Co. Ltd.2,** some amount of guesswork is involved to assess the daily income of a casual labourer, which has to be done by resort to ground realities of wages at the relevant point of time. It is submitted that their Lordships of the Supreme Court in **Ramachandrappa** opined that a coolie or a casual labourer must be held to earn a wage of Rs.100 - 150/- per day or Rs.4500/- per month. It is pointed out that the accident involved in Ramachandrappa related to the year 2004 and going by the ground realities prevalent at that time, it was opined that the daily-wage earned by a casual labourer was Rs.100 - 150/- per day. Here, the accident is one that occurred in the year 2015. It is urged that the rise in price index and in daily wages cannot, therefore, be ignored. He submits that a wage of Rs. 250/- per day is a modest assessment, based on a truthful account of what the deceased was earning at the time of the fateful accident. To assess the deceased's income at Rs. 75/- per day, it is submitted by Mr. Hemant Kumar, is perverse.

14. It is also argued by the learned Counsel for the claimants that deduction on account of money spent by the deceased on himself should be fixed at 1/4th of the income instead of 1/3rd, since the family members of the deceased or the claimants were four. Learned Counsel has relied upon the decision of the Supreme Court in **Sarla Verma (Smt) and others v. Delhi Transport Corporation and another3** to submit that where family members of the deceased are 4-6 in number, the deduction on account of expenditure by the deceased on himself should be 1/4th and not 1/3rd.

Reliance has also been placed on the decision of the Supreme Court in **National Insurance Co. Ltd. v. Pranay Sethi and others4** and **United India Insurance Co. Ltd. v. Satinder Kaur alias Satwinder Kaur and Others5** to the same end.

15. It is also argued by the learned Counsel for the claimants that the multiplier to be applied, according to the decision in **Sarla Verma** *(supra)*, would be 'Eleven', going by the age of the deceased, that was in the age bracket of 51-55 years. It is emphasized that in the postmortem report, the deceased was opined to be 55 years old at the time of accident. The conclusion of the Tribunal, that the deceased was aged above 60 years, is based on pure conjecture. It is urged that the multiplier of 'Five' in any case cannot be applied.

16. It is next submitted by the learned Counsel for the claimants that the deceased being self-employed and in the age group of 50-60, is entitled to award of compensation towards future prospects to the extent of 10% of his income as held in **United India Insurance Co. Ltd. v. Satinder Kaur alias Satwinder Kaur** *(supra)*. The Tribunal, in not awarding future prospects or even considering that, has committed a manifest of law. It is submitted that the award is also grossly flawed, inasmuch as the Tribunal has much underestimated the loss of consortium to the widow and not paid anything to the sons, who too would be entitled to consortium, relying on the decision in **United India Insurance Co. Ltd. v. Satinder Kaur alias Satwinder Kaur.** It has been held that each of the dependents would be entitled to Rs.40,000/- towards loss of consortium, that would aggregate to a figure of Rs.40,000 X 4 = Rs.1,60,000/-. Funeral expenses, again, have been assessed miserably low. The decision of their Lordships of the Supreme Court under reference lays down a figure of Rs.15,000/- towards funeral expenses, whereas Rs.5,000/- has been awarded. It is also submitted that nothing has been awarded towards loss of estate.

17. Mr. Pawan Kumar Mishra, learned Counsel for the insurers, submits that the deceased was a low earning member of the society in the twilight years of his life. It cannot be said that he was much in the productive phase of it. Three of the claimants were, in no way, dependent on the deceased, that is to say, the three adult sons. The widow alone can be classed as a dependent. It is submitted further by Mr. Mishra that loss of consortium would not be available for the adult sons, if the principles in **United India Insurance Co. Ltd. v. Satinder Kaur alias Satwinder Kaur** are to be understood for what they mean on the issue. The income of the deceased and the multiplier have been correctly applied by the Tribunal and the award does not merit any interference.

18. The basic parameters, on which assessment of just compensation payable to the dependents of a deceased is to be made in the case of a motor accident, have been laid down by the Supreme Court in **Sarla Verma** *(supra)*. In **Sarla Verma**, it has been held:

"18. Basically only three facts need to be established by the claimants for assessing compensation in the case of death:

(a) age of the deceased;

(b) income of the deceased; and

(c) the number of dependants.

The issues to be determined by the Tribunal to arrive at the loss of dependency are:

(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.

If these determinants are standardised, there will be uniformity and consistency in the decisions. There will be lesser need for detailed evidence. It will also be easier for the insurance companies to settle accident claims without delay.

19. To have uniformity and consistency, the Tribunals should determine compensation in cases of death, by the following well-settled steps:

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 5000 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 5000 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."

19. It must be said here that the basic principles for determining just compensation, payable to the dependents of a fatal motor accident victim, are ones lay down above, with modification over time regarding the sum relating to future prospects in case of self-employed persons and figures that are to be awarded under non-conventional heads. Further, non-conventional heads have been streamlined

by their Lordships of the Supreme Court in subsequent authorities. These will be spoken of a little later in this judgment.

20. Going by the parameters for the determination of compensation, the first to be encountered is the age of the deceased. The deceased's wife has said clearly in her testimony that her husband was aged 55 years at the time of accident. This assertion by the wife of the deceased finds corroboration by opinion evidence of a medical expert, that is mentioned in the postmortem report. The Tribunal has undertaken an exercise in relative age determination between the eldest son and the father to disbelieve the evidence of the deceased's wife as well as the doctor's opinion about the deceased's age. The reasoning adopted by the Tribunal is based on some strained logic. For one, it proceeds to assume that the deceased's wife, in her testimony, has accurately described her son's age as '40 years'. It is a case, where there are no educational records of parties nor other document to shed light on the son's age or that of the deceased.

21. This Court has perused the testimony of APW-1, Smt. Jiuti Devi. Apparently, she is an illiterate woman, who has thumb marked her testimony. Therefore, the estimation of her eldest son's age at about 40 years has to be taken with a margin of error. This is particularly so as the witness's age, given in her particulars on the record of her evidence, mentions her as aged 50 years. It is, indeed, impossible to accept that the mother and the son would be just 10 years apart in age, even in a rural Indian setting. To the contrary, it is not that unlikely, given the background of parties, that a father and son could be 15, 16 or 17 years apart or a little more. The likelihood is that the eldest son was younger than 40 at the relevant time. This is particularly so, as the assertion about the deceased's age by his wife finds corroboration by the Doctor's opinion evidence. On the other hand, the statement of APW-1 about her son's age is without the basis of a document or an expert estimation to corroborate. Therefore, to disbelieve the assertion about the deceased's age by APW-1, corroborated by medical opinion, would not be correct. Even if there is some doubt of a slight difference in the deceased's age than that stated and opined, the Act being a beneficial legislation, the doubt must be resolved in favour of the claimants. In the opinion of this Court, therefore, the Tribunal has erred in holding the deceased to be aged 60 years or more. This Court finds and holds that the deceased was aged 55 years.

22. The second fundamental parameter, on which compensation is to be assessed, is the income of the deceased. The Tribunal has opined it to be Rs. 75/- per day, going more by an ipse dixit that considering the deceased's age, he would have earned no more in wage than Rs.75/- a day. The accident is one that took place in the year 2015. Regarding the principle about determining income of a casual labourer, the Supreme Court in **Ramachandrappa** *(supra)* has observed :

"13. In the instant case, it is not in dispute that the appellant was aged about 35 years and was working as a coolie and was earning Rs 4500 per month at the time of the accident. This claim is reduced by the Tribunal to a sum of Rs 3000 only on the assumption that the wages of a labourer during the relevant period viz. in the year 2004, was Rs 100 per day. This assumption in our view has no basis. Before the Tribunal, though the Insurance Company

was served, it did not choose to appear before the court nor did it repudiate the claim of the claimant. Therefore, there was no reason for the Tribunal to have reduced the claim of the claimant and determined the monthly earning to be a sum of Rs 3000 per month. Secondly, the appellant was working as a coolie and therefore, we cannot expect him to produce any documentary evidence to substantiate his claim. In the absence of any other evidence contrary to the claim made by the claimant, in our view, in the facts of the present case, the Tribunal should have accepted the claim of the claimant.

14. We hasten to add that in all cases and in all circumstances, the Tribunal need not accept the claim of the claimant in the absence of supporting material. It depends on the facts of each case. In a given case, if the claim made is so exorbitant or if the claim made is contrary to ground realities, the Tribunal may not accept the claim and may proceed to determine the possible income by resorting to some guesswork, which may include the ground realities prevailing at the relevant point of time.

15. In the present case, the appellant was working as a coolie and in and around the date of the accident, the wage of a labourer was between Rs 100 to Rs 150 per day or Rs 4500 per month. In our view, the claim was honest and bona fide and, therefore, there was no reason for the Tribunal to have reduced the monthly earning of the appellant from Rs 4500 to Rs 3000 per month. We, therefore, accept his statement that his monthly earning was Rs 4500." (Emphasis by Court)

23. No doubt, **Ramachandrappa** was a case relating to a much younger man, who was working as a coolie. Moreover, it was not a fatal accident. But, the principle about estimating the monthly income of a casual labourer in the said decision would apply. **Ramachandrappa** was decided relating to an accident that took place some time in the year 2004. At that time, taking into account the ground realities, the daily income of a casual labourer was accepted by their Lordships to be in the range of Rs.100-150/- per day. The accident here took place in the year 2015. This Court is in agreement with Mr. Hemant Kumar, learned Counsel for the claimants, that considering the rising price index and the corresponding increase in wages, a daily-wage of Rs.250/- per day asserted by the claimants is, in no way, unbelievable. To the contrary, reckoning the ground realities, which this Court, as a Court of Appeal on facts and law, is as competent as the Tribunal to determine, it is held that the deceased would have earned a daily-wage of Rs. 250/-, contemporaneous in time to the accident. The finding of the Tribunal, that the deceased was working at a wage of Rs. 75/- per day, is indeed perverse. The said finding is set aside and it is held that the deceased had a daily income of Rs. 250/-, which would work out to a sum of Rs.7500/- per month.

24. The third parameter, on which the substantive compensation is to be determined, is the number of dependents. This parameter comes to the fore in determining what deduction is to be allowed for the personal expenses of the deceased. It has been argued here that the deceased had a family of four, including his widow and three sons and, therefore, the deduction towards personal expenses ought to have been a fraction of one-fourth; not one-third. This submission is, again, inspired by the observations of their

Lordships of the Supreme Court in **Sarla Verma** (supra), where it has been held :

"30. Though in some cases the deduction to be made towards personal and living expenses is calculated on the basis of units indicated in Trilok Chandra [(1996) 4 SCC 362] , the general practice is to apply standardised deductions. Having considered several subsequent decisions of this Court, we are of the view that where the deceased was married, the deduction towards personal and living expenses of the deceased, should be one-third (1/3rd) where the number of dependent family members is 2 to 3, one-fourth (1/4th) where the number of dependent family members is 4 to 6, and one-fifth (1/5th) where the number of dependent family members exceeds six.

31. Where the deceased was a bachelor and the claimants are the parents, the deduction follows a different principle. In regard to bachelors, normally, 50% is deducted as personal and living expenses, because it is assumed that a bachelor would tend to spend more on himself. Even otherwise, there is also the possibility of his getting married in a short time, in which event the contribution to the parent(s) and siblings is likely to be cut drastically. Further, subject to evidence to the contrary, the father is likely to have his own income and will not be considered as a dependant and the mother alone will be considered as a dependant. In the absence of evidence to the contrary, brothers and sisters will not be considered as dependants, because they will either be independent and earning, or married, or be dependent on the father.

32. Thus even if the deceased is survived by parents and siblings, only the mother would be considered to be a dependant, and 50% would be treated as the personal and living expenses of the bachelor and 50% as the contribution to the family. However, where the family of the bachelor is large and dependent on the income of the deceased, as in a case where he has a widowed mother and large number of younger non-earning sisters or brothers, his personal and living expenses may be restricted to one-third and contribution to the family will be taken as two-third."

25. Here, it must be remarked that the deceased in this case, no doubt, left behind his wife and three sons, but the sons do not appear to be dependent on their father financially. This Court has noticed the testimony of APW-1, where she has said that her eldest son, Laxmikant, is employed as a labourer; Jagdish works with a private employer; whereas Ramesh works with a private employer in the City of Ballia. Two of the sons are married. This profile for three of the claimants, who are adult sons of the deceased, do not show them to be dependents. In the circumstances, this Court understands that the principle in **Sarla Verma** would operate to endorse a deduction of one-third and not one-fourth. This Court, therefore, is in agreement with the Tribunal's view that deduction for personal expenses of the deceased here ought to be a fraction of one-third of his total income, and not one-fourth, as urged by Mr. Hemant Kumar.

26. Once the age of the deceased has been found to be 55 years, the appropriate multiplier has to be applied according to the table in Paragraph No. 42 of the judgment of the Supreme Court in **Sarla Verma**. The aforesaid table for the application of multiplier, based on the age bracket of the deceased, has been approved by the Consti*tution Bench of their*

Lordships in ***National Insurance Co. Ltd. v. Pranay Sethi*** (supra). In a recent decision of the Supreme Court in **United India Insurance Co. Ltd. v. Satinder Kaur alias Satwinder Kaur,** following the Constitution Bench decision last mentioned, it was held:

"40. A Constitution Bench of this Court in National Insurance Co. Ltd. v. Pranay Sethi, (2017) 16 SCC 680, 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).

(b) Determination of Multiplier

41. 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, (1994) 2 SCC 176, U.P.S.R.T.C. v. Trilok Chandra, (1996) 4 SCC 362 and New India Assurance Co. Ltd. v. Charlie, (2005) 10 SCC 720.

42. 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

43. 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)

44. In Reshma Kumari (supra), this Court affirmed Column 4 of the chart prepared inSarla 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)"

27. The deceased being 55 years of age, the case would fall in the age bracket of 51-55 years of the table in **Sarla Verma**, for which a multiplier of 'Eleven' is prescribed. The Tribunal has not only fixed a multiplier of 'Five' on a very different assessment of age than what has been found by this Court, but has also adopted a multiplier according to Schedule-II appended to the Act framed under Section 163-A. Going by the principles laid down in the Constitution Bench of the Supreme Court in **National Insurance Co. Ltd. v. Pranay Sethi**, the appropriate multiplier to apply would be by reference to the table in Paragraph No. 42 of the decision in **Sarla Verma;** and not the Schedule to which the Tribunal has taken resort. The deceased being found by this Court to be aged 55 years, his case would fall in the age bracket of 51-55 years, enumerated in the table in **Sarla Verma.** The relevant multiplier to that age bracket is 'Eleven'. Thus, it has to be held that the multiplier applicable would be 'Eleven'; and not 'Five'.

28. Now, to assess the basic parameters of compensation, this Court finds that going by the deceased's daily income, that is to say, Rs. 250/- per day, the deceased would have a monthly income of Rs. 7,500/-. A *fortiori,* he would have an annual income of Rs. 90,000/-. Deducting a fraction of one-third towards the personal expenditure of the deceased, the multiplicand would work out to a figure of Rs. 60,000/-. Applying the determined multiplier of 'Eleven' to the annual dependency, the total dependency of the claimants would be a sum of 60,000 X 11 = Rs. 6,60,000/-. Thus, Rs. 6,60,000/- would be substantive dependency that the claimants would be entitled to. But, this is not where the matter rests, going by the principles of law that have been evolved over time. This Court finds that the Tribunal has not added anything towards future prospects. A reading of the Tribunal's award makes it appear that the Tribunal thought that the deceased had no future prospects. This Court is afraid that the Tribunal's approach does not accord at all with current judicial opinion. The Constitution Bench in **National Insurance Co. Ltd. v. Pranay Sethi** went much ahead of Sarla Verma in finding for self-employed persons, a case for future prospects, where their dependents, in the event of a fatal accident, were held entitled to add future prospects. In **National Insurance Co. Ltd. v. Pranay Sethi,** it was held:

"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 [Sarla Verma v. DTC, (2009) 6 SCC 121 : (2009) 2 SCC (Civ) 770 : (2009) 2 SCC (Cri) 1002] 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 inReshma Kumari [Reshma Kumari v. Madan Mohan, (2013) 9 SCC 65 : (2013) 4 SCC (Civ) 191 : (2013) 3 SCC (Cri) 826] . 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." (Emphasis by Court)

29. Going by the aforesaid decisions, it is evident that the deceased, a self-employed man in the age group of 50-60 years, would entitle his dependents, that is to say, the claimants to add 10% to his income by way of future prospects.

30. Quite apart from the determination of compensation based on dependency, the Tribunal has awarded some compensation under non-pecuniary heads. Mr. Hemant Kumar has emphasized that the Tribunal has not awarded anything under the head "loss of estate', besides the fact that the figure awarded for funeral expenses is much below than what has been laid down in **National Insurance Co. Ltd. v. Pranay Sethi** and followed in **United India Insurance Co. Ltd. v. Satinder Kaur alias Satwinder Kaur**. The award shows that nothing has been granted towards loss of estate and Rs.5000/- each have been awarded for loss of consortium and funeral expenses, aggregating a figure of Rs.10,000/-.

31. In this regard, reference may be made to the holding of the Constitution Bench of the Supreme Court in **National Insurance Co. Ltd. v. Pranay Sethi**, where it is observed:

"48. This aspect needs to be clarified and appositely stated. The conventional sum has been provided in the Second Schedule to the Act. The said Schedule has been found to be defective as stated by the Court in Trilok Chandra [UP SRTC v. Trilok Chandra, (1996) 4 SCC 362] . Recently, in Puttamma v. K.L. Narayana Reddy [Puttamma v.K.L. Narayana Reddy, (2013) 15 SCC 45 : (2014) 4 SCC (Civ) 384 : (2014) 3 SCC (Cri) 574] it has been reiterated by stating : (SCC p. 80, para 54)

"54. ... we hold that the Second Schedule as was enacted in 1994 has now become redundant, irrational and unworkable due to changed scenario including the present cost of living and current rate of inflation and increased life expectancy."

49. As far as multiplier or multiplicand is concerned, the same has been put to rest by the judgments of this Court. Para 3 of the Second Schedule also provides for general damages in case of death. It is as follows:

"3. General damages (in case of death):

The following general damages shall be payable in addition to compensation outlined above:

(i)	Funeral expenses	Rs 2000
(ii)	Loss of consortium, if beneficiary is the spouse	Rs 5000
(iii)	Loss of estate	Rs 2500
(iv)	Medical expenses -- actual expenses incurred before death supported by bills/vouchers but not exceeding	Rs 15,000"

"50. On a perusal of various decisions of this Court, it is manifest that the Second Schedule has not been followed starting from the decision in *Trilok Chandra [UP SRTC v.Trilok Chandra, (1996) 4 SCC 362]* and there has been no amendment to the same. The conventional damage amount needs to be appositely determined. As we notice, in different cases different amounts have been granted. A sum of Rs 1,00,000 was granted towards consortium *in Rajesh [Rajesh v. Rajbir Singh,* (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] . The justification for grant of consortium, as we find fromRajesh [Rajesh v. Rajbir Singh, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] , is founded on the observation as we have reproduced hereinbefore.

51. On the aforesaid basis, the Court has revisited the practice of awarding compensation under conventional heads.

52. As far as the conventional heads are concerned, we find it difficult to agree with the view expressed in Rajesh[Rajesh v. Rajbir Singh, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] . It has granted Rs 25,000 towards funeral expenses, Rs 1,00,000 towards loss of consortium and Rs 1,00,000 towards loss of care and guidance for minor children. The head relating to loss of care and minor children does not exist. ThoughRajesh [Rajesh v. Rajbir Singh, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] refers to Santosh Devi [Santosh Devi v. National Insurance Co. Ltd., (2012) 6 SCC 421 : (2012) 3 SCC (Civ) 726 : (2012) 3 SCC (Cri) 160 : (2012) 2 SCC (L&S) 167] , it does not seem to follow the same. The conventional and traditional heads, needless to say, cannot be determined on percentage basis because that would not be an acceptable criterion. Unlike determination of income, the said heads have to be quantified. Any quantification must have a reasonable foundation. There can be no dispute over the fact that price index, fall in bank interest, escalation of rates in many a field have to be noticed. The court cannot remain oblivious to the same. There has been a thumb rule in this aspect. Otherwise, there will be extreme difficulty in determination of the same and unless the thumb rule is applied, there will be immense variation lacking any kind of consistency as a consequence of which, the orders passed by the tribunals and courts are likely to be unguided. Therefore, we think it seemly to fix reasonable sums. It seems to us that reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs 15,000, Rs 40,000 and Rs 15,000 respectively. The principle of

revisiting the said heads is an acceptable principle. But the revisit should not be fact-centric or quantum-centric. We think that it would be condign that the amount that we have quantified should be enhanced on percentage basis in every three years and the enhancement should be at the rate of 10% in a span of three years. We are disposed to hold so because that will bring in consistency in respect of those heads."

32. The principles regarding award of compensation under conventional heads, particularly, with regard to award of consortium, have been elaborated by the Supreme Court in **Magma General Insurance Co. Ltd. v. Nanu Ram alias Chuhru Ram and others6**, where, it has been held:

"21. A Constitution Bench of this Court in *Pranay Sethi[National Insurance Co. Ltd. v. Pranay Sethi*, (2017) 16 SCC 680 : (2018) 3 SCC (Civ) 248 : (2018) 2 SCC (Cri) 205] dealt with the various heads under which compensation is to be awarded in a death case. One of these heads is loss of consortium. In legal parlance, "consortium" is a compendious term which encompasses "spousal consortium", "parental consortium", and "filial consortium". The right to consortium would include the company, care, help, comfort, guidance, solace and affection of the deceased, which is a loss to his family. With respect to a spouse, it would include sexual relations with the deceased spouse : [Rajesh v. Rajbir Singh, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149]

21.1. Spousal consortium is generally defined as rights pertaining to the relationship of a husband-wife which allows compensation to the surviving spouse for loss of "company, society, cooperation, affection, and aid of the other in every conjugal relation". [Black's Law Dictionary(5th Edn., 1979).]

21.2. 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".

21.3. 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, affection, companionship and their role in the family unit.

22. Consortium is a special prism reflecting changing norms about the status and worth of actual relationships. Modern jurisdictions world-over have recognised 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 therefore permit parents to be awarded compensation under loss of consortium on the death of a child. The amount awarded to the parents is a compensation for loss of the love, affection, care and companionship of the deceased child.

23. The Motor Vehicles Act is a beneficial legislation aimed at 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 children who lose their parents in motor vehicle accidents under the Act. A few High Courts have awarded compensation on this count [Rajasthan High Court in Jagmala Ram v. Sohi Ram, 2017 SCC OnLine Raj 3848 : (2017) 4 RLW 3368; Uttarakhand High Court in Rita Rana v. Pradeep Kumar, 2013 SCC OnLine Utt 2435 : (2014) 3 UC 1687; Karnataka High Court in Lakshman v. Susheela Chand Choudhary, 1996 SCC OnLine Kar 74 : (1996) 3 Kant LJ 570] . However, there was no clarity with respect to the principles on which compensation could be awarded on loss of filial consortium.

24. The amount of compensation to be awarded as consortium will be governed by the principles of awarding compensation under "loss of consortium" as laid down inPranay Sethi [National Insurance Co. Ltd. v. Pranay Sethi, (2017) 16 SCC 680 : (2018) 3 SCC (Civ) 248 : (2018) 2 SCC (Cri) 205] . In the present case, we deem it appropriate to award the father and the sister of the deceased, an amount of Rs 40,000 each for loss of filial consortium." (Emphasis by Court)

33. It needs to be emphasized that in ***Magma General Insurance Co. Ltd. v. Nanu Ram alias Chuhru Ram*** *(supra)*, the deceased was a 24 year-old man and the claim was brought by his father, brother and sister. Their Lordships of the Supreme Court, as would appear from Paragraph No.24 of the Report in **Magma General Insurance Co. Ltd. v. Nanu Ram alias Chuhru Ram,** awarded compensation under the non-pecuniary head of consortium to the father and the sister of the deceased. The brother was not awarded anything under this head.

34. Elaborating further on the aspect of award of compensation under the conventional head of "loss of consortium', it was held by the Supreme Court in **United India Insurance Co. Ltd. v. Satinder Kaur alias Satwinder Kaur** thus :

"54. The Court held that the conventional and traditional heads, cannot be determined on percentage basis, because that would not be an acceptable criterion. Unlike determination of income, the said heads have to be quantified, which has to be based on a reasonable foundation. It was observed that factors such as price index, fall in bank interest, escalation of rates, are aspects which have to be taken into consideration. The Court held that reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The Court was of the view that the amounts to be awarded under these conventional heads should be enhanced by 10% every three years, which will bring consistency in respect of these heads.

a) Loss of Estate - Rs. 15,000 to be awarded

b) Loss of Consortium

55. Loss of Consortium, in legal parlance, was historically given a narrow meaning to be awarded only to the spouse i.e. the right of the spouse to the company, care, help, comfort, guidance, society, solace, affection and sexual relations with his or her mate. The loss of companionship, love, care and protection, etc., the spouse is entitled to get, has to be compensated appropriately. The concept of 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.

56. In *Magma General Insurance Co. Ltd. v. Nanu Ram,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.

57. Parental consortium is granted to the child upon the premature death of a parent, for loss of parental aid, protection, affection, society, discipline, guidance and training.

58. Filial consortium is the right of the parents to compensation in the case of an accidental death of a child. An accident leading to the death of a child causes great shock and agony to the parents and family of the deceased. The greatest agony for a parent is to lose their child during their lifetime. Children are valued for their love and affection, and their role in the family unit.

59. Modern jurisdictions world-over have recognized that the value of a child's consortium far exceeds the economic value of the compensation awarded in the case of the death of a child. Most jurisdictions permit parents to be awarded compensation under loss of consortium on the death of a child. The amount awarded to the parents is the compensation for loss of love and affection, care and companionship of the deceased child.

60. The Motor Vehicles Act, 1988 is a beneficial legislation which has been framed with the object of providing relief to the victims, or their families, in cases of genuine claims. In case where a parent has lost their minor child, or unmarried son or daughter, the parents are entitled to be awarded loss of consortium under the head of Filial Consortium.

61. Parental Consortium is awarded to the children who lose the care and protection of their parents in motor vehicle accidents.

62. The amount to be awarded for loss consortium will be as per the amount fixed inPranay Sethi (supra).

63. At this stage, we consider it necessary to provide uniformity with respect to the grant of consortium, and loss of love and affection. Several Tribunals and High Courts have been awarding compensation for both loss of consortium and loss of love and affection. The Constitution Bench in Pranay Sethi (supra), has recognized only three conventional heads under which compensation can be awarded viz. loss of estate, loss of consortium and funeral expenses.

64. In Magma General (supra), this Court gave a comprehensive interpretation to consortium to include spousal consortium, parental consortium, as well as filial consortium. Loss of love and affection is comprehended in loss of consortium.

65. The Tribunals and High Courts are directed to award compensation for loss of consortium, which is a legitimate conventional head. There is no justification to award compensation towards loss of love and affection as a separate head." (Emphasis by Court)

35. In **United India Insurance Co. Ltd. v. Satinder Kaur alias Satwinder Kaur,** the facts show that the claim for compensation was brought by the wife of the deceased and the three minor children of parties. It was, therefore, clearly a case where children, who were minors, lost the company, guidance, care and protection of their father. It was not a case where on facts or on principle, the question arose whether an adult for the loss of his parent to a fatal accident, would be entitled to compensation under the conventional head of parental consortium. In **Magma General Insurance Co. Ltd. v. Nanu Ram alias Chuhru Ram,** the deceased was, as already noted, a 24-year-old man, where compensation under the head of filial consortium was granted to the father and the sister, but not the brother. Here, of the four claimants, two are married men with children. The loss of a parent at any age is a painful event. But, going by the principles so far evolved, loss of consortium, in case of an adult losing his parent, does not seem to be approved by the law. The considerations, on which parental consortium is granted to children, have been enumerated in **Magma General Insurance Co. Ltd. v. Nanu Ram alias Chuhru Ram,** which are expressed as "loss of parental aid, protection, affection, society, discipline, guidance and training".

36. Loss of consortium, that includes parental consortium, unlike dependency, is not some tangible economic loss. It is an emotional loss to the next of kin of the deceased-victim of a motor accident. In case of parental loss, it causes a particular deprivation to minors and young children, about whom it is said by the Supreme Court in United India Insurance Co. Ltd. v. Satinder Kaur alias Satwinder Kaur, to borrow the words of their Lordships, *"Parental Consortium is awarded to the children who lose the care and protection of their parents in motor vehicle accidents".*

37. To the understanding of this Court, the impact of loss of parental consortium upon the deceased's children, in the very nature of that loss, is dependent upon the children's age. The loss of parent is a disheartening and emotional event for the child at any age of his maturity, but by the nature of the principle governing award of compensation under the head of parental consortium, the deprivation, that is suffered by a child or a minor, appears to be the determinative and entitling fact. A child, who has advanced into matured adulthood, is married or otherwise in the mainstream of life, would not be entitled to compensation under that head.

38. In the view that this Court takes about the entitlement to parental consortium for children of the deceased-victim, who are adults and married or settled in life, I am fortified by the decision of the Tripura High Court in **National Insurance Company Ltd. (To be represented by Senior Divisional Manager) v. Pratibha Das and Others7. In National Insurance Company Ltd. v. Pratibha Das,** it has been held by S.G. Chattopadhyay, J.:

"29. With regard to payment of consortium, it was contended by the

counsel of the respondent that the trial court should have granted parental consortium in this case. Counsel relied on the decision of the Supreme Court in Magma General Insurance Company Ltd. v. Nanu Ram reported in (2018) 18 SCC 130 and Apex Court's decision in United India Insurance Co. Ltd. v. Satinder Kaur reported in AIR 2020 SC 3076. In the case ofMagma General Insurance Co. Ltd. (supra) deceased was a bachelor. Father, brother and sisters filed the claim petition. The Apex Court granted 40,000/- to each of the claimant brother and sister for loss of filial consortium. In the case of United India Insurance Co. Ltd. (supra), the Apex Court granted 40,000/- to each of the children of the deceased for loss of parental consortium. Each of the children in that case were minor and the Apex Court observed that 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. In the case in hand, the sons and daughters of the deceased were all married when the deceased died in the accident. Situated thus, respondents cannot derive any benefit from the judgments cited above. The Tribunal did not commit any error in declining to grant consortium to the claimant sons and daughters of the deceased."

(Emphasis by Court)

39. In view of what this Court has concluded on the entitlement to consortium, it is held that it is the widow of the deceased, who alone is entitled to consortium (that is spousal). The three adult sons of the deceased, two of whom were married on the date of accident, would not be entitled to parental consortium.

40. Thus, the entitlement of the claimants to compensation is determined as follows:

(i)Monthly Income (of the deceased) = **7,500/-**

(ii)Annual Income (of the deceased)

= 7500 X 12

= **90,000/-**

(iii)Annual Dependency = Annual Income

- one-third deduction towards personal

expenses of the deceased = 90,000 – 30,000 = **60,000/-**

(iv)Total Dependency = Annual

Dependency X Applied Multiplier = 60,000 X 11 = **6,60,000/-**

(v)Total loss of dependency = Total

Dependency + 10% of Total Dependency

towards Future Prospects = 6,60,000 + 66,000 = **7,26,000/-**

(vi)Claimants' entitlement towards

conventional heads = Loss of Estate +

Funeral Expenses + Spousal

Consortium = 15,000 + 15,000 + 40,000 = **70,000/-**

The total claim of compensation would

therefore, work out to a figure of

Rs.7,26,000 + Rs.70,000

= 7,96,000/-

Thus, the claimants are entitled to a total compensation of Rs.7,96,000/- **(Rupees Seven Lakh Ninety-Six Thousand only).** The said sum of compensation shall carry interest at the

same rate as awarded by the Tribunal, but from the date the claim petition was instituted. Any sum of money, already paid under the award or in terms of the interim orders passed in this appeal, shall be adjusted.

41. Out of the total sum of compensation payable, the sum of Rs.40,000/- towards spousal consortium shall be set apart and paid exclusively to Smt. Jiuti Devi, claimant-appellant no.1, together with the proportionate interest accrued on the said sum. Out of the balance of the total compensation payable, Smt. Jiuti Devi, claimant-appellant no.1 shall be entitled to and receive 70% whereas the balance 30% shall be divided equally amongst claimant-appellant nos. 2, 3 and 4. The sum of compensation to be so divided between the claimant-appellants shall include the accrued interest on the sum of compensation payable. It is further provided that the entire compensation payable to the claimant-appellants, shall be paid into their respective bank accounts by the Tribunal upon realization through crossed Bank Instruments, drawn in the name of each individual claimant-appellant. The compensation to be distributed amongst the claimant-appellants, as directed, shall include the sum earlier invested under orders of the Tribunal. Any sum of money, already received by the claimant-appellants, shall be proportionately adjusted.

42. In the result, this appeal **succeeds** and is ***allowed in par***t. The compensation awarded by the Tribunal is **modified** and enhanced in terms hereinabove directed.

43. There shall be no order as to costs.

(2022)03ILR A914

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.02.2022

BEFORE

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

First Appeal From Order No. 2861 of 2008
AND
First Appeal From Order No. 3097 of 2010

Smt. Prem Lata Baghel & Ors. ...Appellants
Versus
Union Of India & Anr. ...Respondents

Counsel for the Appellants:
Sri S.K. Pal, Sri R.K. Srivastava

Counsel for the Respondents:
S.C.

Civil Law - Motor Vehicle Act, 1988- Accidental death-no loss of income granted-multiplier of 13 applied-funeral expenses, loss of estate, loss of consortium on pecuniary damages added -Award modified.

Appeal partly allowed. (E-9)

List of Cases cited:

1. National Insurance Co. Vs Pranay Sethi & ors., (2013) LawSuit (SC) 1093

2. Sarla Verma & ors. Vs Delhi Transport Corp. & anr., 2009 ACJ 1298

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

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

1. These two appeals filed against the same judgment dated 29.5.2008, passed by

MACT/Additional District Judge, FTC-3, Firozabad in MAC No.205 of 2004 (Smt.Premlata Baghel and another vs. Union of India and another) for which learned Tribunal passed award for Rs.6,00,914/- with 6% per annum rate of interest.

2. One FAFO bearing No.2861 of 2008 is filed on behalf of claimants for enhancement amount of award of fine and the second FAFO bearing No.3097 of 2010 has been filed on behalf of Union of India for setting aside the impugned judgment.

3. Heard Shri R.K.Srivastava, learned Advocate, holding brief of Shri S.K.Pal, learned counsel for the appellant in FAFO No.2861 of 2008, Shri Manoj Kumar Singh, learned counsel for the appellant in FAFO No.3097 of 2010 and perused the record.

4. Brief facts of the case giving rise to these appeals are that claimants filed a motor accident claim petition against Union of India for the death of Bhup Singh Baghel, who was Advocate in Allahabad High Court and District Court Firozabad. It is averred in petition that on 22.4.2004 at about 4:15 p.m., the deceased was going to his residence by rickshaw. When he reached near Indira Gandhi Crossing Civil Lines, a Military Truck bearing No.99-D-124834-ACLI-45 came from opposite side, which was being driven rashly and negligently by its driver and hit the rickshaw in which the deceased was travelling. Due to the impact of accident, deceased fell on the ground and sustained fatal injuries due to which he died. Union of India filed written statement and denied the factum of accident by the aforesaid Military Truck and it is contended that the rickshaw in which the deceased was travelling overturned the rickshaw. The aforesaid truck was passing through that place and for helping the injured/deceased, the driver of the aforesaid truck put him in the truck and carried to the hospital. Subsequently, claimants involved the truck falsely in order to claim the compensation.

5. Learned counsel for the Union of India submitted that the aforesaid vehicle was not involved in the said accident. The driver of the truck was not named in the first information report. Learned counsel further submitted that it was a matter of chance that when the deceased fell on the ground by overturning the rickshaw, the truck in question was passing-by. He next submitted that the driver of the truck and other Military-personnel, who was travelling in the truck are produced before the Tribunal as DW1, DW2 and DW3. All have said in their respective statements that when their truck reached to the spot, a man was lying on the ground and on the request of nearby people, they put him in the truck and got admitted in the hospital in order to save his life, but the aforesaid truck was falsely implicated and involved in this matter just to claim the compensation. Learned counsel further submitted that there is no log-book entry of the truck, which could show that the truck was plied at the time of accident.

6. Learned counsel appearing for the claimants submitted that against the driver of the aforesaid truck, charge-sheet has been filed. On the basis of evidence on record, the learned Tribunal has rightly held that the truck was involved in the accident.

7. The contention of learned counsel for the Union of India that first information report was lodged against unknown person

and the driver of the truck in question is not named cannot be accepted at all because it is not sine qua non that the person, who filed the FIR should mention the name of the driver of the vehicle rather it is not expected that the complainant/informant must know the name of the driver of the vehicle. It is more than enough even if number of the vehicle is mentioned in the FIR. It is also pertinent to note that Investigating Officer after completion of investigation filed charge-sheet against the driver of the said truck. The rickshaw puller/owner, in which the deceased was travelling was the best witness of this accident. He was produced by the claimants as PW5, wherein he has stated in his statement that deceased was travelling in his rickshaw, which was dashed by the aforesaid truck due to which the deceased fell on the ground and the wheel of the truck ran over him. He has also stated that truck was stopped by the crowed gathered on the spot and his rickshaw was also damaged in the accident. This witness is an independent witness having no personal interest in the matter. Hence, this plea of Union of India is not tenable that a truck in question was not involved in the accident. One more argument is placed by Union of India that rickshaw puller was not made party to the petition, but we do not impress with this argument as rickshaw puller is not a tort-feasor and, therefore, non-joining of the rickshaw puller makes no difference. Consequently, in view of above observations, the appeal preferred by Union of India is liable to be dismissed.

8. Now we come to the issue of compensation as awarded by learned Tribunal. In this regard, learned counsel for the claimant submitted that award passed by the Tribunal is on lower side and no amount is awarded towards the future loss of income. It is also submitted that grant of non-pecuniary damage is also on the lower side and the Tribunal has awarded only 6% rate of interest, which should have been higher.

10. No other argument was placed by the claimants on the issue of amount of compensation.

11. Learned counsel appearing for the Union of India opposed the arguments placed by learned counsel for the claimants and submitted that Tribunal has made correct assessment of the income of the deceased and sufficient compensation has been awarded in accordance with law. Therefore, it needs no interference by this Court.

12. Perusal of the record shows that income of the deceased is assessed as Rs.63,566/- per annum by the Tribunal. The learned Tribunal has arrived at this income on the basis of average of three years income as shown in Income Tax Returns of the deceased, which is not disputed by the learned counsel for the Union of India and this income is justified also keeping in view the income shown in ITRs of the deceased, but learned Tribunal has not granted any sum towards loss of income. As the deceased was 46 years old, therefore, according to the direction of the Hon'ble Apex Court in ***National Insurance Co. vs. Pranay Sethi and others***, *(2013) LawSuit (SC) 1093, 25%* shall be added towards future prospects. Learned Tribunal has rightly deducted 1/3 of the income towards personal expenses of the deceased. Keeping in view the fact that there were four dependants of the deceased and out of them one dependant was minor, multiplier of 13 is applied, which is in consonance with the judgment of Apex Court in ***Sarla***

Verma and others vs. Delhi Transport Corporation and another, *2009 ACJ 1298.* Tribunal has awarded Rs.25,000/- for loss of love and affection, Rs.15,000/- for loss of consortium and Rs.10,000/- for funeral expenses, which are, according to us, are on the lower side as per the judgment of Apex Court in Pranay Sethi (supra).

13. Claimants shall be entitled to get Rs.15,000/- towards funeral expenses and Rs.15,000/- towards loss of estate. Apart from it, the wife of the deceased shall be entitled to get Rs.40,000/- for loss of consortium. These non-pecuniary damages shall have incremental effect @ 10% every three years. Hence we award a lump-sum amount of Rs.1,00,000/- in the head of non-pecuniary damages. Therefore, the total compensation payable to the claimants as per observations made by above is computed herein below:

A. Annual Income : Rs.63,566/- per annum

B. Amount towards future prospects @ 25 % : Rs.15,891/-

C. Total Income : Rs.79,457/-

D. Income after deduction 1/3 : Rs.52,972/-

E. Multiplier applicable :13

F. Total Loss of Dependency : Rs.6,88,636/-

G. Amount under non-pecuniary heads : Rs.1,00,000/-

H. TOTAL COMPENSATION : **Rs.7,88,636/-**

14. As far as issue of rate of interest is concerned, it should be 7.5% in view of the latest decision of the Apex Court in ***National Insurance Co. Ltd. Vs. Mannat Johal and Others,*** *2019 (2) T.A.C. 705 (S.C.)* wherein the Apex Court has held as under:

"13. The aforesaid features equally apply to the contentions urged on behalf of the claimants as regards the rate of interest. The Tribunal had awarded interest at the rate of 12% p.a. but the same had been too high a rate in comparison to what is ordinarily envisaged in these matters. The High Court, after making a substantial enhancement in the award amount, modified the interest component at a reasonable rate of 7.5% p.a. and we find no reason to allow the interest in this matter at any rate higher than that allowed by High Court."

15. Learned Tribunal has awarded rate of interest as 9% per annum but we are fixing the rate of interest as 7.5% in the light of the above judgment.

16. In view of the above, the appeal is partly allowed. Judgment and award passed by the Tribunal shall stand modified to the aforesaid extent. The respondent-Insurance Company shall deposit the amount within a period of 12 weeks from today with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited. The amount already deposited be deducted from the amount to be deposited.

17. Consequently, the appeal of Union of India bearing **FAFO No.3097 of 2010 is dismissed** and the appeal filed by claimants bearing **FAFO No.2861 of 2008 is partly allowed.**

(2022)03ILR A918
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.03.2022

BEFORE

THE HON'BLE J.J. MUNIR, J.

First Appeal From Order No. 3591 of 2014

United India Insurance Company Ltd. ...Appellant

Versus

Sanjay Dixit & Anr. ...Respondents

Counsel for the Appellant:
Sri Nagendra Kumar Srivastava, Sri A. Verma, Sri V.C. Dixit

Counsel for the Respondents:
Sri Vidya Kant Shukla, Sri Amit Kumar Verma

Civil Law - Motor Vehicle Act, 1988 - Finding of Tribunal as to functional disability arising from certified permanent disability of 50 %-Tribunal to consider award of compensation under head of future prospectus, loss under head of pain, suffering and trauma, future medical expenses.

Appeal allowed partly. (E-9)

List of Cases cited:

1. Shri Ram Kushwaha Vs U.P. State Sugar Corporation Ltd. through General Manager, 2015 (2) ADJ 578

2. Raj Kumar Vs Ajay Kumar & anr., (2011) 1 SCC 343

3. N. Manjegowda Vs Manager, United India Insurance Co. Ltd., (2014) 3 SCC 584

4. Sarla Verma (Smt.) & ors. Vs Delhi Transport Corporation & anr., (2009) 6 SCC 121

5. National Insurance Co. Ltd. Vs Pranay Sethi, (2017) 16 SCC 680

6. Jagdish Vs Mohan & ors., (2018) 4 SCC 571

7. Kajal Vs Jagdish Chand & ors., (2020) 4 SCC 413

(Delivered by Hon'ble J.J. Munir, J.)

1. This is an appeal by the Insurance Company, questioning the judgment and award of Mr. Gopal Kulshreshtha, the Additional District Judge, Court No.8/Motor Accident Claims Tribunal, Kanpur Nagar dated 16.09.2014, awarding compensation to the claimant-respondent for the injuries sustained by him in a motor accident.

2. Mr. Sanjay Dixit, along with his friend, Jawahar Lal, was proceeding on foot, according to rule of the road, on the left-hand-side from Ram Narayan Bazar to Phool Bagh, located in District Kanpur Nagar on 23.09.2013 at about half past eleven in the night hours. As the two had traversed a small distance beyond the Baba Sweet House, a Maruti Car bearing Registration No. UP 78 AB 7211, that is said to have been driven very fast and negligently by its driver, came up behind them and hit the two on the rear side. Both Sanjay Dixit and his friend sustained grievous injuries. The passers-by, that include one Kanhaiya Lal and another Anil Kumar, amongst many others, called alarm and made efforts to apprehend the offending vehicle. The driver, however, sped away and escaped. The members of the public present, nevertheless, noted down the registration number of the offending vehicle. The Police reached the spot. The members of the public and the Police, together conveyed Sanjay Dixit and his friend Jawahar Lal for medical aid to a certain K.P.M. Hospital, where they were admitted. The two were administered first aid there. Mr. Sanjay Dixit, who has

brought this claim petition, shall hereinafter be referred to as "the claimant".

3. Since the claimant had sustained grievous injuries, and the hospital where he was given first aid did not have the facility of doing an x-ray imaging, he was referred to Ursala Hospital. It is the claimant's case that until the institution of the claim petition, he was under treatment at the Ursala Hospital. The accident was reported to the Police by Bandi Lal, a brother of the claimant's friend and the other injured Jawahar Lal. On the report lodged by the aforesaid informant relating to the accident, Case Crime No. 156 of 2013, under Sections 279, 338 IPC, Police Station - Philkhana, District - Kanpur Nagar was registered. The claimant is an Advocate, practicing in the District Courts at Kanpur since the year 1996. The claimant's case is that he had a monthly income from his profession in the sum of Rs. 20,000/-, which was the source of his livelihood and that of his family members. As a result of the accident, the claimant says that he has become physically handicapped, the injury afflicting his right lower limb. It has become difficult for him to move about. He further says that the handicap has adversely affected the claimant's profession and, in turn, wiped out his income therefrom. It is also the claimant's case that he cannot do any work or activity in the same manner as he could before the accident. At the time of the accident, he was aged 44 years. The claimant asked for a total compensation of Rs. 29,33,000/-. The owner of the car, one Nazim Khan and the Insurance Company, the United India Insurance Company Ltd. were arrayed as opposite parties to the claims petition. Both the owner and the Insurance Company contested the claimant's case, denying the involvement of the offending vehicle, besides raising other pleas. It would be idle to refer to the pleadings of the parties, inasmuch as the limited issue that has been raised on behalf of the Insurance Company in this appeal is about the quantum of compensation.

4. There were five issues framed by the Tribunal and all of them were answered in favour of the claimant. In view of the limited challenge raised by the appellant, findings recorded by the Tribunal on Issues Nos. 1 to 4 are not required to be examined and must be held to have become final inter partes. It is the fifth issue alone that is the subject matter of this appeal and this issue (translated into English from Hindi) would read :

"Whether the claimant is entitled to receive any compensation from the opposite parties? If yes, how much and from which opposite party?"

5. Before the Court, the Insurance Company has criticised the award largely for its quantum, and there does not appear to be any issue about the party who has to answer the liability.

6. Heard Mr. Nagendra Kumar Srivastava, learned Counsel for the appellant-Insurance Company and Mr. Vidya Kant Shukla, learned Counsel appearing on behalf of the claimant-respondents.

7. Mr. Nagendra Kumar Srivastava, learned Counsel for the appellant-Insurance Company has largely criticised the award on ground that the Medical Disability Certificate, on the foot of which the award is founded, was issued by a Medical Board, but the doctors, who scribed the certificate, were not produced in evidence to prove the precise extent and nature of the disability.

It is submitted by the learned Counsel for the appellant that the claimant has to be compensated for the loss in his earning capacity, and that depends upon the functional disability sustained by him in consequence of the accident. He submits that assuming that the claimant has sustained a 50 percent physical disability, as certified by the Medical Board, the same would not ipso facto translate to a 50 percent loss of earning capacity. The kind of limitations that the victim has become subject to, in consequence of the disability, would have to be precisely ascertained by the Tribunal and its relative impact on his earning capacity, bearing in mind the nature of his profession, calling, trade or business. Learned Counsel for the appellant further submits that there is no amputation of any limb or any injury that appears in the second schedule to the Motor Vehicles Act, 1988.

8. Mr. Vidya Kant Shukla, learned Counsel for the claimant on the other hand, submits that the medical report certifying a 50 percent permanent disability is a public document, which is not required to be proved, as held by a Division Bench of this Court in **Shri Ram Kushwaha v. U.P. State Sugar Corporation Ltd. through General Manager1.** He has particularly placed reliance upon the decision of the Supreme Court in **Raj Kumar v. Ajay Kumar and another2** to submit that 50 percent disability would impact the actual earning capacity, which is required to be ascertained by the Tribunal, adopting a three-step test laid down by their Lordships in order to ascertain the functional disability. Mr. Shukla supports the decision of the Tribunal to submit that the claimant is an Advocate, and by the nature of his profession, he does not require mental faculties alone, but also physical fitness to inspire confidence with his clients and sustain his profession and the resultant earnings therefrom. In support of this contention, Mr. Shukla has placed reliance upon the holding of their Lordships in **N. Manjegowda v. Manager, United India Insurance Co. Ltd.3** to submit that the profession of an Advocate does not require mental fitness alone, but also energetic functioning of all limbs of the body.

9. This Court has carefully considered the submissions advanced on both sides and perused the record. So far as objection of Mr. Srivastava about proof of the Disability Certificate dated 05.03.2014 issued by the Board of three doctors is concerned, there is little doubt that the document is a public document, issued by the Viklang Board, established in the Office of the Chief Medical Officer, Kanpur Nagar. It is not required to be formally proved, in view of the provisions of Sections 74 and 77 of the Indian Evidence Act, 1872. The principal about the non-requirement of formal proof of a Chief Medical Officer's disability certificate, for reason it is a public document, has the endorsement of a Division Bench of this Court in **Shri Ram Kushwaha** *(supra)*. The said objection raised by Mr. Srivastava, therefore, does not have much force. The Tribunal has committed no error in acting on the Disability Certificate issued by the *Viklang* Board. This Court has also perused the same, and it is a dependable document.

10. The crux of the matter is that a particular percentage of physical disability cannot arithmetically translate into an equal measure of functional disability. Functional disability would mean the curtailment of the victim's overall capacity on account of injuries sustained in the accident to pursue

his profession, avocation, calling, business or service and the resultant total of the loss of earning capacity. The degree of functional disability for the same measure of permanent disability medically certified may be different for different occupations, jobs or professions. It is not the doctors' opinion about the physical disability per se that would determine the functional disability. It is after ascertaining from the doctor the nature of limitations that would result from the injuries that the Court has to decide, bearing in mind the nature of the occupation, profession etc. of the victim, the degree and extent of loss to his earnings that would ensue. The principles to assess the extent of functional disability of the victim have been laid down by their Lordships of the Supreme Court in **Raj Kumar** *(supra)*, where it has been held :

"13. Ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The Tribunal has to first ascertain what activities the claimant could carry on in spite of the permanent disability and what he could not do as a result of the permanent disability (this is also relevant for awarding compensation under the head of loss of amenities of life). The second step is to ascertain his avocation, profession and nature of work before the accident, as also his age. The third step is to find out whether (i) the claimant is totally disabled from earning any kind of livelihood, or (ii) whether in spite of the permanent disability, the claimant could still effectively carry on the activities and functions, which he was earlier carrying on, or (iii) whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood.

14. For example, if the left hand of a claimant is amputated, the permanent physical or functional disablement may be assessed around 60%. If the claimant was a driver or a carpenter, the actual loss of earning capacity may virtually be hundred per cent, if he is neither able to drive or do carpentry. On the other hand, if the claimant was a clerk in government service, the loss of his left hand may not result in loss of employment and he may still be continued as a clerk as he could perform his clerical functions; and in that event the loss of earning capacity will not be 100% as in the case of a driver or carpenter, nor 60% which is the actual physical disability, but far less. In fact, there may not be any need to award any compensation under the head of "loss of future earnings", if the claimant continues in government service, though he may be awarded compensation under the head of loss of amenities as a consequence of losing his hand. Sometimes the injured claimant may be continued in service, but may not be found suitable for discharging the duties attached to the post or job which he was earlier holding, on account of his disability, and may therefore be shifted to some other suitable but lesser post with lesser emoluments, in which case there should be a limited award under the head of loss of future earning capacity, taking note of the reduced earning capacity.

15. It may be noted that when compensation is awarded by treating the loss of future earning capacity as 100% (or even anything more than 50%), the need to award compensation separately under the head of loss of amenities or loss of expectation of life may disappear and as a result, only a token or nominal amount may have to be awarded under the head of loss of amenities or loss of expectation of life, as otherwise there may be a duplication in

the award of compensation. Be that as it may."

11. It has also been emphasised in **Raj Kumar** that the Tribunal in determining what just compensation would be, must play a proactive or inquisitorial role in ascertaining the percentage of functional disability with reference to the whole body. In **Raj Kumar,** it has further been held :

"16. The Tribunal should not be a silent spectator when medical evidence is tendered in regard to the injuries and their effect, in particular, the extent of permanent disability. Sections 168 and 169 of the Act make it evident that the Tribunal does not function as a neutral umpire as in a civil suit, but as an active explorer and seeker of truth who is required to "hold an enquiry into the claim" for determining the "just compensation". The Tribunal should therefore take an active role to ascertain the true and correct position so that it can assess the "just compensation". While dealing with personal injury cases, the Tribunal should preferably equip itself with a medical dictionary and a handbook for evaluation of permanent physical impairment (for example, Manual for Evaluation of Permanent Physical Impairment for Orthopaedic Surgeons, prepared by American Academy of Orthopaedic Surgeons or its Indian equivalent or other authorised texts) for understanding the medical evidence and assessing the physical and functional disability. The Tribunal may also keep in view the First Schedule to the Workmen's Compensation Act, 1923 which gives some indication about the extent of permanent disability in different types of injuries, in the case of workmen.

17. If a doctor giving evidence uses technical medical terms, the Tribunal should instruct him to state in addition, in simple non-medical terms, the nature and the effect of the injury. If a doctor gives evidence about the percentage of permanent disability, the Tribunal has to seek clarification as to whether such percentage of disability is the functional disability with reference to the whole body or whether it is only with reference to a limb. If the percentage of permanent disability is stated with reference to a limb, the Tribunal will have to seek the doctor's opinion as to whether it is possible to deduce the corresponding functional permanent disability with reference to the whole body and, if so, the percentage.

19. We may now summarise the principles discussed above:

(i) All injuries (or permanent disabilities arising from injuries), do not result in loss of earning capacity.

(ii) The percentage of permanent disability with reference to the whole body of a person, cannot be assumed to be the percentage of loss of earning capacity. To put it differently, the percentage of loss of earning capacity is not the same as the percentage of permanent disability (except in a few cases, where the Tribunal on the basis of evidence, concludes that the percentage of loss of earning capacity is the same as the percentage of permanent disability).

(iii) The doctor who treated an injured claimant or who examined him subsequently to assess the extent of his permanent disability can give evidence only in regard to the extent of permanent disability. The loss of earning capacity is

something that will have to be assessed by the Tribunal with reference to the evidence in entirety.

(iv) The same permanent disability may result in different percentages of loss of earning capacity in different persons, depending upon the nature of profession, occupation or job, age, education and other factors.

20. The assessment of loss of future earnings is explained below with reference to the following illustrations:

Illustration A.-- The injured, a workman, was aged 30 years and earning Rs. 3000 per month at the time of accident. As per doctor's evidence, the permanent disability of the limb as a consequence of the injury was 60% and the consequential permanent disability to the person was quantified at 30%. The loss of earning capacity is however assessed by the Tribunal as 15% on the basis of evidence, because the claimant is continued in employment, but in a lower grade. Calculation of compensation will be as follows:

(a) Annual income before the accident : Rs. 36,000

(b) Loss of future earning per annum

(15% of the prior annual income) : Rs. 5400

(c)Multiplier applicable with reference to age : 17

(d)Loss of future earnings: (5400 × 17) : Rs. 91,800

Illustration B.-- The injured was a driver aged 30 years, earning Rs. 3000 per month. His hand is amputated and his permanent disability is assessed at 60%. He was terminated from his job as he could no longer drive. His chances of getting any other employment was bleak and even if he got any job, the salary was likely to be a pittance. The Tribunal therefore assessed his loss of future earning capacity as 75%. Calculation of compensation will be as follows:

(a) Annual income prior to the accident : Rs. 36,000

(b) Loss of future earning per annum

(75% of the prior annual income) : Rs. 27,000

(c)Multiplier applicable with reference to age : 17

(d)Loss of future earnings: (27,000 × 17) : Rs. 4,59,000

Illustration C.-- The injured was aged 25 years and a final year Engineering student. As a result of the accident, he was in coma for two months, his right hand was amputated and vision was affected. The permanent disablement was assessed as 70%. As the injured was incapacitated to pursue his chosen career and as he required the assistance of a servant throughout his life, the loss of future earning capacity was also assessed as 70%. The calculation of compensation will be as follows:

(a) Minimum annual income he would

have got if had been employed as an engineer : Rs. 60,000

(b) Loss of future earning per annum
(70% of the expected annual income) : Rs. 42,000

(c)Multiplier applicable (25 years) : 18

(d)Loss of future earnings: (42,000
× 18)
: Rs. 7,56,000

[Note.-- The figures adopted in Illustrations (A) and (B) are hypothetical. The figures in Illustration (C) however are based on actuals taken from the decision in Arvind Kumar Mishra [(2010) 10 SCC 254 : (2010) 3 SCC (Cri) 1258 : (2010) 10 Scale 298] .]

12. In **N. Manjegowda** *(supra)*, their Lordships of the Supreme Court have indeed emphasised the principle that an Advocate does not only require the possession of his mental ability, but also physical ability and fitness in order to command his clientele. In **N. Manjegowda**, it has been held :

"12. In the present case the appellant has been found to suffer weakness of four limbs. He has to work slowly and requires help in climbing steps, cannot run, cannot write sharply and speedily with his right hand. With his left hand he cannot lock the shirt button and has difficulty in holding of spoon for self-feeding. He was having partial sensory loss all over his limbs and lacked proper coordination in all four limbs. It is the medical opinion that for these reasons the appellant requires an assistant for daily routine work. In view of aforesaid medical assessment of the appellant's condition after sustaining injuries in the accident and in the light of whole body disability of 50%, it would be certainly very difficult for the appellant to practise as an advocate and compete with others so as to command confidence and acceptability of general clients. Unlike many other professions, legal profession requires not only sharp and focused mind but also good health and ability to put in hard work within a limited time-frame. The requirement of impressing the client at the age of 36 is much more. It is only when a young advocate has built a good impression and reputation, then in the evening of his life he may continue to command professional work on the basis of his acquired knowledge and reputation. A young advocate is bound to suffer huge professional loss on account of injuries as have been sustained by the appellant and the condition in which the doctor found him."

13. This Court finds that the claimant has indeed established his income preceding the accident by wholesomely proving it through his annual Income Tax Returns for the five assessment years preceding the event. The returns have been more than successfully proved by examining the relevant functionary from the Income Tax Department, who has testified before the Tribunal. He is one Brijesh Kumar, a Senior Assistant in the Office of the Income Tax Officer, Ward-2(4), Kanpur Nagar. The said witness has appeared before the Tribunal as P.W.3 and proved the returns. The Tribunal has rightly inferred the victim's overall annual income at a figure of Rs. 1,55,000/- preceding the accident. That finding is flawless.

14. During the hearing, Mr. Srivastava pointed out that the Tribunal has committed an error in applying the multiplier of 15, according to the Second Schedule appended to the Motor Vehicles Act, where that is the indicated multiplier for a person in the age group of 40-45 years. It was pointed out by Mr. Srivastava that going by the table in **Sarla Verma (Smt.) and others v. Delhi Transport Corporation and another4,** the appropriate multiplier for a victim in the age group of 40-45 years is 14; not 15.

15. Mr. Shukla, learned Counsel for the claimant very fairly does not dispute this proposition and indeed, this Court is of opinion that that the law about the multiplier is well settled. It has to be governed by the table laid down in **Sarla Verma** *(supra),* which, going by the age bracket of the victim, would inevitably lead to a multiplier of 14. The Tribunal, therefore, has erred in applying the multiplier of 15.

16. The most crucial question, however, that remains to be answered is whether the 50 percent physical disability certified by the Medical Board translates for the claimant into an arithmetic equivalent of functional disability, leading to a proportionate loss in his earnings. A perusal of the finding recorded by the Tribunal on Issue No. 5 constrains this Court to remark that the Tribunal has hardly bestowed any consideration to this most vital question. The Tribunal has proceeded in the manner that opining the annual income of the claimant to be a figure of Rs. 1,55,000/-, the loss of it has been inferred to be 50 percent on the basis of the 50 percent disability ipso facto. There is absolutely no assessment done by the Tribunal about the impact upon the claimant's income post accident, or so to speak, corresponding functional disability that has arisen from the 50 percent certified physical disability. The determination of functional disability in this case may require some further probe by the Tribunal into the nature of the physical disability and how it impacts the claimant's capability and physical ability to go about his profession. It may also require some consideration of the impact of the accident on the professional prospects of the victim after eliminating irrelevant factors. This Court may not be understood to mean that 50 percent physical disability sustained by the claimant could not have led to an equal measure of functional disability. Depending on the nature of the injury, the manner it would work to impact the claimant's ability to undertake his profession, is required to be assessed. It could turn out to be an equal measure of functional disability, that is to say, 50 percent, or may be more than that or less than it. This may require some enquiry to be made from one of the doctors on the Medical Board, who have certified the physical disability. The doctor's evidence would not be assessed to doubt the correctness of the opinion of the Medical Board, but to ascertain the nature of the physical disability for the purpose of inferring, on its basis, its precise impact on the claimant's professional prospects. This evidence is not at all there on record. The doctor was never called by the claimant; nor by the Tribunal for the limited purpose indicated above. This Court is of opinion that one of the doctors on the Medical Board, who have issued the Permanent Disability Certificate, should be summoned in order to enable the Tribunal to ascertain the precise nature of the claimant's disability and then assess its percentage impact on his functional disability. The Permanent Disability Certificate dated

05.03.2014 issued by the Medical Board records the following opinion :

प्रमाणित किया जाता है कि कु०/श्रीमती/श्री संजय दीक्षित आयु 44 वर्ष पुत्र/पुत्री/ पत्नी स्व० रूप किशोर दीक्षित निवासी (पूर्ण आवासीय पता) 112/164 बेनाझाबर रोड आर्यनगर थाना स्वरूप नगर

जिला कानपुर नगर आज मेरे सम्मुख अपनी शारीरिक जांच हेतु उपस्थित हुये/हुई। सम्यक शारीरिक जाँच के उपरान्त उनके शरीर में निम्नलिखित विकलाँगता पाई गई जो स्थाई प्रकार की है।

उपरोक्त विकलाँगता के आधार पर इनका विकलाँगता प्रतिशत लगभग 50%(fifty) है। इनका पहचान चिन्ह Raise mole Rt side face है। इनके (दायें/बायें) अंगूठे का निशान निम्नवत् हैः-

17. The Tribunal, while writing the impugned judgment, has not analysed this medical opinion expressed in medical terms in order to assess its impact on the claimant's functional disability or impairment in pursuing his profession.

18. At one stage of his submissions, Mr. Shukla, learned Counsel for the claimant has invited the attention of the Court to the Tribunal's failure to award anything under the head of future prospects, bearing in mind the principles laid down by the Constitution Bench of the Supreme Court in **National Insurance Company Ltd. v. Pranay Sethi5**. The future prospects are no longer limited to the salaried class, but extend to the self-employed professionals, businessmen and others. Mr. Shukla impressed upon this Court the fact that in cases of injury, not only fatal accident, future prospects are to be awarded. He has drawn this Court's attention to the decision of their Lordships of the Supreme Court in **Jagdish v. Mohan and others6**. There is little doubt that future prospects ought to be considered for the claimant, which the Tribunal did not do, going by the principles of law governing the subject then declared. Nevertheless, the claimant is entitled to an assessment about his future prospects.

19. Learned Counsel for the claimant urged this Court to go about the exercise of assessing future prospects based on well settled principles, which he said this Court could do without a claim in that behalf or a cross appeal. He invited the attention of this Court to the holding of the Supreme Court in **Kajal v. Jagdish Chand and others7** . That principle is not in doubt and this Court would not hesitate to pass an award, directing just compensation, without a cross appeal relating to future prospects or some other heads like trauma, suffering and pain that have escaped the Tribunal's determination. But since this Court is of opinion that the issue of functional disability is required to be ascertained by the Tribunal on the basis of the doctor's evidence and other relevant factors, it is best left to the Tribunal to go into the issue of future prospects as also compensation to be awarded under the head of pain, suffering and lost amenity, besides expenses on future medical treatment, if found involved on further evidence being led about it.

20. This order of remand and the consequent setting aside of the impugned award, would not mean that the sum of money that has been paid to the claimant under the interim orders of this Court and the impugned award, since set aside by this

order, would have to recovered from the claimant right away. The said compensation would remain with the claimant to abide by the final determination about the claimant's extent of entitlement to compensation.

21. For the sake of eschewing any confusion, it is made clear that all other findings recorded by the Tribunal in the impugned award are affirmed, except the finding relating to functional disability arising from the certified permanent disability of 50 percent. The Tribunal is also required to consider award of compensation under the head of future prospects that the claimant would be entitled to, besides loss under the head of pain, suffering and trauma resulting from the accident, the inability of the victim to lead a normal life, together with its amenities and any future medical expenses related to the accident. These matters would be gone into by the Tribunal on the basis of evidence led before it or evidence that the Tribunal comes by, upon inquiring into what would be just compensation in this case.

22. In the result, this appeal **succeeds** and stands ***allowed in part***. The impugned award is **set aside**, with a remand of the claim petition to the Tribunal now competent to hear the claim petition. The Tribunal shall hear and decide the claims petition afresh in accordance with the remarks in this judgment and on issues made over to it for determination. The necessary evidence shall be examined by the Tribunal for the purpose of passing an award that determines just compensation, to which the claimant is entitled. The sum of money already paid to the claimant under the Tribunal's award, since set aside in terms of the interim order passed in this appeal, shall not be recovered from the claimant and shall abide by the final determination to be made relating to the claim. The Tribunal shall proceed to decide the claim afresh within three months of receipt of a copy of this judgment, after hearing both parties, that is to say, the Insurance Company and the claimant. Both the parties shall appear before the Presiding Officer, Motor Accident Claims Tribunal, Kanpur Nagar on 21.03.2022.

23. Let this order be communicated to the Presiding Officer, Motor Accident Claims Tribunal, Kanpur Nagar by the Registrar (Compliance) and let the lower court records be sent to the said Tribunal by the Office, forthwith.

(2022)03ILR A927
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.01.2022

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE SUBHASH VIDYARTHI, J.

Special Appeal No. 1 of 2022

Amod Kumar ...Petitioner
Versus
Director Training & Employement, U.P. Rozgar Bhawan, Lko. & Ors.
...Respondents

Counsel for the Petitioner:
Amita Srivastava

Counsel for the Respondents:
C.S.C., A.S.G.I.

A. Service Law – Service Rules of 1991 - Rule 8 - U. P. Industrial Training Institutes (Instructors) Service Rules, 1991 - Rule 5 - U. P. Procedure for Direct Recruitment

for Group 'C' Posts (Outside the Purview of U.P. Public Service Commission) Rules, 1998 read with U.P. Procedure for Direct Recruitment to Group 'C' Posts of Technical Nature Or For Which Specific Qualifications are Prescribed (Outside the Purview of the U.P. Public Service Commission), Rules, 2001; 3rd Amendment to the U.P. Industrial Training Institutes (Instructors) Service Rules, 1991 - Equivalence of qualifications for the purposes of employment, can be decided by the employer only, which in the present case is the State Government, and not by any other authority, including the Courts. (Para 28)

The appointment has to be made strictly as per terms of the advertisement and in case, the candidates who did not possess the qualification as mentioned in the advertisement were permitted to participate in the selection process, it would be a fraud with the Public and no Court should be a party to the perpetuation of the fraudulent practice. (Para 29)

B. Equity and law are twin brothers and law should be applied and interpreted equitably but equity cannot over-ride written or settled law. (Para 30)

C. Mere inclusion of candidates in a selection list does not confer upon them a vested right to appointment. In the instant case, the petitioner had merely faced interview and the selection process had not even been completed. The respondents issued a fresh advertisement on the ground that they could not get candidates possessing the prescribed eligibility qualification in response to the earlier advertisement, which is a valid reason and which is not arbitrary or unreasonable. Therefore, the appellant-petitioner had no indefeasible right to be selected in pursuance of the earlier advertisement issued on 18-12-2006 and the contention of the petitioner in this regard is liable to be rejected. (Para 33, 34)

The petitioner had the opportunity of participating in the selection process held pursuant to the subsequent advertisement issued in the year 2007 but he chose not to do so. In the Writ Petition challenging the advertisement issued in the year 2007, no relief can be granted at this distant point of time, particularly keeping in view the fact that the petitioner did not have any indefeasible right for appointment merely on the ground that he had faced the interview. (Para 35)

Special appeal dismissed. (E-4)

Precedent followed:

1. Upendra Narain Singh Vs St. of U. P., [2006 (7) ADJ 178] (Para 7, 14)

2. District Collector and Chairman, Viziangaram & anr. Vs M. Tripura Sundari Devi, (1990) 3 SCC 655 (Para 29)

3. P.M. Latha & anr. Vs St.of Kerala & ors., (2003) 3 SCC 541 (Para 30)

4. State Vs Umesh Kumar, (2020) 10 SCC 448 (Para 33)

Present appeal challenges order dated 24.09.2017, passed by Additional/Joint Director, Treasury and Pension, Varanasi, Uttar Pradesh.

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

1. Heard Sri Rajeev Srivastava, Advocate, learned counsel for the appellant and Sri Amitabh Rai, Advocate, learned Additional Chief Standing Counsel appearing for respondent nos.1 and 2.

2. By means of the instant Special Appeal filed under Chapter-VIII, Rule-5 of the Allahabad High Court Rules, the Appellant has challenged the judgment and order dated 30.11.2021 passed by the Hon'ble Single Judge dismissing Writ Petition No. 2453 (Service Single) of 2008 (Amod Kumar vs. Director Training and Employment, Lucknow and 03 others).

3. On 08.01.2006, an advertisement was issued by the Director, Training and

Employment, Uttar Pradesh inviting applications for selection on 11 posts of Instructor in the Trade of Mechanic (Tractor).

4. The eligibility qualification mentioned in the advertisement was as follows: -

(1) Having passed Intermediate Examination conducted by the Uttar Pradesh Intermediate Education Board or any other examination recognized by the Government as its equivalent, (2) a certificate issued by NCVT in the concerned trade or the principles of teaching module in trade or a Diploma in the Trade issued by the Council for Technical Education or any other Institution recognized by the State Government and (3) a certificate under regular draft instructor training scheme of one year duration; or the principles of teaching module in trade not having facilities for instructors training (necessary practical will be provided after the appointment within three years) and (3) a minimum of two years' experience in an industry or a training/ teaching institution either before or after obtaining instructor training.

5. The petitioner applied in response to the aforesaid advertisement and on 03.02.2007, the respondent no.1 had issued a letter calling the appellant to appear for interview on 16.02.2007. The appellant claimed that he had appeared for interview on 16.07.2007 but no selection was made as, according to the respondent no.1, no candidate was found to be eligible for being appointed as Instructor in the Trade of Mechanic (Tractor).

6. In March 2008, the respondent No. 1 issued a fresh advertisement inviting applications for selection to 11 posts of Instructors in Trade Mechanic Tractor.

7. The appellant-petitioner did not apply in pursuance of the said advertisement and he filed Writ Petition No. 2453 (S/S) of 2008 in this Court challenging the said advertisement seeking a writ of mandamus commanding the respondent Nos. 1 and 2 to consider his appointment in furtherance of the earlier advertisement dated 18.12.2006 mainly on the ground that the petitioner holds the eligibility qualification mandated by this Court in the judgment dated 08-08-2006 passed in Writ Petition No. 1822 of 2004 - **Upendra Narain Singh versus State of U.P.** [2006 (7) ADJ 178], which in turn has to be read in the qualifications prescribed in Rule 8 of the Service Rules of 1991 as amended with effect from 08-08-2003 and the qualification no. 3 prescribed in Rule 8 of the Rules of 1991 is not only misconceived, but is beyond the authority of the respondents no. 1 and 2.

8. Placing reliance on the aforesaid judgment in Upendra Narain Singh (Supra), the appellant-petitioner has submitted that when this Court had issued a direction to the State Government *"to advertise, hold and complete the selection process on all the vacancies within a period of four months from the date of delivery of this judgment."*, the respondents had no right to cancel the selection process and it had to be completed as directed in the aforesaid judgment and order dated 08-08-2006.

9. In support of his contention that the Craft Instructor Certificate (CTI) awarded to the appellant-petitioner by the NCVT for the trade of Farm Mechanic includes trades of Tractor Mechanic and Agriculture Mechanic Machinery, the appellant-

petitioner has annexed a letter dated 26.11.2007 written by the Director, Central Higher Training Institute (ATI) Ludhiana to the Director Training and Employment, U.P. as Annexure No. 5 to the Writ Petition, stating that "मैं प्रमाणित करता हूं कि अनुदेशक प्रशिक्षण शिल्पकार फॉर्म मैकेनिक ट्रेड से (सी.टी.आई.) कराया जाता है । ट्रेड फॉर्म मैकेनिक, ट्रैक्टर मैकेनिक, एग्री. मैकेनिक मशीनरी के प्रशिक्षार्थी को प्रशिक्षण दिया जाता है। तीनों ट्रेडों की अनुदेशक प्रशिक्षण शिल्पकार (सी.टी.आई.) फॉर्म मैकेनिक से प्रमाण पत्र दिया जाता है । याची गण का प्रमाण पत्र सत्य जारी किया गया है ।"

10. In the counter affidavit filed on behalf of the State, it was pleaded that mere calling for the interview does not create any right. The petitioner-appellant was not having the requisite qualification as prescribed in the amended Instructor Service Rules and as mentioned in the advertisement and for this reason though the appellant-petitioner was called for interview but no selections were made.

11. In the counter affidavit filed on behalf of the respondent Nos. 3 and 4 i.e. Director General of Employment and Training, Ministry of Labour and Employment, Government of India, New Delhi and Director Advanced Training Institute, National Council for Vocational Training, Government of India, Ministry of Labour, Gill Road, Ludhiana, it was stated that NCVT in its 31st meeting held in November 1995 recommended a separate stream of instructors for theory subjects and practical classes with enhanced qualifications and revised norms with revised pay scale. The above recommendations were accepted by Government of India for its implementation and, therefore, all the State Governments had been advised to amend their recruitment rules and appoint the Vocational instructors with enhanced qualification and revised norms vide letter dated 24th July 1996.

12. Regarding the aforesaid letter dated 26.11.2007 relied by the petitioner, it is stated in the counter affidavit that it is false that the Director, Advanced Training Institute, Gill Road, Ludhiana had written a letter dated 26.11.2007 to the Directorate of Training and Employment, Rozgar Bhavan, Lucknow as no such letter was issued by the office of the Director, Advanced Training Institute, Gill Road, Ludhiana. The letter dated 26.11.2007 contained as Annexure No. 5 to the writ petition submitted by the appellant-petitioner was false and fabricated document. The said letter had neither been signed by the official respondent nor had it been issued to the opposite party No. 1. In this way, the letter dated 26.11.2007 was a forged, fraudulent and fabricated document.

13. Replying to the pleadings of the respondent Nos. 1 and 2 that by merely by being called for interview, the appellant-petitioner does not get any indefeasible right for being selected, the appellant-petitioner has stated that once a candidate has submitted his application in accordance with the terms and conditions stipulated in the advertisement and the candidate concerned has been called for the interview in recognition of the application of the candidate having been found in order, the prospective employer is estopped from disputing the qualification of the candidate concerned. It is only when the certificate/testimonial given by the candidate concerned is found to be fake or

not genuine that the candidature of an applicant is liable to be cancelled.

14. The advertisement dated 18-12-2006 and the second advertisement issued in March 2008, copies whereof have been filed as Annexure Nos. 2 and 3 to the Writ Petition respectively, state that the same were issued in compliance of the order dated 08-08-2006 issued by this Court in Writ Petition No. 1822 of 2004 **Upendra Narain Singh versus State of U. P.** [2006 (7) ADJ 178]. The principal contention of the learned Counsel for the Appellant is that the respondents were obliged to complete the selection process in compliance with the aforesaid judgment of this Court and by not completing the selection process, they have violated the order passed by this Court.

15. By means of the judgment and order dated 30-11-2021, the Hon'ble Single Judge has dismissed the Writ Petition holding that the appointing authority or the employer has the right to cancel the selection process pursuant to the advertisement issued earlier and to re-advertise the posts. Merely by appearing for the interview, the petitioner did not get any indefeasible right to be appointed on the post of Instructor Mechanic (Tractor). The appellant-petitioner had the opportunity of participating in the selection process held pursuant to the subsequent advertisement issued in the year 2007 but he chose not to do so. In the Writ petition challenging the advertisement issued in the year 2007, no relief can be granted at this distant point of time, particularly keeping in view the fact that the petitioner did not have any indefeasible right for appointment merely on the ground that he had faced the interview.

16. Learned counsel for the appellant-petitioner has sought to assail the judgment dated 30-11-2021 on the ground that the Hon'ble Single Judge failed to take into consideration the judgment dated 08.08.2006 passed by this Court in Upendra Narain Singh versus State of U.P. (Supra), paragraph No. 34 whereof is as follows:-

"34. The State Government is directed, in addition, and in modification to the direction issued by Lucknow Bench of this Court in its judgment and order dated 05.3.2003, in Writ Petition No. 6565 (SS) of 2001, Kalyan Rai v. State of U.P. and Ors. to advertise, hold and complete the selection process on all the vacancies within a period of four months from the date of delivery of this judgment. Now since directions have to be issued for fresh advertisement for these vacancies and all those vacancies, which may have arisen subsequently, the rights of those candidates, who have obtained these higher/ teaching qualifications as recommended by the Central Government and provided in the rules by the 2nd Amendment to the Rules of 1991, on 08.08.2003 cannot be ignored. It is as such further directed that all those candidates, who have obtained qualifications upto the date of fresh advertisement shall also be considered for selections and that all those candidates, who were within the age limit on the last date of receiving application in pursuance of advertisement dated 20.8.2003, shall also be eligible to apply for selections in pursuance of the fresh advertisement."

17. A perusal of the judgment in Upendra Narain Singh (Supra) reveals that prior to the year 1991 the service conditions of the Vocational Instructors were regulated by the Government Orders and Administrative Instructions. Then the

State Government framed U. P. Industrial Training Institutes (Instructors) Service Rules, 1991 (In short "the Rules of 1991') which replaced those orders and provided for, amongst other, the qualifications and method of recruitment. Rule 5 of the Rules of 1991 provides for recruitment through U.P. Public Service Commission on the basis of competitive examination and interview. The rules were amended in 1994 by 1st Amendment to these rules providing for source of recruitment through the Subordinate Services Selection Commission, under the Rules known as U. P. Procedure for Direct Recruitment for Group 'C' Posts (Outside the Purview of U.P. Public Service Commission) Rules, 1998, read with U.P. Procedure for Direct Recruitment to Group 'C' Posts of Technical Nature Or For Which Specific Qualifications are Prescribed (Outside the Purview of the U.P. Public Service Commission), Rules, 2001.

18. The National Council of Vocational Training (NCVT) made recommendations to the Central Government to enhance the qualifications required for the post of Vocational Instructors in Industrial Training Institutes. The NCVT proposed that for Vocational Instructors teaching, Theory including Workshop, Calculation, Science and Engineering Drawing, the candidate should possess apart from the minimum academic qualifications of 10+2 system of education, three years diploma in appropriate branch of engineering from recognized institutions and in addition, the teaching qualification namely Certificate under Draft Instructor Training Scheme (one year course) or should have successfully completed minimum two modules of teaching methodology under Draft Instructor Training Programme on module pattern, or should have passed one year course from Technical Teachers Training Institute (TTTI) under Ministry of Human Resource Development.

19. The NCVT further proposed that for Vocational Instructor (Practical) apart from the academic qualification of 10+2 system of education, the candidate should possess technical qualification of NTC/CAC for Trade; (1) a certificate under regular draft instructor training scheme of one year duration; or (2) the principles of teaching module in trade not having facilities for instructors training, necessary practical be provided after the appointment within three years; and (3) a minimum of two years' experience in an industry or a training/ teaching institution either before or after obtaining instructor training.

20. The recommendations of NCVT, were accepted by the Central Government and by letter dated 24.7.1996 of Director General/ Joint Secretary (DGE & I), Ministry of Labour, Government of India, the Central Government, issued directions to all Secretaries of the State Governments/ UT Administration (dealing with Draftsman Training Scheme), for necessary amendments in recruitment rules.

21. In the meanwhile 'Prashikshan Mitra Yojana' was introduced by issuing a circular dated 31.8.2000, initially for the financial year 2000-01 for appointment of 'Guest Speakers' on honorarium basis on contract. On the expiry of their fixed term, the 'Guest Speakers' appointed on contract basis under the scheme filed writ petitions with the prayer to continue them and to regularize their services. The writ petitions were clubbed and heard together with leading Writ Petition No. 6565 (SS) of 2001, Kalyan Rai v. State of U.P. All the

writ petitions were dismissed by means of a judgment dated 05.3.2003 and a direction was issued to the Department of Industries, Government of U.P., the administrative department, to hold selections within a period of four months by making advertisement, if the selections were not earlier advertised.

22. The Government of Uttar Pradesh accepted the recommendations of the NCVT and the Central Government and amended the Rules of 1991 by 2nd Amendment notified on 08.8.2003 and advertised the vacancies on 20.8.2003 inviting applications from the candidates possessing the higher teachers training qualifications provided in the amended rules. However, after applications were received, the State Government cancelled the advertisement by issuing a notice dated 29-09-2003.

23. Thereafter State Government again amended the Rules of 1991 by the 3rd Amendment to the Rules of 1991 notified on 09.12.2003, deleting enhanced teaching qualifications, directed by the Central Government on recommendations of the National Council of Vocational Training. A fresh advertisement was issued on 13.12.2003 inviting applications for 742 vacancies of Instructors existing in ITI's in 34 Trades.

24. In Upendra Narain Singh (Supra), under challenge was to the **3rd Amendment** to the **U.P. Industrial Training Institutes (Instructors) Service Rules, 1991** notified on **09.12.2003,** deleting the higher teaching qualifications, introduced in the rules by the 2nd Amendment vide notification dated 08.08.2003, for the post of Vocational Instructors (Trade, Theory, Workshop, Calculation, Science, Engineering and Drawing) and Vocational Instructor (Practical) in the Industrial Training Institutes (in short ITI's) in U.P. and this Court held as follows: -

"The State Government having acted upon the directions of the Central Government and amended the rules, was not competent to again amend the rules lowering the higher teaching qualifications and making them preferential. The State Government rightly understood its legal obligations and the constitutional scheme. Having accepted the position, the State Government acted grossly illegally and arbitrarily in amending the rules by the 3rd Amendment, in violation of Article 14 and 16 of the Constitution, The Court takes judicial notice of the fact in the State of U.P. the teaching standards in all the educational institutions are falling gradually. In order to improve these standards, the national level teaching institutions have been established offering higher teaching qualifications and the Central Government is insisting the State Government to appoint only such teachers, who have higher and specific teaching qualifications. The candidates possessing such higher teaching qualifications have legitimate expectation to be considered for appointment on teaching posts. In case the State Government allows the persons having lower teaching qualifications to hold the posts, the rights of candidates having higher teaching qualifications will be violated. It will give rise to invidious discrimination and violate their constitutional right of equality before law.

The amendment in Rule 8 by the U.P. Industrial Training Institute (Instructor) (3rd Amendment) Service Rules, 2003, is thus held to be violative to

the Constitutional Scheme of distribution of legislative powers, as also Article 14 and 16 of the Constitution of India. The writ petitions challenging the advertisement dated 13.12.2003 are thus liable to be allowed and the advertisement dated 13.12.2003 is consequently quashed."

25. Finally this Court issued the following directions: -

"The State Government is directed, in addition, and in modification to the direction issued by Lucknow Bench of this Court in its judgment and order dated 05.3.2003, in writ petition No. 6565 (SS) of 2001, Kalyan Rai v. State of U.P. and Ors. to advertise, hold and complete the selection process on all the vacancies within a period of four months from the date of delivery of this judgment. Now since directions have to be issued for fresh advertisement for these vacancies and all those vacancies, which may have arisen subsequently, the rights of those candidates, who have obtained these higher/ teaching qualifications as recommended by the Central Government and provided in the rules by the 2nd Amendment to the Rules of 1991, on 08.08.2003 cannot be ignored. It is as such further directed that all those candidates, who have obtained qualifications upto the date of fresh advertisement shall also be considered for selections and that all those candidates, who were within the age limit on the last date of receiving application in pursuance of advertisement dated 20.8.2003, shall also be eligible to apply for selections in pursuance of the fresh advertisement."

26. The position which emerges from the judgment in Upendra Narain Singh (Supra) is that the NCVT had proposed that for Vocational Instructor (Practical) apart from the academic qualification of 10+2 system of education the candidate should possess technical qualification of NTC/CAC for Trade; (1) a certificate under regular draft instructor training scheme of one year duration; or (2) the principles of teaching module in trade not having facilities for instructors training, necessary practical be provided after the appointment within three years; and (3) a minimum of two years' experience in an industry or a training/ teaching institution either before or after obtaining instructor training. The recommendations of NCVT, were accepted by the Central Government and the Central Government issued directions to all Secretaries of the State Governments/UT Administration for necessary amendments in recruitment rules. The Government of Uttar Pradesh accepted the recommendations and amended the Rules of 1991 by 2nd Amendment notified on 08.8.2003. However, thereafter the 3rd amendment was made in the Rules deleting the requirement of higher qualification which was introduced by the 2nd Amendment and the third amendment was quashed by this Court in Upendra Narain Singh (Supra). Therefore, the eligibility requirement put in the Advertisement dated 18-12-2006 was as per the 2nd Amendment Rules as also as per the order passed in Upendra Narain Singh (Supra) and there is no illegality in it.

27. The appellant-petitioner next contended that he possesses the qualification of Craft Instructor's Certificate (CTI) awarded by NCVT in the trade of Farm Machinery, which according to him is an umbrella term which includes the trades of Farm Mechanic, Tractor Mechanic, Agriculture Mechanic Machinery and this has been certified by

the Director, Central Higher Training Institute (ATI) Ludhiana to the Director Training and Employment, U.P. through his letter dated 26.11.2007 filed as Annexure No. 5 to the Writ Petition. In this regard firstly, we may state that in the counter affidavit filed on behalf of the Director, Central Higher Training Institute, it has been stated that it is false that the Director, Advanced Training Institute, Gill Road, Ludhiana had written the letter dated 26.11.2007 to the Directorate of Training and Employment, Rozgar Bhavan, Lucknow as no such letter was issued by the office of the Director, Advanced Training Institute, Gill Road, Ludhiana. This letter dated 26.11.2007 contained as annexure No. 5 to the writ petition submitted by the appellant-petitioner is false and fabricated document. The said letter has neither been signed by the official respondent nor has it been issued to the opposite party No. 1. In this way, the letter dated 26.11.2007 is a forged, fraudulent and fabricated document. Therefore no benefit can be given to the petitioner on the basis of the aforesaid letter.

28. Secondly, equivalence of qualifications for the purposes of employment, can be decided by the employer only, which in the present case is the State Government, and not by any other authority, including the Courts.

29. In **District Collector and Chairman, Viziangaram and another v. M. Tripura Sundari Devi** (1990) 3 SCC 655, the Hon'ble Supreme Court held that the appointment has to be made strictly as per terms of the advertisement and in case, the candidates who did not possess the qualification as mentioned in the advertisement were permitted to participate in the selection process, it would be a fraud with the Public and no Court should be a party to the perpetuation of the fraudulent practice. Paragraph No. 6 of the said report runs as follows:

"6. It must further be realised by all concerned that when an advertisement mentions a particular qualification and an appointment is made in disregard of the same, it is not a matter only between the appointing authority and the appointee concerned. The aggrieved are all those who had similar or even better qualifications than the appointee or appointees but who had not applied for the post because they did not possess the qualifications mentioned in the advertisement. It amounts to a fraud on public to appoint persons with inferior qualifications in such circumstances unless it is clearly stated that the qualifications are relaxable. No Court should be a party to the perpetuation of the fraudulent practice. We are afraid that the Tribunal lost sight of this fact."

30. In **P.M. Latha and another v. State of Kerala and others,** (2003) 3 SCC 541, as per the advertisement the candidates having educational qualification of Teachers Training Certificate (for short T.T.E.) were entitled to compete for the selection and seek appointment on the post of Teachers in Government Primary School. However, in the select list B.Ed. Candidates were also included. As a result of which the candidates possessing the qualification of T.T.C. were excluded. Repelling the arguments advanced on behalf of the successful candidates that B.Ed. qualification was a higher qualification than T.T.C. and therefore, the B.Ed. Candidates should be held to be eligible to compete for the said post, the Apex Court in paragraph No. 13 of the said report has held as follows:

"13. Equity and law are twin brothers and law should be applied and interpreted equitably but equity cannot over-ride written or settled law. The division bench forgot that in extending relief on equity to B.Ed. candidates who were unqualified and yet allowed to compete and seek appointments contrary to the terms of the advertisement, it is not redressing the injustice caused to the appellants who were T.T.C. candidates and would have secured a better position in the Rank list to get appointment against the available vacancies, had B.Ed. candidates been excluded from the selections. The impugned judgment of the division bench is both illegal, inequitable and patently unjust. The T.T.C. candidates before us as appellants have been wrongly deprived of due chance of selection and appointment. The impugned judgment of the division bench, therefore, deserves to be set aside and of the learned single judge restored."

31. Thus the respondents could complete the selection process only considering the eligibility qualifications mentioned in the advertisement itself and any deviation therefrom would vitiate the selection process. Therefore, the petitioner's contention that he was entitled to be selected as he possessed a Craft Instructor Certificate (CTI) for the trade of Farm Mechanic and that includes trades of Tractor Mechanic also, is liable to be rejected for the aforesaid reasons.

32. Now we come to the petitioner's next ground of challenge, which is that the fact that the petitioner was interviewed for the post of instructor in Govt. ITI, conferred upon the petitioner the right to be considered for appointment as instructor in the trade of Mechanic Tractor. In the judgment under challenge in this Appeal, the Hon'ble Single Judge has held that the appointing authority or the employer has the right to cancel the selection process pursuant to the advertisement issued earlier and to re-advertise the posts. Merely by appearing for the interview, the petitioner did not get any indefeasible right to be appointed on the post of Instructor Mechanic (Tractor). We find no error in this finding of the Hon'ble Single Judge.

33. In **State v. Umesh Kumar**, (2020) 10 SCC 448, the Hon'ble Supreme Court has been pleased to summarize the well settled law in this regard in the following words: -

"19. The real issue, however, is whether the respondents were entitled to a writ of mandamus. This would depend on whether they have a vested right of appointment. Clearly the answer to this must be in the negative. In Punjab SEB v. Malkiat Singh, this Court held that the mere inclusion of candidates in a selection list does not confer upon them a vested right to appointment. The Court held: (SCC p. 26, para 4)

"4. ... the High Court committed an error in proceeding on the basis that the respondent had got a vested right for appointment and that could not have been taken away by the subsequent change in the policy. It is settled law that mere inclusion of name of a candidate in the select list does not confer on such candidate any vested right to get an order of appointment. This position is made clear in para 7 of the Constitution Bench judgment of this Court in Shankarsan Dash v. Union of India which reads: (SCC pp. 50-51)

"7. It is not correct to say that if a number of vacancies are notified for

appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in State of Haryana v. Subash Chander Marwaha, Neelima Shangla v. State of Haryana or Jatinder Kumar v. State of Punjab"

34. In the instant case, the petitioner had merely faced interview and the selection process had not even been completed. The respondents issued a fresh advertisement on the ground that they could not get candidates possessing the prescribed eligibility qualification in response to the earlier advertisement, which is a valid reason and which is not arbitrary or unreasonable. Therefore, the appellant-petitioner had no indefeasible right to be selected in pursuance of the earlier advertisement issued on 18-12-2006 and the contention of the petitioner in this regard is liable to be rejected.

35. The Hon'ble Single Judge has rightly held that the petitioner had the opportunity of participating in the selection process held pursuant to the subsequent advertisement issued in the year 2007 but he chose not to do so. In the Writ Petition challenging the advertisement issued in the year 2007, no relief can be granted at this distant point of time, particularly keeping in view the fact that the petitioner did not have any indefeasible right for appointment merely on the ground that he had faced the interview.

36. In view of the aforesaid discussion, the Special Appeal lacks merit and is liable to be dismissed.

37. Accordingly, the Special Appeal is **dismissed**. Costs made easy.

(2022)03ILR A937
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.02.2022

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Writ A No. 2615 of 1998

Smt. Yashoda Devi & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Kapil Deo, Sri Abhishek Yadav, Sri Ashwani Kumar

Counsel for the Respondents:
C.S.C., Sri K.P. Tripathi, Sri Manik Sinha, Sri N.K. Seth, Sri R.C. Srivastava, Sri Sudeep Seth, Sri Uttam Kumar Verma

A. Service Law – Uttar Pradesh Krishi Evam Prodyogik Vishwavidyalaya Adhiniyam, 1988 - As per the interim order, the petitioners have been drawing revised pay scale of Rs. 1200-2040/- after it was sanctioned

to them in the year 1991. Thus, for 31 years, the petitioners have been paid revised pay scale. The University itself has granted revised pay scale to some of the Lab Assistants as mentioned above. Even pay committee has recommended the identical pay scale to the Lab Assistants in Government Departments and other institutions which was Rs. 1200-2040/- (Revised Rs. 4000-6000/-). The audit objection, which was the basis for withdrawing the pay scale of Rs. 1200-2040, was removed and the very ground for issuing the GO vide order dated 28th April, 1998 got vanished after removal of the audit objection. It is not in dispute that the Lab Assistants working in the other Government Departments were in the pay scale of Rs. 1200-2040/- with effect from 1st January, 1986 and, thereafter Rs. 4000-6000/- in the sixth pay scale. The petitioners are duly appointed having requisite qualifications for the post of Lab Assistant and they have been working for fairly long time and some of them have retired and others are on the verge of retirement. At this stage, it would be unjust and improper to decline the pay scale of Rs. 1200-2040/- (revised from time to time). (Para 29)

The present writ petition is allowed. The petitioners in this writ petition are entitled to pay scale of Rs. 1200-2040/- w.e.f. the date of interim order i.e. 22nd June, 1998 (revised from time to time). (Para 30)

Writ petition allowed. (E-4)

Present petition prays for quashing of order dated 28.04.1998, issues by Government.

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

1. The petitioners, who were employed as Lab Assistant in the Acharya Narendra Dev University of Agriculture and Technology, Kumarganj, Faizabad (now Ayodhya) (hereinafter referred to as 'the University'), have filed this writ petition impugning the order dated 27th May, 1998 whereby pay scale sanctioned to the petitioner @ Rs.1200-2040/- against Rs.950-1500/- vide order dated 4th October, 1991 was cancelled by the Vice Chancellor of the University on the ground that the State Government vide order dated 28th April, 1998 had directed for stopping payment of pay scale of Rs.1200-2040/- to the post of Lab Assistant working in the University.

2. The petitioners have also prayed for quashing of the order dated 28th April, 1998 issued by the Government directing for stopping of the pay scale of Rs.1200-2040/-.

3. The petitioners have also prayed for a writ in the nature of mandamus commanding the respondents/opposite parties to allow them pay scale of Rs.1200-2040/- with consequential benefits.

4. It is stated that the petitioners were appointed as Lab Assistant in the University between 1980 and 1988, details of which have been given in para 3 of the writ petition.

5. Initially, four posts of Lab Assistant were created by the Board of Management of the University in the pay scale of Rs.200-320/-. Subsequently, with effect from 1st July, 1979, the pay scale was revised to Rs.354-550/- and, thereafter, it was revised to Rs.950-1500/- with effect from 1st January, 1986.

6. Since Lab assistants in Chandra Shekhar Azad Agriculture and Technical University, Kanpur and Gobind Ballabh Pant Agriculture and Technical University, Pantnagar, Uttarakhand, two other agricultural universities in the State, were receiving revised pay scale of Rs.1200-2040/-, the Lab Assistants working in the

University went on strike in the year 1991 making a demand of revised pay scale of Rs.1200-2040/- instead of Rs.950-1500/-. Finance State Committee constituted by the State Government in the University in its meeting dated 11th September, 1991 recommended the amendment in the pay scale of Lab Assistants in the University, on the basis of report of Samata Samiti on the premise that there had been an error in fixation of pay scale of Lab Assistant in the University.

7. The Board of Management in its meeting dated 12th September, 1991 resolved to sanction the new pay scale of Rs.1200-2040/- for the post of Lab Assistant with effect from 1st January, 1986, in anticipation of the approval of the State Government. The Board of Management in its resolution dated 12th September, 1991 said that new pay scale of Rs.1200-2040/- was sanctioned tentatively to the post of Lab Assistant. As per the resolution of the Board of Management, the Vice Chancellor vide order dated 4th October, 1990 gave new pay scale of Rs.1200-2040/- to the Lab Assistants provisionally in anticipation of the approval from the State Government.

8. The State Government, however, vide impugned order dated 28th April, 1998 declined to approve the pay scale of Rs.1200-2040/- to the Lab Assistant and, thereafter the University vide order dated 27th May, 1998 cancelled the earlier order dated 4th October, 1991 and directed payment of earlier pay scale of Rs.950-1500/- to the Lab Assistant.

9. The petitioners, therefore, aggrieved by the said two orders, had filed this writ petition and this court vide interim order dated 22nd June, 1998 directed the respondents to pay salary to the petitioners on the basis of scale which they were getting earlier (Rs.1220-2040/-) up to June, 1998. It was said that this order would be subject to the decision passed later on if any. The said interim order has been remained in operation till date.

10. During pendency of the writ petition, some of the petitioners had attained the age of superannuation and some of them had died. Retirement dues were not paid to the petitioners, who had got retired and this Court, therefore, vide order dated 26th November, 2013 directed for granting retirement benefits to the employees, who had attained the age of superannuation or died.

11. Heard Mr. Kapil Deo, learned Senior Advocate assisted by Mr.Ashwini Kumar, learned counsel for the petitioners, Mr.Sanjay Mishra, learned Additional Chief Standing Counsel for the State and Mr.Uttam Kumar Verma, learned counsel appearing for respondent Nos.3 and 4

12. Mr. Kapil Deo, learned Senior Advocate assisted by Mr.Ashwini Kumar, learned counsel appearing for the petitioners has submitted that three agriculture universities were established namely Chandra Shekhar Azad Agriculture and Technical University, Kanpur, Gobind Ballabh Pant Agriculture and Technical University, Pantnagar, Uttarakhand and Acharya Narendra Dev University of Agriculture and Technology, Kumarganj, Faizabad in the State of U.P. by the State Government and services of the employees, teachers and other staff of all the three universities were governed by the Uttar Pradesh Krishi Evam Prodyogik Vishwavidyalaya Adhiniyam, 1988 and the Statutes and Regulations framed thereunder. He has submitted that with effect

from 1st January, 1986 pay scale of the Lab Assistant in Chandra Shekhar Azad Agriculture and Technical University, Kanpur and Gobind Ballabh Pant Agriculture and Technical University, Pantnagar, Uttarakhand was revised to Rs.1200- 2050/- vide Government Order dated 27th January, 1990 and 4th February, 1990 respectively.

13. Vetan Samata Samiti, on 7th November, 1998 after making a comprehensive study in respect of the posts existing in the State Government Departments, Educational Institutions, Local Bodies and District Board, recommended that the posts having different pay scale be merged and granted pay scale of Rs.1200-2040/-. Samta Samiti had recommended pay scale of Rs.1220-2040/- for the post of Lab Assistant in Medical Department having Intermediate (Science) qualification, even in Horticulture Department pay scale of Lab Assistant was revised to Rs.1200-2040/-.

14. Learned Senior Advocate has further submitted that Lab Assistants of two other agriculture universities and medical department were sanctioned pay scale of Rs.1200-2040/- except for the Lab Assistants of the University.

15. It is relevant to note here that a notification was issued on 12/19th November, 1993 whereby the Chancellor granted sanction auditing Chapter X(A) of the Statute which reads as under:-

" Scale of pay, Allowances, Pension/Gratuity, Provident Fund, Insurance and other service benefits:-

"The scale of pay allowances and other emoluments the rules of pension including family pension, gratuity general or contributory provident fund, Insurance and other service benefit for teachers, officials and employees of the University will be the same as per Government orders issued on the subject from time to time."

16. Learned Senior Advocate has further submitted that during pendency of this writ petition, the petitioners at Serial Nos.33, 35, 36 namely, Mr.Brijendra Kumar Singh, Mr.Anil Kumar Singh and Mr.Kedar Yadav got regularized by the opposite parties vide order dated 4th June, 2003 on the post of Lab Assistant in the pay scale of Rs.4000-6000/- (revised from Rs.1200-2040/-). Thereafter, vide orders dated 30th June, 2003 and 15th April, 2004, two other petitioners placed at Serial Nos.37 and 34 namely, Mr.Krishna Kant Singh Yadav and Mr.Krishna Kumar were also regularized in the pay scale of Rs.4000-6000/-. Two other Lab Assistants namely, Smt. Kusum Lata Chauhan and Smt. Mithlesh were also regularized vide order dated 31st March, 2005 on the post of Lab Assistant in pay scale of Rs.4000-6000/- in compliance of the orders of this Court dated 16th April, 2002 passed in Writ Petition No.4677(SS) of 2002: Merai versus State of UP & Ors.

17. It has been further submitted that the opposite parties have been adopting pick and choose policy to regularize some of the Lab Assistants in the pay scale of Rs.4000-6000/- whereas the petitioners were not regularized in the same pay scale and thus, the opposite parties have discriminated against the petitioners.

18. It has been further submitted that the State Government wrote a letter dated 13th March, 1996 to the Vice Chancellor of the University intimating that the pay scale of Rs.1200-2040/- against pay scale of Rs.975-1540/- had been illegally allowed by the

University to the Lab Assistant and the said illegality in allowing the pay scale of Rs.1200-2040/- against the pay scale of Rs.975-1540/- had been figured in the audit objection. Therefore, it was directed that immediate necessary action should be taken for stopping the payment of salary in the pay scale of Rs.1200-2040/-. Another letter was written by the Government on 27th November, 1996 requesting the Vice-Chancellor to take rectificatory measures in the matter and send compliance report to the Government. It has been further submitted that the sole ground for Government's objection and direction for stopping the payment of pay scale of Rs.1200-2040/- was the audit objection. On 9th February, 2009, a letter/report was sent to the Assistant Director, Local Funds Accounts and Statutory Audit Section of the University by the Head of Department of the University indicating that pay scale of Rs.1200-2040/- was rightly and legally allowed to the Lab Assistants working in the University and there was no illegality or arbitrariness in granting the said pay scale to the Lab Assistant as figured in the audit objection. It was requested that on the basis of report, the aforesaid audit objection for the financial year 1990-91 should be dropped/removed.

19. Assistant Director, Local Funds Accounts and Statutory Audit Section of the University vide letter dated 12.02.2019 sent the said letter of the Head of Department dated 09.02.2009 on the subject to the Finance Controller of the University wherein it was recommended that audit objection for the financial year 1990-91 related to the alleged illegal pay scale of Rs.1200-2040/- to the Lab Assistants be dropped.

20. Learned Senior Advocate, therefore, has submitted that the very basis of the impugned order dated 28th April, 1998 is non-existent ground inasmuch as the audit objection for the year 1990-91 had been removed and the petitioners ought to have been granted the pay scale.

21. It has been further submitted by the learned Senior Advocate that the Lab Assistants working in other Departments of the State Government including in the affiliated colleges and universities, on the basis of recommendation of the Samata Smiti, have been drawing salary of the pay scale of Rs.1200-2040/- (revised Rs.4000-6000/-) with effect from 1st January, 1986. He has also drawn attention of the Court to the Government Order dated 26th September, 2013 whereby the State Government had taken a decision regarding fixation of pay on the basis of recommendation dated 7th November, 1998 of the Vetan Samiti in respect of Educational and Technical Education institutions.

22. It has been further submitted that the recommendations of the pay committee would show it had been recommended that the lab assistants posted in the affiliated colleges with the University should be given the pay scale of Lab Assistants at par the Lab Assistants posted in the Government Department and Institutions.

23. It has been submitted by the learned Senior Advocate that in view of the aforesaid, the petitioners are also entitled the salary for the pay scale of Rs.1200-2040/- (revised as Rs.4000-6000/-) in the sixth pay scale and, thereafter in the pay scale of Rs.5200-20200/- along with grade pay of Rs.2400/-.

24. On the other hand, Mr Sanjay Mishra, learned Additional Chief Standing Counsel appearing for the respondent No.1

and 2 has submitted that the petitioners were initially appointed as Lab Assistants in the pay scale of Rs.200-320/-, which was revised from Rs.354-550/- with effect from 1st July, 1979 and it was again revised to Rs.950-1500/- with effect from 1st January, 1986. The petitioners were illegally sanctioned the pay scale of Rs.1200-2040/- by the University in anticipation of approval by the State Government. Mr. Sanjay Mishra, learned A.C.S.C. has also submitted that the pay scale of Lab Assistants in Chandra Shekhar Azad Agriculture and Technical University, Kanpur was Rs.775-1025/- and Rs.1200-2040/- on or before 1st January, 1986 whereas in Gobind Ballabh Pant Agriculture and Technical University, Pantnagar, pay scale of Lab Assistant was Rs.430-685/- and Rs.354-550/- prior to 1st January, 1986 and after re-fixation with effect from 1st January, 1986, two pay scales became Rs.1200-2040/- and Rs.950-1500/-.

25. It has been further submitted by Mr.Sanjay Mishra, learned A.C.S.C. that there was only one pay scale of Lab Assistant in the University which was initially Rs.200-320/-, which got revised to Rs.354-550/- with effect from 1st July, 1979 and, then it was further revised to Rs.950-1500/- with effect from 1st January, 1986. He, therefore, has submitted that the petitioners are not entitled for the pay scale of Rs.1200-2040/-.

26. Mr Sanjay Mishra, learned Additional Chief Standing Counsel has also submitted that the petitioners have not brought any material on record to show that nature of work and duties, volume of work, degree of responsibility, quality and quantity of work, area of work etc., of Lab Assistants in the University and Chandra Shekhar Azad Agriculture and Technical University, Kanpur, Gobind Ballabh Pant Agriculture and Technical University, Pantnagar, Uttarakhand are same. It has been further submitted that the petitioners were appointed in the pay scale of Rs.200-320/-, which was revised as mentioned above to Rs.950-1500/- with effect from 1st January, 1986 and, therefore, they were not entitled for pay scale of Rs.1200-2040/- as claimed by them. The State Government, therefore, directed the University to cancel the order of granting pay scale of Rs.1200-2040/- to them. He, therefore, submits that there is no illegality in the impugned order passed by the State Government and consequential order passed by the University.

27. Mr Uttam Kumar, learned counsel appearing for the University has submitted that the Board of Management in its meeting dated 12th September, 1991 resolved to sanction of new pay scale of Rs.1200-2040/- for the post of Lab Assistant with effect from 1st January, 1986 as the Lab Assistants posted in the University went on strike in the year 1991 making demand of revised pay scale of Rs.1200-2040/-. Said pay scale was granted to the Lab Assistants in anticipation of the approval from the State Government. He has further submitted that the University received grant/budget from the State Government and, since revised pay scale of Rs.1200-2040/- was not approved by the State Government, the petitioners did not become entitled for the said pay scale inasmuch as the same was granted to them by the University provisionally in anticipation of the approval from the State Government.

28. I have considered the submissions advanced on behalf of the learned counsel

for the petitioners as well as learned Additional Chief Standing Counsel and Mr Uttam Kumar Verma, learned counsel appearing for the University.

29. As per the interim order, the petitioners have been drawing revised pay scale of Rs.1200-2040/- after it was sanctioned to them in the year 1991. Thus, for 31 years, the petitioners have been paid revised pay scale. The University itself has granted revised pay scale to some of the Lab Assistants as mentioned above. Even pay committee has recommended the identical pay scale to the Lab Assistants in Government Departments and other institutions which was Rs.1200-2040/- (Revised Rs.4000-6000/-). The audit objection, which was the basis for withdrawing the pay scale of Rs.1200-2040, was removed and the very ground for issuing the Government Order vide order dated 28th April, 1998 got vanished after removal of the audit objection. It is not in dispute that the Lab Assistants working in the other Government Departments were in the pay scale of Rs.1200-2040/- with effect from 1st January, 1986 and, thereafter Rs.4000-6000/- in the sixth pay scale. The petitioners are duly appointed having requisite qualifications for the post of Lab Assistant and they have been working for fairly long time and some of them have retired and others are on the verge of retirement. At this stage, it would be unjust and improper to decline the pay scale of Rs.1200-2040/- (revised from time to time).

30. In view of the aforesaid discussion, the present writ petition is ***allowed***. The petitioners in this writ petition are entitled to pay scale of Rs.1200-2040/- with effect from the date of interim order i.e. 22nd June, 1998 (revised from time to time).

(2022)03ILR A943
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.12.2021

BEFORE

THE HON'BLE DINESH PATHAK, J.

Writ C No. 8810 of 2019

Gram Panchyat Kabirpur Distt. Chandauli ...Petitioner

Versus

Addl. Commissioner (Administration) Varanasi Div. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Manoj Kumar Yadav, Si Bhupendra Kumar Tripathi

Counsel for the Respondents:
C.S.C., Sri Abhishek Singh, Sri Bhupendra Kuar Tripathi, Sri Sanjeev Singh (Sr. Adv.), Sri Dinesh Kumar Singh

A. Land Law - U.P.Z.A. & L.R. Act, 1950.-- **Section 229 B** - Suit for declaration of Bhumidhari Rights- decreed ex-parte- four restoration applications filed at a very belated stage at different stages under Order IX Rule 13 of C.P.C.

B. Civil Law - Code of Civil Procedure, 1908 - Order IX Rule 13 of C.P.C.- Defendant against whom decree has been passed ex-parte is entitled to get the same set-aside if he could satisfy the court that the summons were not duly served upon him or that he was prevented by sufficient cause from appearing when the suit was called upon for hearing.

C. Civil Law - Code of Civil Procedure, 1908 - Second Proviso to Rule 13 of Order IX of C.P.C.- Right to get an ex-parte decree ceased to be available in a case where the defendant knew, or but for his willful conduct would have known of the date of hearing in

sufficient time to enable him to appear and answer the plaintiff's claim.

D. Time spent in pursuing the application under Order IX Rule 13 of C.P.C. is to be taken as sufficient cause for condoning the delay in filing the first appeal.

E. Civil Law - Code of Civil Procedure, 1908 -Section 96 (2) - Conjoint reading of Order IX Rule 13 of C.P.C. & Section 96 (2) of C.P.C. indicates that the defendant who suffered ex-parte decree has two remedies, either to file an application under Order IX Rule 13 of C.P.C. or, or to file a regular appeal from the original decree challenging the same on merits.

Writ Petition Dismissed. (E-12)

List of Cases cited:-

1. Bhivchandra Shankarmore Vs Balu Gangaram More & ors., (2019) 6 SCC 387

2. Lekhi Ram @ Mula & anr. Vs St. of U.P. & ors., 2002 R.L.T. 668

(Delivered by Hon'ble Dinesh Pathak, J.)

1. Rejoinder affidavit and supplementary affidavit filed on behalf of the petitioner is taken on record.

2. Heard Sri Bhupendra Kumar Tripathi, learned counsel for the petitioner (Gaon Sabha), Sri Sanjeev Singh, learned Senior Advocate assisted by Sri Dinesh Kumar Singh, learned counsel for the contesting respondent No. 7, learned Standing Counsel representing respondents No. 1 and 2 and perused the record.

3. Learned counsel for the contesting Respondent No. 7 has refused to file any reply to the aforesaid supplementary affidavit and is agreed to argue the matter on merits.

4. As per the office report dated 26.11.2021, notices were sent to the respondents No. 3 to 6, however, neither the acknowledgement due nor undelivered envelope is received back till date. No one has put in appearance on their behalf.

5. Learned Senior Counsel states that respondent No. 7 is the vendee from respondents No. 3 to 6, who have lost their interest in the matter and even before the revisional court they did not appear and the matter was contested only by the respondent No. 7.

6. In view of the office report dated 26.11.2021 and the statement made by counsel for the respondent No. 7, service of notice upon the respondents No. 3 to 6 is deemed to be sufficient and the court proceeds ex-parte against them.

7. The present writ petition has been filed on behalf of Gram Panchayat, Kabirpur invoking extraordinary jurisdiction of this Court under Article 226 of the Constitution of India challenging the judgment and decree dated 8.10.1985 as well as order dated 5.10.2016 passed by Sub-Divisional Officer (respondent No. 2) and order dated 14.8.2018 passed by Additional Commissioner (respondent No. 1).

8. Grievance of the petitioner is that a suit for declaration of Bhumidhari rights under Section 229B of The UP Zamindari Abolition and Land Reforms Act, 1950 (in brevity, "UPZA Act') has been decided ex-parte against the petitioner and the restoration filed at the behest of the petitioner, against the said ex-parte judgment and decree, has illegally been rejected by the trial court, which was affirmed by the revisional court.

9. Facts culled out from the pleadings of the parties reveals that Habib Ullah (father of respondent No. 3 to 6) had filed suit dated 10.1.1983 for declaration under Section 229B of UPZA Act for declaring him as a Bhumidhar with transferable right over plot in question i.e. plot No. 59/4 area 0.77 decimal and plot No. 105/2 area 0.40 decimal. Aforesaid suit was filed against Gaon Sabha and the State. Service of notice was properly served upon the parties. Written statement had been filed by the State of Uttar Pradesh through District Government Counsel (Revenue) (in brevity, "DGC (R)'). After exchange of pleadings, aforesaid suit was decreed by judgment and decree dated 8.10.1985. Aforesaid judgment was well within the knowledge of DGC (R), who has jotted the remark of "seen' on the margin of the order sheet dated 20.11.1985. After death of Habib Ullah, name of his sons namely Eqbal Ahmad and others (respondent No. 3 to 6) came to be recorded in the revenue record. Registered sale deed dated 25.3.2010 was executed by them with respect to the property in question in favour of the respondent No. 7 namely Ashok Kumar Agarwal. On the basis of aforesaid sale deed, the name of Ashok Kumar Agarwal (respondent No. 7) was recorded in the revenue record.

10. At the very belated stage, Gaon Sabha has filed restoration application dated 24.8.1992 against the judgment and decree dated 8.10.1985, which was ordered to be dismissed in default on 17.4.1993 and against the said order, Gaon Sabha has filed restoration application dated 27.9.1993, which was also dismissed in default on 21.6.1996. Again restoration application was filed on 14.8.1996, which was allowed by order dated 14.7.1997. Being aggrieved against the order dated 14.7.1997, respondent No. 7 has filed revision, which was allowed by order dated 29.3.2004 passed by the revisional court relegating the parties before the trial court to first decide the application for the condonation of delay in filing the restoration application. Consequent to the remand order dated 29.3.2004, restoration application dated 14.8.1996 was restored to its original number but the same was dismissed in default by order dated 25.5.2015 (annexure No. 2). Against the order dated 25.5.2015, two restoration applications were filed:-

(i) Restoration application dated 15.6.2015 filed on behalf of the State.

(ii) Restoration application dated 27.6.2015 filed on behalf of the Gaon Sabha.

11. Both the aforesaid restoration applications were rejected on 5.10.2016. Being aggrieved with the said order dated 5.10.2016, a revision was preferred on behalf of Gaon Sabha, which was dismissed vide order dated 14.8.2018 passed by respondent No. 1, which is under challenge in the present writ petition.

12. Learned counsel for the petitioner has assailed the impugned orders dated 5.10.2016 and 14.8.2018, inter alia, on the grounds that disputed property belongs to the Gaon Sabha, therefore, no private person can confer his right and title over the property. Judgement and decree dated 8.10.1985 is collusive decree. Although trial court has discussed so many documents/revenue records but failed to verify the genuineness and sanctity of the aforesaid documents. All the entries referred by the trial court are not in consonance with the provisions of law. It is

further submitted that while filing the restoration application, sufficient reason has been assigned for non-appearance of the petitioner but the same has illegally not been considered by the court concerned. Lastly, it is submitted that endeavour should have been made to decide the suit on merits rather than to decide it ex-parte in the absence of the petitioner. In support of his contention, counsel for the petitioner has cited the case of **Bhivchandra Shankarmore Vs. Balu Gangaram More and others, 2019 6 SCC 387** and Division Bench decision of this Court in the case of **Lekhi Ram @ Mula and another Vs. State of UP and others; Civil Misc. Writ Petition No. 9675 of 1989 decided on 20.12.2001, reported in 2002 R.L.T. 668.**

13. Per contra, learned senior counsel for the respondent No. 7 contended that DGC (R) had appeared representing both the defendants namely State and Gaon Sabha. After judgment dated 8.10.1985, he jotted the remark of "seen' on the margin of the order sheet dated 20.11.1985, which clearly proves that judgment in question was well within the knowledge of the DGC (R). It is further contended that there was always deliberate inaction and malafide intention at the part of the petitioner, who has moved as many as four restoration applications but was never serious to argue them on merits. Till date, judgment and decree dated 8.10.1985 has not been challenged in the regular appeal, as provided under the law. Moving restoration application, that too one after another, is nothing but an abuse of the process of law intending to harass the contesting respondents for the reasons known to the petitioner best. It is further contended that there is no illegality, perversity and ambiguity in the impugned orders passed by the respondents No. 1 and 2 so as to warrant any interference or indulgence of this Court in exercise of writ jurisdiction. The present writ petition is devoid of merits and is liable to be dismissed.

14. Carefully considered the rival submission advanced by learned counsel for the parties and perused the record on board.

15. The present writ petition is arising out of a restoration application, which was filed on behalf of present petitioner in a declaratory suit under Section 229B of UPZA Act. The suit filed by Habib Ullah (father of respondents No. 3 to 6) was decreed by judgment and decree dated 8.10.1985. After the death of Habib Ullah, names of his sons, respondents No. 3 to 6, had been recorded in the revenue record, who had executed registered sale deed in favour of the present petitioner. At a very belated stage, the present petitioner has filed four restoration applications at different stages, which were dismissed. Details of the aforesaid applications and there outcome are properly demonstrated in the following chart:

Serial No.	**Restoration Application dated**	**Order dated/decided on**	**Result**
1.	24.8.1992 against judgment dated 8.10.1985	17.4.1993	Dismissed in default
2.	27.9.1993 against order dated 17.4.1993	21.6.1996	Dismissed in default
3.	14.8.1996 against order	17.4.1997	Allowed.

	dated 21.6.1996		
4.	Revision filed by respondent No. 7 against order dated 17.4.1997	29.3.2004	Revision allowed and remanded before the trial court.
5.	Consequent to the order dated 29.3.2004, restoration application dated 14.8.1996 was restored.	25.5.2015	Dismissed in default
6.	Restoration application dated 15.6.2015 filed on behalf of the State	5.10.2016	Dismissed on merits
7.	Restoration application dated 17.6.2015 filed on behalf of the Gaon Sabha	5.10.2016	Dismissed on merits

16. The order dated 5.10.2016 was assailed in revision, which was dismissed by the respondent No. 1 vide order dated 14.8.2018.

17. Before discussing the merits of the case, it would be befitting to consider the scope of Order IX Rule 13 of the CPC along with its UP amendment, which is quoted below:

Order IX Rule 13

13. Setting aside decree ex parte against defendant.--In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

[Provided further than no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.]

[Explanation.--Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of an any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex parte decree.]

UP Amendment

Allahabad.- In Order IX rule 13, after second proviso, insert the following proviso, namely:-

"Provided also that no such decree shall be set aside merely on the ground of irregularity in the service of summons if the Court is satisfied that the defendant knew, or but for his wilful conduct would have known, of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim."

[Vide Notification No. 4084/35(a)3(7), dated 24th July, 1926.]

18. According to the provision of restoration as enunciated under Order IX Rule 13 of CPC, a defendant against whom decree has been passed ex-parte is entitled to get the same set aside, if he could satisfy the court on the points;

(i) That summons was not duly served upon him; or

(ii) That he was prevented by sufficient cause from appearing when the suit was called upon for hearing.

19. Intending to curb the protracting litigation, the State of UP has added second proviso to Rule 13 by which any irregularity in the service of summon has not been treated to be sufficient ground for setting aside an ex parte decree if court is satisfied either that the defendant knew or he would have not for his wilful conduct known of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim. Meaning thereby, right to get an ex-parte decree set aside would be ceased to be available in a case where the defendant knew, or but for his wilful conduct would have known, of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim. Accordingly, in the matter where summons have not duly been served upon the defendant and the date of hearing is not known to him but he comes to know of the proceeding well in time he can easily find out the date and put in appearance and answer the plaintiff's claim. If he, without any justification fails to take the steps to find out the date of hearing, it would be presumed that he has deliberately ignored the court proceedings. His ignorance can safely be concluded that but for his willful conduct he would have known the date of hearing in sufficient time so as to enable him to appear and answer the plaintiff's claim.

20. In the matter in hand, unfortunately, the defendant failed to satisfy any of the ingredients for setting aside the ex parte decree as enunciated under Order IX Rule 13 of the CPC. This is no the case of the defendant/petitioner that summons was not duly served upon him. Learned trial court has given a categorical finding in its judgment dated 8.10.1985 that the summons was duly served upon the defendants. Finding given by the trial court with respect to the service of summon upon the defendant has not been denied by the defendant/petitioner. Record reveals that written statement was filed by the State through DGC (R). After judgment and decree being passed by the trial court, DGC (R) has jotted the remark of "seen" on the margin of the order sheet dated 20.11.1985, which explicitly made it clear that DGC (R), who is representing State and Goan Sabha, was well aware about the judgment and decree dated 8.10.1985 passed in the suit.

21. Record reveals that all the subsequent proceedings i.e. moving the restoration applications and filing a revision were pursued by the DGC (R). Dismissal of restoration applications in

default at three stages succinctly denotes the malafide intention and deliberate inaction at the part of the defendant/petitioner. No justification has been offered by the learned counsel for the petitioner as to under which circumstances, despite the service of notice, the petitioner was prevented in pursuing the suit and the restoration applications filed one after another. There is nothing on the record to show that the defendant/petitioner has ever tried to challenge the judgment and decree dated 8.10.1985 by way of filing a regular appeal. Perusal of memo of revision filed before the learned Commissioner (Annexure No. 4) and the grounds of writ petition reveals that the defendant/petitioner has tried to challenge the ex-parte decree and dismissal of the restoration applications only on the grounds of the merits of the case but no cogent reason has been assigned as to what circumstances prevailed preventing the defendant/petitioner from pursing the suit as well as restoration applications.

22. Delay caused in filing the restoration applications is also a matter of concern. Against the judgment and decree dated 8.10.1985 present petitioner has filed restoration application on 24.8.1992. Even at subsequent stages, belated restoration applications were filed. Counsel for the petitioner has failed to satisfy the Court as to under what circumstances all the restoration applications were filed at belated stage. Even for the sake of substantial justice if the delay caused in filing the restoration application be condoned, the petitioner failed to bring his case within the realm of Order IX Rule 13 of the CPC. The trial court as well as revisional court, in dismissing the restoration application vide order dated 5.10.2016 and dismissing the revision vide order dated 14.8.2018 respectively, have discussed the matter in detail and succinctly pointed out gross negligence and deliberate inaction at the part of the defendant/petitioner in pursing the suit as well as the restoration applications filed on its behalf at different stages.

23. The case of **Bhivchandra Shankarmore (supra)** as cited by the learned counsel for the petitioner does not come to his rescue. The facts and circumstances of the cited case **Bhivchandra Shankarmore (supra)** is different than that of the present matter, wherein ex-parte judgment and decree was initially set aside by the appellate court in first appeal treating it within time on the ground that defendant has availed the remedy of restoration under Order IX Rule 13 of the CPC, therefore, the period of pendency of the restoration application should be treated to be sufficient ground for the purpose of condonation of delay. The order passed by the appellate court was set aside by High Court on the ground that the remedy availed under Order IX Rule 13 of the CPC cannot be ignored, therefore, the period of perusing the remedy by filing restoration application cannot be excluded in deciding the delay in filing the appeal. Considering the aforesaid aspect of the matter, Hon'ble Supreme Court succinctly made an observation in paragraph 19 of the judgment that the time spent in pursuing the application under Order IX Rule 13 CPC is to be taken as sufficient cause for condoning the delay in filing the first appeal.

24. So far as the second cited case is concerned i.e. **Lekhi Ram @ Mula (supra),** it is also different from the facts and circumstances of the present case. In the aforesaid cited case, claim of plaintiff over

the property of Gaon Sabha on the basis of adverse possession has been denied. This cited case has no relevance in deciding the merits of the restoration application, which is the question before this Court. Learner counsel for the petitioner, however, in his entire argument, has made emphasis on the merits of the case and tried to demonstrate that trial court has illegally decreed the suit on the basis of those revenue document which were not properly verified and tried to question the genuineness and sanctity of the aforesaid document. It will not be befitting, at this juncture, to discuss the merits of the case and consider the genuineness of the revenue records which have not been discussed and considered in the impugned orders under challenge passed in the matter arising out of restoration application. Learned counsel for the petitioner has conceded the fact as contended by the learned counsel for respondent No. 7, that no regular appeal has been filed against the ex-parte judgement and decree dated 8.10.1985. In the cited case of Bhivchandra Shankarmore (supra), Hon'ble Supreme Court has succinctly observed that in paragraph No. 10 that a conjoint reading of Order IX Rule 13 CPC and Section 96 (2) of CPC indicates that the defendant, who suffered ex-parte decree has two remedies:-

(i) either to file an application under Order IX Rule 13 of the CPC to set aside the ex-parte decree to satisfy the court that summons were not properly served or those served, he was prevented by "sufficient cause' from appearing in the court when the suit was called for hearing.

(ii) to file a regular appeal from the original decree to the first appellate court and challenge the ex-parte decree on merits.

25. In view of the observation, as made by Hon'ble Supreme Court, remedy is still available for the petitioner to file a regular appeal against the ex-parte judgment and decree dated 8.10.1985, subject to law of limitation.

26. In this conspectus, as above, I am of the view that no satisfactory ground has been made out by the learned counsel for the petitioner for interfering the impugned orders under challenge. Counsel for the petitioner has failed to substantiate his submission in assailing the impugned orders. After considering the facts and circumstances of the present case as put forward before this Court, it cannot be said that there was no gross negligence and deliberate inaction at the part of the petitioner in challenging the ex-parte decree by way availing the remedy of moving restoration applications at belated stage. There is nothing on the record to show that summons were not duly served upon the defendant/petitioner or he was prevented by sufficient cause from appearing when the suit was called on for hearing. DGC (R) was throughout present, who has pursued the matter on behalf of Gaon Sabha at different stages.

27. Resultantly, the present writ petition fails and is dismissed being devoid of merits and misconceived. There is no order as to the cost.

(2022)03ILR A950
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.02.2022

BEFORE

THE HON'BLE ROHIT RANJAN AGARWAL, J.

Writ C No. 15642 of 2020
connected with other cases

Awadhesh Kumar ...Petitioner
Versus
State Of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vibhu Rai, Sri Abhinav Gaur, Sri Abhishek Shukla

Counsel for the Respondents:
C.S.C.

A. Civil Law - The Aadhar (Targeted Delivery of Financial and other Subsidies, Benefits and Services) Act, 2016- License of fair price shop dealers cancelled on the ground that multiple transactions have been carried out by the dealer on one Aadhar Card and that the ration was lifted of the dormant card-holders before the Aadhar No. could be feeded and seeded.

B. For carrying out distribution of essential commodities to ration card-holders through E-posh Machine, the first step is of entering the details of Aadhar of a beneficiary into the e-pos machine, where neither authentication is done nor any OTP is generated and this is called 'feeding', this is a dynamic mode wherein system operator cold enter the details and edit the same number of times till it is finally locked after verification during the evening hours. This process is known as seeding of the Aadhar details, this is a static mode.

C. Dealers took advantage of this hybrid mode and syphoned off ration of dormant card-holders.

Writ Petition Dismissed. (E-12)

List of Cases cited:-

1. Ravi Yashwant Bhoir Vs District Collector, Raigad & ors. (2012) 4 SCC 407

2. Sant Lal Gupta & ors. Vs Modern Cooperative Group Housing Society Limited & ors.(2010) 13 SCC 336.

3. Pooran Singh Vs St. of U.P. & ors., 2010 (3) ADJ 659

4. Madan Kumar & ors.Vs District Magistrate, Auraiya & ors.2013 (10) ADJ 606;

5. Dipak Babaria & anr. Vs St. of Guj. & ors.(2014) 3 SCC 502;

6. J. Ashoka Vs University of Agricultural Sciences & ors.(2017) 2 SCC 609

7. Mrs. Maneka Gandhi Vs U.O.I. & anr. (1978) 1 SCC 248.

8. Swaraj Abhiyan (V) Vs U.O.I. & ors., Writ Petition (C) No.857 of 2015

9. Amarjeet Singh & ors.Vs Devi Ratan & ors.(2010) 1 SCC 417

10. Edukanti Kistamma (Dead) through LRs & ors.Vs S. Venkatareddy (Dead) through LRs & ors.(2010) 1 SCC 756.

11. Najakat Ali & ors.Vs St. of U.P. & ors.2021 (10) ADJ 504

12. K.L. Tripathi Vs S.B.I. & ors.(1984) 1 SCC 43,

13. General Manager (P), Punjab and Sind Bank & ors.Vs Daya Singh (2010) 11 SCC 233;

14. St. of Madras Vs A.R. Srinivasan AIR 1966 SC 1827

15. Bakshi Sardari Lal (Dead) through LRs & ors.Vs U.O.I. & anr. AIR 1987 SC 2106.

16. E.P. Royappa Vs St. of T.N. & anr. AIR 1974 SC 585

17. Jasbir Singh Chhabra & ors.Vs St. of Punjab & ors.(2010) 4 SCC 192;

18. Ratnagiri Gas & Power Pvt. Ltd. Vs RDS Projects Ltd. & ors.2013 (1) SCC 524

19. Rajneesh Khajuria Vs Wockhardt Ltd. & anr. 2020 (3) SCC 86

20. Ekta Shakti Foundation Vs Government of NCT Delhi, AIR 2006 SC 2609

21. State of Odisha & anr. Vs Anup Kumar Senapati & anr., 2019 (19) SCC 626.

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

1. Modern science and technology had transformed life of million of people across the globe. In this 21st Century, technology has helped various Government in uplifting and shaping the life of poor and downtrodden by implementing various beneficial scheme, through the use of technology.

2. One such move was made by Central Government in implementing National Food Security Act, 2013 *(hereinafter called as "Act of 2013")*, which provided for food and nutritional security in human life cycle approach, by ensuring access to adequate quantity of quality food at affordable prices to people to live a life with dignity and for matters connected therewith or incidental thereto.

3. For the first time, ration card holders were to be distributed essential commodities under the "Targeted Public Distribution System". Section 2(23) of Act of 2013 defines the word "Targeted Public Distribution System" as under :

"(23) "Targeted Public Distribution System" means the system for distribution of essential commodities to the ration card holders through fair price shops."

4. Act of 2013, vide Section 3 for the first time, recognized the right of an individual belonging to "priority households' to receive foodgrains at subsidized prices under the Targeted Public Distribution System.

5. Section 7 required implementation of scheme for realisation covering entitlement under Sections 4, 5 and 6 by the State Government. Section 9, which comes under Chapter IV of Act of 2013, provides for identification of eligible households, required that the coverage of population under Targeted Public Distribution System was to be determined by the Central Government and the total number of persons to be covered in the rural and urban areas of the State was to be calculated on the basis of population estimate as per the census of which relevant figures have been published.

6. Section 10 required the State Government to prepare guidelines and to identify priority households. Chapter V of Act of 2013, through Section 12 required both Central and State Governments to progressively undertake necessary reforms in the Targeted Public Distribution System in consonance with the rule envisaged for them under the Act. Sub-section (2) of Section 12 was the most important step as it included reforms, such as :

(a) doorstep delivery of foodgrains to the Targeted Public Distribution System outlets;

(b) application of information and communication technology tools including end-to-end computerisation in order to ensure transparent recording of transactions at all levels, and to prevent diversion;

(c) leveraging "aadhaar" for unique identification, with biometric information of entitled beneficiaries for proper targeting of benefits under this Act.

7. Thus, it was for the first time that reforms vide Targeted Public Distribution System was introduced through Act of 2013 whereby the focus was that the

essential commodities be distributed to eligible card holders by the use of technology and computarization of records to ensure transparent recording of transactions and the use of Aadhaar with biometric information so as to stop pilferage of foodgrains.

8. Subsequent to this enactment, Central Government came out with the Targeted Public Distribution System (Control) Order, 2015 *(hereinafter called as "Control Order of 2015),* which was published in the Gazette of India on 20th March, 2015. The object of brining the Control Order of 2015 was for maintaining supplies and securing availability and distribution of essential commodity, namely, foodgrains. Clause 3 thereof required identification of eligible households under the Act of 2013 in rural and urban areas respectively for receiving subsedized foodgrains under the Targeted Public Distribution System. This was the first step which required the State Governments to access the coverage of eligible households in rural and urban areas to whom the subsedized foodgrains was to be distributed under the Targeted Public Distribution System.

9. The Central Government, after consultation with the State Government on 17th August, 2015, published in Gazette of India, "The Food Security (Assistance to State Governments) Rules, 2015" *(hereinafter called as "Rules of 2015").* Rules of 2015 for the first time came up with the concept of distribution of foodgrains through a device to be installed and operated at fair price shops for identification of entitled persons and households, known as "E-PoS Machine", which has been defined under Rule 2(g) as under :

""point of sale device" means a device to be installed and operated at fair price shops for identification of entitled persons and households for delivery of foodgrains, based on "Aadhaar number' or other authentication tools, specified by the Central Government from time to time."

10. Similarly, the State Government was required to engage an agency to purchase, install and maintain the point of sale device, which was known as "system integrator". Rule 2(h) defines the same, as under :

"System integrator" means an agency engaged by the State Government to purchase, install and maintain the point of sale device at fair price shops in the State."

11. Likewise, Rule 3 prescribes the time limit for allocation of foodgrains; Rule 5 provides for the duty of the State Governments; and Rule 7 provides for norms and patterns of Central assistance to the State Government and Union Territory and share of the Central Government.

12. Pursuant to the enactment of Act of 2013 and Rules of 2015, the State Government on 20.01.2016, published in U.P.Gazette called "Uttar Pradesh State Food Security Rules, 2015 *(hereinafter called as "State Rules of 2015").* Rule 3 thereof provided for identification of eligible households and the State Government was required to, as soon as possible, identify the households covered under Antyodaya Ann Yojana and priority households. Rule 15 provides that the State Government shall, as soon as may be, notify detailed guidelines for the reforms in the Targeted Public Distribution System as required by Section 12 of the Act.

13. As the Act of 2013, Rules of 2015 and State Rules of 2015 came into force in the State of U.P., the entire distribution of essential commodities was governed by the Uttar Pradesh Scheduled Commodities Distribution Order, 2004 *(hereinafter called as "Order of 2004").* The State Government found that it was not in consonance with the scheme and theme of the Act of 2013, as such, the State on 10.08.2016, exercising power under Section 3 of Essential Commodities Act, 1955 (hereinafter called as "Act of 1955") read with notification of Government of India, Ministry of Consumer Affairs, Food and Public Distribution (Department of Food and Public Distribution) and Section 21 of General Clauses Act, 1897 and in supersession of Government Notification dated 20th December, 2004, the Uttar Pradesh Essential Commodities (Regulation of Sale and Distribution Control) Order, 2016 *(hereinafter called as "Control Order of 2016")* was enforced.

14. The Control Order of 2016 integrated in itself the entire concept and mechanism as provided under the Act of 2013, Rules of 2015, State Rules of 2015 and Control Order of 2015. Sub-clause (2) of Clause 2 of Control Order of 2016 is of great relevance as it takes care of the fact that, words and expressions not defined in Control Order of 2016 but defined in Act of 1955 or Act of 2013, shall have the meaning respectively assigned to them in the said Acts. Thus, entire Control Order of 2016 hinges around the Act of 1955 and Act of 2013.

15. Similarly, Clause 3 provides for identification of eligible households by the State Government to be covered under the Antyodaya Anna Yojana and the priority households. Clause 4 provides for issuance of Ration Cards to the eligible households. Clause 4(3) provides that State Government shall ensure that essential commodities is distributed under the Targeted Public Distribution System. Likewise, Clause 4(4) requires for installation of point of sale electronic device for reading the smart card instead of Ration Cards to be installed at the fair price shop.

16. In between, Central Government enacted "The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 *(hereinafter called as "Aadhaar Act of 2016")* with the object of 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.

17. The validity of Aadhaar Act of 2016 was put to challenge 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.** The Apex Court upheld the validity of Aadhaar Act of 2016. Once the validity of Aadhaar Act of 2016 was upheld, the Central as well as State Governments fastened the speed of distribution of essential commodities through use of technology such as E-PoS Machine and the biometric of the eligible card holder linking his Aadhaar.

18. The State of U.P. for the first time on 07.10.2014 and 23.01.2015 had issued a Government Order in pursuance of the Act of 2013 for identification of eligible households in the rural and urban areas of

the State. According to the said Government Orders, the estimated population of the State was 20 crores, out of which rural population was about 15.51 crores and urban population was 4.45 crores out of which targeted households in the rural area was 79.56 % (12.34 crores) and in urban area, it was 64.43 % (2.87 crores). The modalities were to be worked out regarding exclusion and inclusion in the rural and urban area. After some exercise, an inclusion list was prepared and eligible households and their units were feeded and Ration Cards were prepared. Unfortunately, the entire procedure, that was conceptualized vide Government Orders dated 07.10.2014 and 23.01.2015 failed, resulting in feeding of ineligible cards. Accordingly, the Government issued fresh order on 09.02.2017 and 07.04.2017 whereafter it was decided to undertake the exercise afresh.

19. At district Meerut, the District Magistrate on 21.03.2017 and 18.04.2017 issued orders requiring the Ration Cards to be prepared afresh which was to be in consonance with Clause 4(19) of Control Order of 2016.

20. As the fresh exercise had begun, pursuant to the Government Orders dated 09.02.2017 and 07.04.2017, the Commissioner, Food and Civil Supplies on 18.10.2017 directed for feeding of Aadhaar Card.

21. These connected bunch of cases, leading case being Writ Petition No.15642 of 2020 raise somewhat same question, pursuant to the initiative of the State Government for feeding of the Aadhaar Card and the distribution of essential commodities to be made by the fair price shop owners through E-PoS Machine taking the biometric of the ration card holder. The interregnum period of feeding of Aadhaar card led to certain technological lapse alleged by the shop owners which has resulted in syphoning off large quantity of essential commodities.

22. As in all the connected matters, the licence of fair price shop dealer has been cancelled by the State on the ground that in the month of July, 2018, certain transaction alleged to have been carried out by the dealers before the Aadhaar number could be feeded and seeded, that ration was lifted of the dormant cardholders.

23. On the agreement of all the petitioners' counsel and State counsel, the matter is being heard together and decided by a common order.

24. Heard Sri Anoop Trivedi, Senior Advocate, assisted by Sri Vibhu Rai, Advocate, along with S/Sri S.M.Iqbal Hasan, Vishal Tandan, A.C.Srivastava, P.K.Srivastava, and K.K.Singh for the petitioners for their respective case and Sri Manish Goyal, learned Additional Advocate General, assisted by Sri S.P.S.Rathore, learned Standing Counsel for the respondents State.

25. Writ Petition No.15642 of 2020 is being taken as leading case and as the issue raised is legal in nature, it is being heard and decided along with all other connected writ petitions in which the order passed in the present petition shall be followed.

26. According to Sri Anoop Trivedi, Senior Advocate, petitioner Awadhesh Kumar was granted licence to run fair price shop at Minakshipuram, Meerut Cantt., Meerut in the year 2003. A first information report was lodged under Section 3/7 of Act of 1955. On the basis of

F.I.R., respondent no.3, i.e. District Supply Officer, Meerut proceeded to cancel the licence and also licence of 175 other shops was cancelled on 17.01.2019. It was on 19.02.2019 that petitioner came to know through an advertisement published in daily newspaper that shop in question was going to be allotted and an invitation was made to the public at large. A representation was moved by Fair Price Shop Dealers' Association on 18.02.2019 before the District Magistrate, Meerut. Simultaneously, Upbhokta Sahkari Samiti Limited and others filed Writ Petition No.6918 of 2019 and this Court declined to interfere in the matter at that stage. However, it directed the District Magistrate to decide the matter afresh. The District Magistrate was required to issue show cause notice to petitioners within two weeks and they had further two weeks' time for responding to the show cause notice and the proceeding was to be finalized within three weeks thereafter. However, cancellation order was made subject to final order to be passed by the District Magistrate.

27. On 14.06.2019, a show cause notice was issued to the petitioners, which was replied on 09.07.2019. But, by the order impugned dated 25.11.2019, the District Magistrate upheld the cancellation order passed by the District Supply Officer and rejected the represenation dated 23.04.2019 and reply dated 09.07.2019.

28. Sri Trivedi submitted that reply of the petitioner was not considered, wherein it was specifically mentioned that the data is not feeded in E-PoS Machine at the dealer's end and it is the District Supply Office and N.I.C., which feeds in the data and the Machine is taken in the custody in the evening of fourth day of the month. There is no software in which the dealer can manipulate or change the data. Further, E-PoS Machine is a primitive type instrument which works only by the computer system of N.I.C. and the Supply Office.

29. According to him, PDS server is available with the Supply Office and the data base is being prepared by the Officers of the department, which employ the Operator, who perform the work of feeding and seeding and dealer cannot edit any details in this process. It was next contended that login I.D. is with the Supply Officer and the Operator appointed by the department. It is only to save the District Supply Officer/Supply Officer that the dealers have been made a scapegoat. According to him, as the matter not only relates to district Meerut and the scam is at the State level, it may be because of some technical glitch in the software as it is only for the month of July, 2018 which has occurred throughout the State.

30. Sri Trivedi invited the attention of the Court to the letter dated 10.01.2018 wherein M/s Rising Star IT Solution was given the work of feeding of Aadhaar Card in district Meerut within three months.

31. Petitioner had filed four supplementary affidavits on 07.10.2020, 18.11.2020, 14.11.2021 and 21.11.2021. Through the first supplementary affidavit, order passed by Lucknow Bench of this Court in Misc. Bench No.25532 of 2018 has been brought on record, wherein proceedings for quashing first information report lodged against one fair price shop owner was under challenge, wherein similar incidence of syphoning off ration for the month of July, 2018 has been alleged, was under challenge. Sri Trivedi

invited the attention of the Court to the application filed by one Raj Singh Sisodiya, a dealer, on 30.09.2019 under Right to Information Act, requiring certain information, wherein, according to him information sought as to whether a dealer can change the software in E-PoS Machine, further who prepares the password/login I.D. for E-PoS Machine and whether the dealer can change it, and, whether the dealer can feed the Aadhaar of a cardholder. On 17.10.2019, a reply was given by the office of District Supply Officer, wherein it was stated that dealer cannot change the software of E-PoS Machine. The password/login I.D. is prepared by N.I.C. at Lucknow. Lastly, feeding and seeding of Aadhaar cannot be done by a dealer. He then tried to impress upon the Court that once feeding and seeding of an Aadhaar could not be done by a dealer and it was only the department who was eligible to perform such work, the liability fastened upon the dealer is of no consequence.

32. Through the second supplementary affidavit, petitioner had tried to bring on record the guidelines for fair price shop dealer provided in FPS Automation. The third supplementary affidavit dated 14.11.2021 has been filed to bring on record different circulars and orders issued and passed by different State Authorities. Annexure-SA-1 is the circular dated 21.08.2018 issued by the Commissioner, Food and Civil Supply, U.P. which is addressed to all the District Supply Officers of the State mentioning that in 43 districts, through 1,86,737 transactions in which multiple transaction has been reported through one Aadhaar Card and in district Meerut 27,324 transactions have been found on 108 Aadhaar Cards.

33. Sri Trivedi invited the attention of the Court to Annexure SA-2, which is the order dated 20.09.2018 passed by Commissioner, Food and Civil Supply directing all the District Supply Officers to enquire into each and every transaction of the ration card through actual spot inspection. In the supplementary affidavit, number of orders passed by different districts and divisional authorities have been brought on record to demonstrate that dealers were not responsible for the incidents which had taken place in the month of July, 2018.

34. Through the fourth supplementary affidavit, an effort has been made to bring on record the previous orders passed by co-ordinate Benches of this Court in other connected matters.

35. Sri Trivedi next invited the attention of the Court to Annexure CA-3 of the counter affidavit filed by the State on 06.01.2021 which is the Power Point Presentation of the process of seeding of the Aadhaar Card.

36. According to him, the definition of the words "feeding' and "seeding' clearly lays down that aadhaar data of a beneficiary means that 12-digit Aadhaar number having been entered by the user in database without biometric/demographic/O.T.P. based authentication from UIDAI's CIDR and with demographic authentication based on name, Aadhaar number, gender from UIDAI's CIDR. Thus, the exercise of feeding and seeding results on the authentication from UIDAI.

37. He further contended that process of ration card entry/Aadhaar seeding and maintenance of records is done at the

instance of Supply Inspector, District Supply Officer, and after the verification of Aadhaar by UIDAI, once the beneficiary name has been validated and are locked at database level, the process of seeding becomes irreversible. He further submitted that E-PoS integration at fair price shop through System Integrator is done once the Government of U.P. has selected UPDESCO as State level Agency and UPDESCO has thereafter hired four private company as System Integrators. These four companies provide E-PoS Devices at fair price shop as per the areas assigned to them. The hardware, software and network connectivity of E-PoS device is managed by the concerned System Integrator. He further submitted that two days before starting of distribution cycle, Ration Card ID, Member ID, Aadhaar number, name and other essential details of all ration cards are saved in different database. The same cannot be edited by user and this database is used for biometric authentication. Once ration is availed for the ration card I.D. during current cycle, then entitlement against the availed commodity is returned zero and transaction is denied for that commodity.

38. Thus, according to him, once essential commodity is distributed through one card I.D., the same cannot be fed again to procure ration the second time in the current cycle. According to him, the entire process of feeding and seeding is at the end of Food and Civil Supply Department and N.I.C., with minimal role of the dealer and data once fed and locked, cannot be changed by any dealer throughout the State. It was not possible for any dealer to carry out such transaction in the entire State of U.P. in a single day and within such short span of time without having login I.D. and password, which is with the District Supply Officer and the System Integrator.

39. According to Sri Trivedi, the action against the dealer is an eyewash to save the real culprits and without the connivance and active participation of the Official(s) of the State Government, such huge bungling was not possible. Simultaneously, he contended that it might be a technical glitch or an error in the software as the entire State was affected and that too only for the month of July, 2018. It was a coincidence and the software may have failed and such errors were recorded in the transaction. Lastly, it was contended that the District Magistrate while deciding the representation/reply of the petitioner has not considered the grounds taken and in a cryptic manner rejected the same holding that essential commodities were distributed through single Aadhaar number editing/modifying the database with the help of some unknown operators. It was the duty of the State to have come out with a specific case as to who has caused the changes in the details of cardholders which was feeded by the department before proceeding to cancel the licence, when it was a specific case of the petitioner that feeding and seeding was done by the department. Moreover, without any material on record, or any enquiry having been conducted to nail the petitioner, the action of the District Authority was arbitrary and lacks transparency. According to him, the State has not come out with a clear case as to who are the real culprit, and, without nailing any person, the axe has wrongly fallen upon the petitioner who has been made the scapegoat for the wrong which he has not committed.

40. Reliance has been placed upon judgment of Apex Court in the case of **Ravi Yashwant Bhoir Vs. District Collector, Raigad and others (2012) 4**

SCC 407 and Sant Lal Gupta and others Vs. Modern Cooperative Group Housing Society Limited and others (2010) 13 SCC 336.

41 . Sri A.P. Srivastava, learned counsel appearing in Writ Petition Nos.32038 of 2019, 32422 of 2019, 32279 of 2019, 32308 of 2019, 32526 of 2019 and 32518 of 2019 submitted that orders impugned in the said writ petitions had not taken care of the provisions of Government Order dated 29.07.2004 and order of this Court dated 27.02.2019 was not complied with and the Authorities had failed to consider the decision of Full Bench in the case of **Pooran Singh vs. State of U.P. and others, 2010 (3) ADJ 659.** According to him, mere possession of E-PoS Machine by the dealer cannot make him responsible for the operation in distribution of ration unless the liability is fixed upon the Supply Inspector and Area Rationing Officer as per the Government Order dated 21.08.2019. According to him, the Authorities had not adhered to the Government Order dated 27.09.2004 and Control Order of 2016. Reliance has been placed upon decision in the case of **Madan Kumar and others Vs. District Magistrate, Auraiya and others 2013 (10) ADJ 606; Dipak Babaria and Another Vs. State of Gujarat and others (2014) 3 SCC 502; J. Ashoka Vs. University of Agricultural Sciences and others (2017) 2 SCC 609 and Msr. Maneka Gandhi Vs. Union of India and Another (1978) 1 SCC 248.**

42. Sri P.K. Srivastava, learned counsel appearing in one of the matters submitted that Authorities have cancelled licence without dealing with the specific objections raised by the petitioners and without following the due procedure of law.

43. Sri Vishal Tandon, learned counsel appearing in Writ Petition No.21861 of 2019 submitted that the State could not prove the factum of fraud and solely by alleging fraud, has proceeded to cancel the licence without there being any material on record. He further contended that enquiry is pending with the Cyber Cell of the State in regard to alleged fraud to have been committed in 43 districts in the month of July 2018 and without there being any material or report of Cyber Cell, the Authorities have proceeded to cancel the licence. According to him, it was not possible of meeting of minds of dealers situated in 43 districts of the State to have committed such a huge bungling with a common objective in the month of July, 2018. In his case, the allegation is in regard to 136 cardholders using three Aadhaar cards. He next contended that the Authorities had not recorded any finding to the reply submitted by the petitioner before cancelling his licence.

44. Sri K.K. Singh, learned counsel appearing in Writ Petition No.22900 of 2019 while endorsing the argument of Sri Anoop Trivedi, Senior Advocate, submitted that the Authorities while cancelling the licence, had not considered the reply of the petitioner.

45. Sri S.M. Iqbal Hasan, learned counsel appearing in Writ Petition No.4166 of 2020 submitted that while cancelling the licence, the Authorities were required to enquire from the cardholders as per the direction of the Commissioner, Food and Civil Supply of the year 2018, but the Authorities proceeded in defiance of such direction. According to him, the allegation is of withdrawal of essential commodities through 263 ration cards on the basis of one Aadhaar card, he has relied upon decision

of Apex Court in the case of **Swaraj Abhiyan (V) Vs. Union of India & Ors., Writ Petition (C) No.857 of 2015,** decided on 21st July, 2017. Relevant Paras 13 and 14 are extracted here as under:-

"13. Insofar as Section 15 of the NFS Act is concerned this mandates the State Government to appoint or designate, for each district, an officer to be the District Grievance Redressal Officer for expeditious and effective redressal of grievances of aggrieved persons in matters relating to the distribution of entitled foodgrains or meals under Chapter II of the NFS Act and to enforce the entitlements under the said Act.

14. We were informed that no rules had been framed as required by Section 15 of the NFS Act for the appointment or designation of the District Grievance Redressal Officer nor had any qualifications been prescribed for the appointment of such officers. All that had been done by the State Governments was that some officials were given additional responsibility as a District Grievance Redressal Officer. However, since those very officers were in charge of implementation of the NFS Act, designating them as District Grievance Redressal Officers to whom grievances could be addressed against them did not serve any purpose at all. We suggested to the learned Attorney General that since the States before us did not seem to be fully on board with regard to the implementation of a law enacted by Parliament, an extremely unfortunate situation had arisen. To get over this stalemate created by the State Governments it might be appropriate for the Central Government to consider framing Model Rules under Section 15 of the NFS Act so that it would make things easier for the State Governments and also give some teeth to the law enacted by Parliament."

46. Replying to the argument made on behalf of the petitioner, Sri Manish Goyal, learned Additional Advocate General appearing for the State, on the first count objected to the maintainability of the writ petition, as the basic order cancelling licence of the petitioner dated 17.01.2019 passed by District Supply Officer, Meerut was not put to challenge and only order dated 25.11.2019 passed by respondent no.2, post remand by this Court, has been challenged. According to him, the order of Writ Court dated 01.04.2019 was specific to the effect that cancellation would be subject to the final order passed by District Magistrate. In absence of challenge to the basic order and proceedings initiated for cancellation, the petition would not be maintainable by only challenging the order of affirmation by which representation has been decided. Reliance has been placed upon decision of Apex Court in the case of **Amarjeet Singh and others Vs. Devi Ratan and others (2010) 1 SCC 417 and Edukanti Kistamma (Dead) through LRs and others Vs. S. Venkatareddy (Dead) through LRs and others (2010) 1 SCC 756.**

47. It was next contended that a show cause notice was issued in pursuance of the order of the Writ Court, though the Government Order dated 29.07.2004 as well as decision of Full Bench in the case of **Pooran Singh (supra)** is no more applicable after enforcement of Act of 2013, Rules of 2015 and also Control Order of 2016. Reliance has been placed upon decision in the case of **Najakat Ali and Ors. Vs. State of U.P. and others 2021 (10) ADJ 504.** The show cause notice was

specific as to the ration of 311 cardholders being withdrawn and black marketed for the month of July, 2018 by interpolating the database of actual beneficiary and using one Aadhaar Card No.8305 8473 8779 by engaging services of an unknown technical Operator and transaction being completed using biometric of foreign person.

48. According to him, in the reply, there is no denial to the fact that single Aadhaar Card was used for withdrawal of ration of 311 cardholders nor they have denied that ration was not withdrawn by the beneficiaries. According to Sri Goyal, the reply basically hinges on the defence taken that department is responsible for feeding and seeding database for which petitioner has no concern. Since, there are large scale irregularities that has come into light, it appears to be a system/programme malfunctioning and thus, nobody can be said to be responsible. Further, Officials of the department have committed gross irregularities and in order to save their skin, they are placing burden upon the petitioner by lodging false FIRs and resorting to cancellation of licence. The entire exercise undertaken by State is in gross violation of law and in breach of principles of natural justice and further, without examining the ration cardholder, the responsibility is being fixed upon the petitioners.

49. Sri Goyal next contended that the order of District Magistrate has taken into consideration the stand taken by petitioner in his reply to show cause notice. However, the petitioner has not submitted any reply to specific issues in the show cause notice, thus, the District Magistrate has rightly affirmed the cancellation of licence dated 17.01.2019. According to him, the order passed was based upon consideration of material that was available and the order of affirmation does not require to contain detailed reason. Reliance has been placed upon decision of Apex Court in case of **K.L. Tripathi Vs. State Bank of India and others (1984) 1 SCC 43, General Manager (P), Punjab and Sind Bank and others Vs. Daya Singh (2010) 11 SCC 233; State of Madras Vs. A.R. Srinivasan AIR 1966 SC 1827 and Bakshi Sardari Lal (Dead) through LRs and others Vs. Union of India and Another AIR 1987 SC 2106.**

50. It was next submitted that no ground has been taken in the writ petition with respect to mala fides, however, in the representation filed on 18.02.2019 by the President of Meerut Fair Price Shop Welfare Association, specific allegation was made against District Supply Officer, namely, Sri Vikas Gautam, but neither he has been made party in the writ petition nor any specific allegation has been levelled against him.

51. Likewise, in other connected matters, there was allegation in various representation or replies against certain officers by name, but neither there are any pleadings in the writ petition nor such officers have been made party in the writ petition. According to him, efforts has been made on behalf of the petitioner to make out a case of malice in fact. To establish malice in fact, specific pleadings are required, necessary parties are to be impleaded and such malice in fact/bias is to be proved. None of the ingredients have been established, thus, no case of malice in fact is made out.

52. He further submitted that through supplementary affidavit, petitioner has relied upon certain case laws that deal with malice in law, however, how and in what

manner malice in law is established in the present case has neither been pleaded nor ground to such effect has been taken and ingredient of malice in law has not been established. Thus, legal mala fides are also not made out. Petitioners had tried to establish a case of mala fides through their argument without necessary pleadings, which is impermissible and in given circumstances, action in cancellation of licence of fair price shop owner cannot be said to be actuated by either legal malice or malice in law or personal bias. Reliance has been placed upon a Constitution Bench judgment of Apex Court in case of **E.P. Royappa Vs. State of Tamil Nadu and Another AIR 1974 SC 585,** relevant paras 90 to 92 are extracted here as under:-

"90. We may now turn to the ground of challenge based on mala fide exercise of power. The petitioner set out in the petition various incidents in the course of administration where he crossed the path of the second respondent and incurred his wrath by inconvenient and uncompromising acts and notings and contended that the second respondent, therefore, nursed hostility and malus animus against the petitioner and it was for this reason and not on account of exigencies of administration that the petitioner was transferred from the post of Chief Secretary. The incidents referred to by the petitioner, if true, constituted gross acts of maladministration and the charge levelled against the second respondent was that because the petitioner in the course of his duties obstructed and thwarted the second respondent in these acts of maladministration, that the second respondent was annoyed with him and it was with a view to putting him out of the way and at the same time deflating him that the second respondent transferred him from the post of Chief Secretary. The transfer of the petitioner was, therefore, in mala fide exercise of power and accordingly invalid.

91. Now, when we examine this contention we must bear in mind two important considerations. In the first place, we must make it clear, despite a very strenuous argument to the contrary, that we are not called upon to investigate into acts of maladministration by the political Government headed by the second respondent. It is not within our province to embark on a far-flung inquiry into acts of commission and omission charged against the second respondent in the administration of the affairs of Tamil Nadu. That is not the scope of the inquiry before us and we must decline to enter upon any such inquiry. It is one thing to say that the second respondent was guilty of misrule and another to say that he had malus animus against the petitioner which was the operative cause of the displacement of the petitioner from the post of Chief Secretary. We are concerned only with the latter limited issue, not with the former popular issue. We cannot permit the petitioner to side track the issue and escape the burden of establishing hostility and malus animus on the part of the second respondent by diverting our attention to incidents of suspicious exercise of executive power. That would be nothing short of drawing a red herring across the trail. The only question before us is whether the action taken by the respondents includes any component of mala fides; whether hostility and malus animus against the petitioner were the operational cause of the transfer of the petitioner from the post of Chief Secretary.

92. Secondly, we must not also overlook 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. Here the petitioner, who was himself once the Chief Secretary, has flung a series of charges of oblique conduct against the Chief Minister. That is in itself a rather extraordinary and unusual occurrence and if these charges are true, they are bound to shake the confidence of the people in the political custodians of power in the State, and therefore, the anxiety of the Court should be all the greater to insist on a high degree of proof. In this context it may be noted that top administrators are often required to do acts which affect others adversely but which are necessary in the execution of their duties. These acts may lend themselves to misconstruction and suspicion as to the bona fides of their author when the full facts and surrounding circumstances are not known. The Court would, therefore, be slow to draw dubious inferences from incomplete facts placed before it 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. Such is the judicial perspective in evaluating charge of unworthy conduct against ministers and other high authorities, not because of any special status which they are supposed to enjoy, nor because they are highly placed in social life or administrative set up--these considerations are wholly irrelevant in judicial approach--but because otherwise, functioning effectively would become difficult in a democracy. It is from this standpoint that we must assess the merits of the allegations of mala fides made by the petitioner against the second respondent."

53. Reliance has also been placed upon decision in case of **Jasbir Singh Chhabra and others Vs. State of Punjab and others (2010) 4 SCC 192; Ratnagiri Gas and Power Private Limited Vs. RDS Projects Limited and others 2013 (1) SCC 524**. Relevant paras 26, 27, 29, 30, 32 and 38 of the judgment in **Ratnagiri Gas and Power Private Limited (supra)** are extracted here as under:-

"26. The legal position in this regard is fairly well settled by a long line of decisions of this Court. We may briefly refer to only some of them:

26.1. In State of Bihar v. P.P. Sharma 1992 Supp (1) SCC 222 : 1992 SCC (Cri) 192 this Court summed up the law on the subject in the following words: (SCC p. 260, paras 50-51)

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

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

26.2. We may also refer to the decision of this Court in Ajit Kumar Nag v. Indian Oil Corpn. Ltd. [(2005) 7 SCC 764 : 2005 SCC (L&S) 1020] where the Court declared that allegations of mala fides need proof of high degree and that an administrative action is presumed to be bona fide unless the contrary is satisfactorily established. The Court observed: (SCC p. 790, para 56)

"56. ... It is well settled that the burden of proving mala fide is on the person making the allegations and the burden is "very heavy'. (Vide E.P. Royappa v. State of T.N. [(1974) 4 SCC 3 : 1974 SCC (L&S) 165]) There is every presumption in favour of the administration that the power has been exercised bona fide and in good faith. It is to be remembered that the allegations of mala fide are often more easily made than made out and the very seriousness of such allegations demands proof of a high degree of credibility. As Krishna Iyer, J. stated in Gulam Mustafa v. State of Maharashtra[(1976) 1 SCC 800] (SCC p. 802, para 2): "It (mala fide) is the last refuge of a losing litigant.'"

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.

....

29. In the case at hand there was no allegation of "malice in fact" against any individual nor was any individual accused of bias, spite or ulterior motive impleaded as a party to the writ petition. Even Mr Sudhir Chandra and Jagdeep Dhankar, learned Senior Counsel appearing for RDS fairly conceded that RDS had not alleged malice in fact against any individual who had played any role in the decision-making process. What according to them was alleged and proved by RDS was malice in law, which did not require impleading of individual officers associated with the decision-making process. We will presently examine whether a case of malice in law had been made out by the respondent RDS. But before we do

so we wish to point out that the High Court had in the absence of any assertion in the writ petition and in the absence of the officers concerned recorded a finding suggesting that the officers had acted mala fide. The High Court named the officers concerned and concluded that the integrity of the entire process was suspect. We shall subsequently extract the passage from the impugned judgment [RDS Projects Ltd.v. Ratnagiri Gas and Power (P) Ltd., WP (C) No. 534 of 2011, decided on 17-10-2011 (Del)] where the High Court has even without an assertion of any malice against the officers named in the judgment, recorded a finding which was wholly unjustified in the circumstances of the case especially when the High Court was making out a case for RDS which it had not pleaded when nor were the officers concerned arrayed as parties to the writ petition, in their individual capacities.

30. Coming then to the question whether the action taken by the appellant Rgppl was vitiated by malice in law, we need hardly mention that in cases involving malice in law the administrative action is unsupportable on the touchstone of an acknowledged or acceptable principle and can be avoided even when the decision maker may have had no real or actual malice at work in his mind. The conceptual difference between the two has been succinctly stated in the following paragragh by Lord Haldane in Shearer v. Shields [1914 AC 808 (HL)] quoted with approval by this Court in ADM, Jabalpur v. Shivakant Shukla[(1976) 2 SCC 521 : AIR 1976 SC 1207] : (SCC p. 641, para 317)

"317.... "Between "malice in fact" and "malice in law" there is a broad distinction which is not peculiar to any system of jurisprudence. The person who inflicts a wrong or an injury upon any person in contravention of the law is not allowed to say that he did so with an innocent mind. He is taken to know the law and can only act within the law. He may, therefore, be guilty of "malice in law", although, so far as the state of his mind was concerned he acted ignorantly, and in that sense innocently. "Malice in fact" is a different thing. It means an actual malicious intention on the part of the person who has done the wrongful act.'" (Shearer case [1914 AC 808 (HL)] , AC pp. 813-14)

.....

32. To the same effect is the recent decision of this Court in Ravi Yashwant Bhoir v. Collector (2012) 4 SCC 407 wherein this Court observed: (SCC p. 431, paras 47-48)

"Malice in law

47. This Court has consistently held that the State is under an obligation to act fairly without ill will or malice in fact or in law. Where malice is attributed to the State, it can never be a case of personal ill will or spite on the part of the State. "Legal malice' or "malice in law' means something done without lawful excuse. It is a deliberate act in disregard to the rights of others. It is an act which is taken with an oblique or indirect object. It is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite.

48. Mala fide exercise of power does not imply any moral turpitude. It means exercise of statutory power for "purposes foreign to those for which it is in law intended'. It means conscious violation

of the law to the prejudice of another, a depraved inclination on the part of the authority to disregard the rights of others, where intent is manifested by its injurious acts. Passing an order for unauthorised purpose constitutes malice in law. (See ADM, Jabalpurv. Shivakant Shukla [(1976) 2 SCC 521 : AIR 1976 SC 1207] , Union of India v. V. Ramakrishnan [(2005) 8 SCC 394 : 2005 SCC (L&S) 1150] and Kalabharati Advertising v. Hemant Vimalnath Narichania [(2010) 9 SCC 437 : (2010) 3 SCC (Civ) 808 : AIR 2010 SC 3745] .)"

....

38. We need hardly point out that in cases where the decision-making process is multi-layered, officers associated with the process are free and indeed expected to take views on various issues according to their individual perceptions. They may in doing so at times strike discordant notes, but that is but natural and indeed welcome for it is only by independent deliberation, that all possible facets of an issue are unfolded and addressed and a decision that is most appropriate under the circumstances shaped. If every step in the decision-making process is viewed with suspicion the integrity of the entire process shall be jeopardised. Officers taking views in the decision-making process will feel handicapped in expressing their opinions freely and frankly for fear of being seen to be doing so for mala fide reasons which would in turn affect public interest. Nothing in the instant case was done without a reasonable or probable cause which is the very essence of the doctrine of malice in law vitiating administrative actions. We have, therefore, no hesitation in holding that the findings recorded by the High Court to the effect that the process of annulment of the tender process or the rejection of the tender submitted by RDS was vitiated by mala fides is unsustainable and is hereby set aside. Question 2 is accordingly answered in the negative."

54. Reliance has also been placed in case of **Rajneesh Khajuria Vs. Wockhardt Ltd. And Another 2020 (3) SCC 86** (Paras 16 to 23).

55. Sri Goyal then invited the attention of the Court to PowerPoint presentation regarding process of seeding of Aadhaar Card of a beneficiary. According to him, the point of sale device was to be linked with Aadhaar containing demographic details. This required actual seeding of Aadhaar in the point of sale device machine, so as to make the Targetted Delivery System workable. Thus, a contract was entered with a service provider known as "Rising Star IT Solution Ltd.".

56. According to him, there is difference between "feeding' and "seeding' of Aadhaar. Difference is not of mere language, but difference is a marked difference. It is on account of this difference that huge scale embezzlement of essential commodities was committed by the dealers of fair price shop. The word "feeding' of Aadhaar merely means typing of Aadhaar number and details of Aadhaar, as provided under Section 3(3) of Aadhaar Act of 2016 on the designated machine. This feeding can be reversed by erasing the details and, therefore, feeding can be done of another cardholder or of the same cardholder several times. According to him, the process of "seeding' is irreversible and Aadhaar Card, which is subjected to verification by the Competent Authority, after crossing the stage of feeding, is

verified from the server of UIDAI finally and forms the database for the machine concerned regarding details of beneficiary. No change can be done and this amounts to seeding. In case of feeding, verification is not done at the level of UIDAI and thus, there is no actual seeding and changes can be done.

57. According to him, during the day time, the data was entered by the service provider by feeding the Aadhaar details of a cardholder, but no verification was done immediately, as the service provider was undertaking this exercise only once in a day and that too during the evening hours. Once the details were verified through UIDAI, the data was locked and become irreversible. According to him, for the whole day machine remained opened and changes were made by feeding Aadhaar number and thereafter, erasing it and again feeding the same Aadhaar number, lifting the ration thereafter. Process of feeding same Aadhaar number and lifting the ration continued. As it was the obligation of the fair price shop owner to ensure delivery to the rightful person, the dealer permitted use of his machine and within a span of two hours, two Aadhaar Cards were utilized for lifting the ration of 311 cardholders.

58. According to Sri Goyal, most of these ration cards were dormant, which establishes the fact that dealer was fully aware that dormant card can be used for lifting the ration. He next emphasized that during the process of seeding, ration was being distributed through use of E-PoS Machine on the basis of Aadhaar Card details and this process was known as "dynamic mode', inasmuch as, if there was any discrepancy in feeding of details, it can be corrected. Thus, certain leeway was given to the dealer before process gets irreversible and for this purpose, the system was kept on a dynamic mode.

59. According to him, in a real time seeding, there are two concepts, one is when the process before it becomes irreversible, called as dynamic feeding which permits changes up till verification, while another concept is when the process become static, i.e. when there is on spot real time seeding and there is no dynamic feeding. This static real time seeding is the present mode of entry in the point of sale device throughout the State. It was not prevalent at the time when dealers syphoned off the ration belonging to Central Pool for distribution to the cardholders.

60. Through Annexure-3, Sri Goyal has tried to clarify and distinguish between "dynamic' and "static' mode of feeding/seeding of Aadhaar Card. He next invited the attention of the Court to Annexure-1 of the personal affidavit filed by Principal Secretary, Food and Civil Supply, Government of U.P. to demonstrate that how the modus operandi of the dealer worked. In the present case, 311 transactions were carried out by the petitioner Awadhesh Kumar between 15.07.2018 and 18.07.2018 using two Aadhaar Cards number and the difference between the two transactions was hardly of 2-3 minutes, while in case, the ration card was distributed to genuine cardholder, it was not possible to carry out transaction within such short span of time.

61. He then contended that it was after enforcement of Act of 2013 and Rules of 2015 that the State Government had come out with Control Order of 2016, under which essential commodity was to be distributed under Targeted Public

Distribution System. The present Control Order is substantially different from the earlier Control Order. According to him, the foodgrains are now to be distributed by the State under the Targeted Public Distribution System after identification of eligible household. The earlier exercise started by the State in the year 2014-15 failed and fresh exercise was undertaken in the year 2017 for feeding of eligible cardholders, as mandated in Clause-4 (19) of Control Order of 2016. The estimated Aadhaar Card, which was to be feeded in both rural and urban sector, was estimated to be 15 Crores, but after fresh exercise, the figure dropped. It was during this period while the System Integrator was appointed and thereafter, contract was made with the service provider for feeding and seeding of Aadhaar data. In the month of July, 2018, taking benefit of the fact that entire data was not seeded and the process was in hybrid mode i.e. dynamic and static mode, these dealers took advantage of withdrawing ration from the Central Pool of dormant cardholders while it was on dynamic mode and data could be changed during the day time without it being validated by UIDAI server.

62. Sri Goyal next relied upon the decision of Apex Court in case of **K.S. Puttaswamy (Retired) and Another (supra**) and tried to impress upon that while upholding validity of Aadhaar, the Apex Court on one hand upheld right of personal autonomy which is a part of dignity (and right to privacy), another part of dignity of the same individual is to lead dignified life as well (which is again a facet of Article 21 of the Constitution). Therefore, in a scenario where the State is coming out with welfare schemes, which strive at giving dignified life in harmony with human dignity and in the process some aspect of autonomy is sacrificed, the balancing of the two becomes an important task which is to be achieved by the courts. Relevant Paras 314, 315, 330 and 333 are extracted here as under:-

"314. It may be highlighted at this stage that the petitioners are making their claim on the basis of dignity as a facet of right to privacy. On the other hand, Section 7 of the Aadhaar Act is aimed at offering subsidies, benefits or services to the marginalised sections of the society for whom such welfare schemes have been formulated from time to time. That also becomes an aspect of social justice, which is the obligation of the State stipulated in Part IV of the Constitution. The rationale behind Section 7 lies in ensuring targeted delivery of services, benefits and subsidies which are funded from the Consolidated Fund of India. In discharge of its solemn constitutional obligation to enliven the fundamental rights of life and personal liberty (Article 21) to ensure justice, social, political and economic and to eliminate inequality (Article 14) with a view to ameliorate the lot of the poor and the Dalits, the Central Government has launched several welfare schemes. Some such schemes are PDS, scholarships, mid-day meals, LPG subsidies, etc. These schemes involve 3% percentage of the GDP and involve a huge amount of public money. Right to receive these benefits, from the point of view of those who deserve the same, has now attained the status of fundamental right based on the same concept of human dignity, which the petitioners seek to bank upon.

315. The Constitution does not exist for a few or minority of the people of India, but "We, the People". The goals set out in the Preamble of the Constitution do

not contemplate statism and do not seek to preserve justice, liberty, equality and fraternity for those who have the means and opportunity to ensure the exercise of inalienable rights for themselves. These goals are predominantly or at least equally geared to "secure to all its citizens", especially, to the downtrodden, poor and exploited, justice, liberty, equality and "to promote" fraternity assuring dignity. Interestingly, the State has come forward in recognising the rights of deprived section of the society to receive such benefits on the premise that it is their fundamental right to claim such benefits. It is acknowledged by the respondents that there is a paradigm shift in addressing the problem of security and eradicating extreme poverty and hunger. The shift is from the welfare approach to a rights-based approach. As a consequence, right of everyone to adequate food no more remains based on directive principles of State policy (Article 47), though the said principles remain a source of inspiration. This entitlement has turned into a constitutional fundamental right. This constitutional obligation is reinforced by obligations under International Convention. The Universal Declaration of Human Rights (Preamble, Articles 22 & 23) and International Covenant on Economic, Social and Cultural Rights to which India is a signatory, also cast responsibilities on all State parties to recognise the right of everyone to adequate food. Eradicating extreme poverty and hunger is one of the goals under the Millennium Development Goals of the United Nations. Parliament enacted the National Food Security Act, 2013 to address the issue of food security at the household level. The scheme of the Act designs a targeted public distribution system for providing foodgrains to those below BPL. The object is to ensure to the people adequate food at affordable prices so that people may live a life with dignity. The reforms contemplated under Section 12 of the Act include, application of information and communication technology tools with end-to-end computerisation to ensure transparency and to prevent diversion, and leveraging Aadhaar for unique biometric identification of entitled beneficiaries. The Act imposes obligations on the Central Government, State Government and local authorities vide Chapters VIII, IX and X. Section 32 contemplates other welfare schemes. It provides for nutritional standards in Schedule II and the undertaking of further steps to progressively realise the objectives specified in Schedule III.

....

330. The purpose of citing aforesaid judgments is to highlight that this Court expanded the scope of Articles 14 and 21 of the Constitution by recognising various socio-economic rights of the poor and marginalised section of the society and, in the process, transforming the constitutional jurisprudence by putting a positive obligation on the State to fulfil its duty as per the Charter of Directive Principles of the State Policy, contained in Part IV of the Constitution. It is to be kept in mind that while acknowledging that economic considerations would play a role in determining the full content of the right to life, the Court also held that right included the protection of human dignity and all that is attached to it, "namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms" (see Francis Coralie Mullin v. State (UT of Delhi) [Francis

Coralie Mullin v. State (UT of Delhi), (1981) 1 SCC 608 : 1981 SCC (Cri) 212]). It is, thus, of some significance to remark that it is this Court which has been repeatedly insisting that benefits to reach the most deserving and should not get frittered mid-way. We are of the opinion that purpose of the Aadhaar Act, as captured in the Statement of Objects and Reasons and sought to be implemented by Section 7 of the Aadhaar Act, is to achieve the stated objectives. This Court is convinced by its conscience that the Act is aimed at a proper purpose, which is of sufficient importance.

...

333. Section 7, which provides for necessity of authentication for receipt of certain subsidies, benefits and services has a definite purpose and this authentication is to achieve the objectives for which the Aadhaar Act is enacted, namely, to ensure that such subsidies, benefits and services reach only the intended beneficiaries. We have seen rampant corruption at various levels in implementation of benevolent and welfare schemes meant for different classes of persons. It has resulted in depriving the actual beneficiaries to receive those subsidies, benefits and services which get frittered away though on papers, it is shown that they are received by the persons for whom they are meant. There have been cases of duplicate and bogus Ration Cards, BPL cards, LPG connections, etc. Some persons with multiple identities getting those benefits manifold. Aadhaar Scheme has been successful, to a great extent, in curbing the aforesaid malpractices. By providing that the benefits for various welfare schemes shall be given to those who possess Aadhaar number and after undergoing the authentication as provided in Section 8 of the Aadhaar Act, the purpose is to ensure that only rightful persons receive these benefits. Non-action is not costly. It is the affirmative action which costs the Government. And that money comes from exchequer. So, it becomes the duty of the Government to ensure that it goes to deserving persons. Therefore, second component also stands fulfilled."

63. Lastly, it was contended that petitioners cannot claim negative equality, as the ration was actually lifted and distributed by the petitioners and they have tried to raise a plea to the effect that entire role in commission of this scam is of Government Officials namely, District Supply Officer and also NIC Officials, who had access to the login I.D. and password and thus, only they can change the details of beneficiaries. According to him, the act of distributing ration to 311 cardholders was done by the petitioner. Reliance has been placed upon the decision of Apex Court in the case of **Ekta Shakti Foundation Vs. Government of NCT Delhi, AIR 2006 SC 2609 and State of Odisha and another Vs. Anup Kumar Senapati and Another, 2019 (19) SCC 626.**

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

65. This is a case affecting 43 districts of the State in which, in the month of July, 2018, by the use of E-PoS Machine, ration meant for poor and eligible cardholders to be distributed from the Central Pool by the State Agencies have been syphoned off. With the advancement of technology and more and more use in daily life, the effort is for upliftment of life of an individual

both by the State and through individual effort.

66. Here is a case where the Government made effort to stop pilferage in the public distribution system, for the first time by enacting Act of 2013, thereafter framing Rules of 2015, mandating and bringing in the use of technology through E-PoS Machine, wherein the data of a cardholder was to be feeded and by use of his biometric authentication, ration was to be distributed. The sole aim and purpose was to eliminate in the Public Distribution System, the pilferage of goods by the dealers by not providing the benefit which was extended by the Government through various beneficial schemes meant for poor and downtrodden who are forced to live life of poverty and hunger. The basic object was to eliminate hunger and to fulfil the goal enshrined in our Constitution that an individual lives a life of dignity.

67. The Aadhaar Act of 2016 gave a boost to the objective of Act of 2013, and after implementation and its validity being upheld by the Apex Court in **K.S. Puttaswamy's case (supra)**, it became easy for the Government in fulfilling its object by entering the details of an individual cardholder in E-PoS Machine and only on the verification of biometric, which was done by the Authority known as UIDAI through server of NIC that ration can be distributed.

68. This system was introduced so as to break corrupt nexus between the dealers and the officials of the Food and Civil Supply Department. Without the authentication of biometric of a cardholder, ration could not be distributed. Once, the biometric was used for current cycle, it gets locked and second transaction was not possible. The Government could now keep an eye and have the exact figure of the ration/essential commodities sent by it from the Central Pool to the State Agencies for distribution and the amount of foodgrains distributed to the cardholders.

69. But, this transition from the manual process of distribution of goods to use of E-PoS Machine was not smooth and had certain hurdles. Earlier, in the year 2014-15, an assessment of State Government regarding urban and rural eligible cardholders was around 15 crores but, feeding failed and therefore, fresh exercise was undertaken pursuant to the enforcement of Control Order of 2016 by the State in the year 2017.

70. The State chose four System Integrator who were required to provide E-PoS Machine to the dealers and a contract was entered with the System Operator for feeding of Aadhaar details in E-PoS Machine. State had required the process to be completed within three months. But, as there was some problems, time was extended.

71. It was during the process of feeding which started throughout the State, that large scale syphoning off foodgrain meant for the cardholders happened.

72. As pointed out in Power Point Presentation of feeding and seeding by both the sides, it is clear that the first step is of entering the details of Aadhaar of a beneficiary into the E-PoS Machine, where neither authentication is done nor any OTP is generated and this is called "feeding'. According to the State, this was dynamic mode, wherein system operator could enter the detail and edit the same number of

times till it was finally locked during the evening hours.

73. It is admitted to both the parties that only once in the evening the data, which was feeded during the day time, was locked and then it became irreversible and could not be changed because of its authentication by the Competent Authority i.e. UIDAI. This process is seeding of the Aadhaar details.

74. E-PoS Machine is undoubtedly with the custody of the dealer and it was during the day time that the feeding was done in the E-PoS Machine, as it was in dynamic mode. During the feeding process, the data could be changed/altered number of times till it was finally locked after verification.

75. The catch lies here. Taking advantage of the fact that entire Aadhaar details of all the ration cardholders attached to a particular dealer/shop was not feeded and seeded and the process was continuing, while the distribution of essential commodities continued, interpolation was made by the dealer in the details and using one or two Aadhaar numbers, ration from dormant cardholders was withdrawn.

76. The most interesting part is that this exercise was done only in the month of July, 2018 in most part of the State. The argument made at the behest of petitioner's counsel that it was not possible without connivance of District Supply Officer and official of NIC does not impress the Court as the E-PoS Machine was in the custody of dealer and during day time, the data can be feeded and edited number of times till it was finally locked in the evening.

77. From perusal of transactions sheet brought on record by the State through personal affidavit of Principal Secretary, it reflects that most of the transactions had taken place between an interval of 2-3 minutes. Looking from the practical aspect, it is not possible for any dealer to carry out the transaction and deliver the goods after completing the formality within two minutes.

78. The argument regarding role of officials of Supply Office and NIC cannot be considered on two counts, firstly, neither any specific allegation has been made in the writ petition against any of such officials nor they have been impleaded as a party. Moreover, in the representation of petitioner as well as during oral arguments, such allegations have been made. Secondly, the Court finds that there was no requirement of use of login ID or password as the Machine was open for feeding during the day-time and the dealer, with the help of unknown operator, as alleged in the show cause notice, had performed number of transactions as the details was finally locked in the evening. All the transactions in the leading case is of the day time.

79. Reliance placed upon decision in case of **Ravi Yashwant Bhoir (supra)** is not applicable as petitioners have failed to make out any case of mala fides either in the writ petition or through argument. The Apex Court in **Ratnagiri Gas and Power Private Limited (supra**) while distinguishing between malice in fact and malice in law had taken note of the said judgment.

80. Coming to the argument advanced by Sri Trivedi that the concept of feeding and seeding required authentication from the Competent Authority, thus, the dealer was incapacitated to perform any such act and make any interpolation at its end was not possible, cannot be accepted due to the

fact that feeding of Aadhaar data was being carried out for the first time in the E-PoS Machine and it was in a transition phase.

81. The feeding part became irreversible only after the authentication by the Competent Authority, which was done only once during the day and that too the evening, leaving it open during the day time for altering and editing data number of times. Thus, the concept of seeding has two facets, one when the Machine is on dynamic mode wherein feeding is done and data can be altered number of times till it is finally locked and becomes irreversible. Secondly, when the data fed is authenticated by Competent Authority and becomes irreversible, which is called static mode.

82. In **K.S. Puttaswamy (supra)**, Power Point Presentation was given in Supreme Court in regard to process of feeding and seeding of Aadhaar details and authentication by the Competent Authority. The Apex Court had found that the system was foolproof and once authentication was done by the Competent Authority, no change can be made in the details feeded in the Machine.

83. Similarly, while the details of Aadhaar was being fed in the E-PoS Machine, during feeding, the details could be changed subject to verification and authentication by the Authority. Once, it was done, the change became irreversible.

84. The dealers, taking advantage of this hybrid mode, had resorted to such illegal activities and syphoned off ration of dormant cardholders. They were aware that no enquiry would be conducted as the cards were dormant and no one would come up to make any complaint. But, on verification of transactions it was found that using details of few Aadhaar numbers, ration of thousands of cardholders was withdrawn throughout the State of U.P.

85 . Argument, that information given by District Supply Officer clearly demonstrate that dealer can neither change the software in E-PoS Machine, nor prepares the Password/login ID nor he can feed the Aadhaar details, is of no help to the petitioners, as it was a general information which was sought in the year 2019 after the entire work of feeding and seeding was over.

86. No information was sought in regard to the fact that, at the first instance, when feeding began, whether without data being authenticated, the same can be changed or altered? It is an accepted fact that once the process of seeding is over, no one can change the same and transaction will be completed only after authentication of biometrics of a beneficiary.

87. An argument has been raised on behalf of the petitioner that it was not possible for dealers situated in 43 districts of State to come up with one idea and performs such illegal transaction in one month. This Court finds that as the entire feeding and seeding process was not completed and was in a transition mode, the dealers had an opportunity before the data was locked permanently and was in a dynamic mode, they withdrew rations of the dormant cardholders.

88. "Process of Seeding" includes both feeding and seeding of Aadhaar details of a beneficiary in E-PoS Machine. As discussed earlier, the process is divided into two parts, *firstly*, by entering the data where it is in dynamic mode and, *secondly*,

upon its verification, it gets locked and is in static mode. Petitioner's argument is only to the extent of static mode where the data become irreversible and gets locked, and there is no role of the dealer therein to get it altered or changed.

89. This fact is accepted to the State that once feeding is over and the data gets locked, it becomes irreversible and beyond the approach of the dealer to alter it. But in the case in hand, the transaction took place while the process was in dynmic mode and not in static mode. The word "Process of Seeding" incaptulates both feeding and seeding and it cannot be read in isolation.

90. Thus, during the transition period, first, the data was feeded and after authentication, it was seeded and then only became irreversible.

91. Alternate argument raised in regard to technical glitch or malfunctioning of software in the month of July, 2018 has no legs to stand, as petitioners have tried to raise contradictory plea and argument. When the petitioners failed to nail the officials of the department, an attempt has been made to portray that technical glitch occurred in the working of software. This Court finds that most of the transactions were carried out by the dealers of dormant cardholders. Moreover, the Card ID are different but only few of the Aadhaar numbers have been given for all the Card IDs, this cannot be a technical glitch but a deliberate attempt.

92. Further, the transaction sheet, reveals that in the 4th Column, Ration Card ID of all the 311 cardholders are different but 6th Column mentions only 2 Aadhaar numbers. This cannot be a technical glitch, and the State has come out with a case that out of 311 Cardholders, 236 Cards are dormant and rest of the cardholders are not identifiable.

93. In fact, through Section 12 of Act of 2013, the Government had mandated for use of technology through computerization and leveraging Aadhaar so that actual beneficiary may receive foodgrains and to eliminate all those cardholders from the system, who were not entitled under the Act to get the foodgrains.

94. Dealers are well aware that once the entire data of ration cardholders are fed in E-PoS Machine and distribution takes place through use of biometric by authentication, pilferage in the system would be reduced to negligible. This was a last ditch attempt to squeeze out the maximum from the kitty of the State misusing the technology.

95. As discussed earlier, technology advancement is beneficial to the mankind, but its misuse can be detrimental to the society at large when used with wrong intention.

96. As it is clear that on 17.10.2017, the State Government had apprised the Commissioner, Food and Civil Supplies, U.P. that the work of Aadhaar seeding was to be carried out in the entire State, for which E-tendering was required, pursuant to which the Commissioner, Food and Civil Supplies on 18.10.2017 required all the District Magistrates of the State for seeding of Aadhaar Card in the E-PoS Machine.

97. In the letter addressed to the Collectors, it was made clear that the feeding work was to be completed within three months. Thus, it can be safely said that the State as well as the different

authorities had been using the word seeding of Aadhaar Card in the E-PoS Machine, though the process of seeding is bifurcated into two parts, namely, "feeding' and "seeding'.

98. In the present case, on 10.01.2018, the District Supply Officer, Meerut had issued a letter to M/s Rising Star IT Solution, the System Integrator, requiring him to complete the work of feeding within three months. Thus, the argument that the order of Collector as well as process initiated by State Government in 2017 using the terminology "seeding' was a process irreversible, is a fallacy.

99. Seeding is the final and ultimate part of the process wherein Aadhaar data is entered in the E-PoS Machine and after verification from the Competent Authority, the data gets finally locked and is thus called "seeded'.

100. It appears that the petitioners have fallen in trap of the word "seeded' and its use at different places has led them to believe that the process initiated by the Government became irreversible on mere feeding of data. In fact, the details of Aadhaar feeded during the day time could be easily changed and altered number of times unless and until it was authenticated by the Competent Authority wherein the process became irreversible and the data stood seeded.

101. The argument raised by learned Additional Advocate General as to the basic order having not been challenged by the petitioner, this Court finds that though there is a lacuna that only the consequential order has been challenged by the petitioner but the Court, at this stage, declines to accept this plea as the matter is being heard and decided after exchange of pleadings by both the sides.

102. The entire controversy in all the connected bunch matters raises similar question that it was not in the domain of dealers, nor they could edit or change the data which had seeded by the department. The entire narration on their behest was to the extent, including information received under Right to Information Act that dealer cannot make any change in the seeded data and the LoginID/Password was not in their custody.

103. After analysis, the Court finds that entire controversy is being dragged on in the garb of the word "seeded'. The terminology is vast and includes both "feeding' and "seeding'. One should be remindful of the fact that prior to the use of E-PoS Machine, an exercise being undertaken by the State Authorities for seeding of the Aadhaar details of a beneficiary, the PDS System was working manually.

104. The entire effort of both Central and State Governments was to reduce pilferage of essential commodities meant for eligible cardholders by the use of electronic device with biometric authentication of beneficiary.

105. Petitioners have not denied the ration being given to the dormant cardholders in their reply nor in the writ petition. Their entire effort rest on the fact that no official of the department had been made liable and further no inquiry has been conducted, nor any complainant has come forward and made complaint before the State is of no consequence as neither any official of the department has been made party in the writ petition nor any allegation

has been made against them. Moreover, the case of the State is specific to the effect that ration was withdrawn of the dormant cardholders. Thus, no question arises for anyone coming forward and making complaint.

106. In **Ekta Shakti Foundation (supra)**, Apex Court had clearly laid down the concept of equality, as envisaged under Article 14 of the Constitution, which is a positive concept and cannot be enforced in a negative manner. The petitioners were under the obligation to prove their case, rather shifting the burden and blame upon the State.

107. Considering the facts and circumstances of the case, this Court finds that no interference is required in the order dated 25.11.2019 passed by District Magistrate.

108. In the result, the writ petition fails and is hereby dismissed.

109. Similarly, in all the other connected matters, this Court declines to interfere in the order of cancellation passed by District Supply Officer and the same having been affirmed by the District Magistrate, cancelling the licence of the fair price shops in question.

110. All the writ petitions are hereby dismissed.

(2022)03ILR A976
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.01.2022

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ C No. 17979 of 2021

C/M of Krishna Sahkari Awas Samiti Ltd., Kanpur Nagar & Ors. ...Petitioners
Versus
State Of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Krishna Mohan Misra, Sri Abhishek Misra, Sri H.R. Misra

Counsel for the Respondents:
C.S.C., Sri Manish Pandey, Sri Radhey Krishna Pandey, Sri Sunil Kumar Misra, Sri Rakesh Pande

A. Civil Law - U.P. Coopeartive Societies Act, 1965- Sections 128 & 98 (n)- Consent of parties will not confer jurisdiction of appeal where none has been vested by law. Similarly failure to raise the objection in regard to the jurisdiction to entertain the appeal will not cure the defect of inherent lack of jurisdiction in the case. It is true that issue of jurisdiction has to be raised at the earliest stage. However, it is equally well-settled that the plea regarding inherent lack of jurisdiction can be taken at any stage and also in collateral proceedings.

Writ Petition Allowed. (E-12)

List of Cases cited:-

1. A.V. G.P. Chettiar & Sons & ors. Vs T. Palanisamy Gounder, (2002) 5 SCC 337

2. Arcot Textile Mills Ltd. Vs The Regional Provident Fund Commissioner & ors., (2013) 16 SCC 1

3. Hindustan Zinc Ltd. Vs Ajmer Vidyut Vitran Nigam Ltd., (2019) 17 SCC 82

4. Kiran Singh & ors. Vs Chaman Paswan & ors., (1955) 1 SCR 117

5. Zuari Cement Ltd. Vs Regional Director, Employees' State Insurance Corporation, Hyderabad & ors., (2015) 7 SCC 690

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

1. Heard Sri Krishna Mohan Misra, learned counsel for the petitioners, learned

Standing Counsel for the respondent No.1 and 4-State, Sri Sunil Kumar Misra, learned counsel for the respondent No.2 and 3 and Sri Rakesh Pande, learned Senior Counsel

2. The petitioner-committee of management has assailed the order dated 22.06.2021 entered by the learned appellate authority /Joint Secretary, Co-operative Department, U.P. Government, Lucknow passed in purported exercise of appellate powers conferred under Section 98(n) of the Uttar Pradesh Co-operative Societies Act, 1965.

3. Sri Krishna Mohan Misra, learned counsel for the petitioners contends that the learned appellate authority /Joint Secretary, Co-operative Department, U.P. Government, Lucknow has passed the impugned order dated 22.06.2021 despite inherent lack of jurisdiction. Failure to raise the issue of jurisdiction at the stage of the appeal, does not preclude the petitioners from canvassing the same before this Court. The issue of jurisdiction goes to the root of the matter.

4. Sri Krishna Mohan Misra, learned counsel for the petitioners has placed reliance on authorities in point which are discussed in the body of the judgement.

5. Per contra, Sri Rakesh Pande, learned Senior Counsel assisted by Sri Radhey Krishna Pandey, learned counsel for the respondent No.5 submits that the issue of jurisdiction has to be taken in the first instance before the concerned authority. Admittedly, the petitioner-committee of management failed to do so and he is raising the issue of jurisdiction for the first time before this Court. Sri Rakesh Pande, learned Senior Counsel places reliance on **A.V.G.P. Chettiar and Sons & Ors. Vs. T.Palanisamy Gounder1.**

6. The facts in brief giving rise to this writ petition are these. There exists a cooperative society running in the name and style of "Krishna Sahkari Awas Samiti Limited, Yashoda Nagar, Kanpur Nagar" (hereinafter referred to as the 'cooperative society'). A resolution was passed by the petitioner-committee of management on 13.11.2017 accepting the resignation of the respondent No.5, as the honorary Secretary of the Cooperative Society. On behalf of the respondent No.5, the fact of resignation was seriously disputed. It was contended that the resignation letter and other consequential proceedings are all forged. Subsequently, an order was passed by the Chairman of the Cooperative Society on 19.12.2017 directing the concerned authorities not to recognize and act upon the signatures of the respondent No.5 as an office bearer of the society.

7. Aggrieved by the aforesaid order dated 19.12.2017, the respondent No.5 took out the proceedings under Section 128 of the U.P. Co-operative Societies Act, 1965 before the competent authority/Additional Housing Commissioner/Additional Registrar, Co-operatives Department, U.P. Awas & Vikas Parishad, Lucknow.

8. Section 128 of the U.P. Co-operative Societies Act, 1965 being relevant to the controversy is extracted hereunder for ease of reference:

"Section 128. Registrar's powers to annul resolution of a co-operative society or cancel order

passed by an officer of a co-operative society in certain cases. - The Registrar may -

(i) annul any resolution passed by the committee of management, or the general body of any co-operative society; or

(ii) cancel any order passed by an officer or a co-operative society; if he is of the opinion that the resolution or the order, as the case may be is not covered by the objects of the society, or is in contravention of the provisions of this Act, the rules or the bye-laws of the society, where upon every such resolution or order shall become void and in-operative and be deleted from the records of the society.

[Provided that, the Registrar shall, before making any order, require the Committee of Management, general body or officer of the co-operative society to reconsider the resolution, or as the case may be, the order, within such period as he may fix but which shall not be less than fifteen days, and if he deems fit may stay the operation of that resolution or the order during such period]"

9. The competent authority/Additional Housing Commissioner/Additional Registrar, Co-operatives Department, U.P. Awas & Vikas Parishad, Lucknow while passing the order dated 31.12.2018 under Section 128 of the U.P. Cooperative Societies Act, 1965 directed the committee of management of the society to review the order dated 19.12.2017.

10. In compliance of the said order, the petitioner-committee of management re-examined the issue but with no better results for the respondent No.5. The resolution passed by the committee of management of the cooperative societies on 17.02.2019 in this regard declined to recall the resolution dated 19.12.2017 and reaffirmed the same.

11. Validity of the said resolutions were thereafter examined by the Additional Housing Commissioner/Additional Registrar, Co-operatives Department, U.P. Awas & Vikas Parishad, Lucknow under Section 128 of the U.P. Cooperative Societies Act, 1965 on a representation made by the respondent No.5. The Additional Housing Commissioner/Additional Registrar, Co-operatives Department, U.P. Awas & Vikas Parishad, Lucknow by order dated 04.06.2019 under Section 128 of the U.P. Cooperative Societies Act, 1965 upheld the decisions of the committee of management and rejected the representation of the respondent No.5.

12. The respondent No.5 appealed the order dated 04.06.2019 passed by the Additional Housing Commissioner /Additional Registrar, Co-operatives Department, U.P. Awas & Vikas Parishad, Lucknow under Section 128 of the U.P. Cooperative Societies Act, 1965. The appeal purportedly filed under Section 98(n) of the U.P. Cooperative Societies Act, 1965 by the respondent No.5 was instituted before the learned appellate authority / Joint Secretary, Co-operative Housing, U.P. Government, Lucknow, and came to be registered as Appeal No.21 of 2019 (Ambar Tripathi Vs. Additional Housing Commissioner/Additional Registrar, Housing, Lucknow and another).

13. The learned appellate authority / Joint Secretary, Co-operative Housing, U.P. Government, Lucknow by the impugned

order dated judgment dated 22.06.2021 has allowed the said appeal. The impugned order invalidates the resolution passed by the committee of management on 13.11.2017, and also the order dated 04.06.2019 passed by the Additional Housing Commissioner/ Additional Registrar, Cooperative Department, U.P. Awas & Vikas Parishad, Lucknow/competent authority under Section 128 of the U.P. Cooperative Societies Act, 1965.

14. The preliminary issue of maintainability of the appeal shall be decided in the first instance.

15. The powers of appeal are vested in the appellate authority under Section 98 (n) of the U.P. Cooperative Societies Act, 1965. The controversy turns on the scope of the said provision and the same is extracted below for ease of reference:

"98(n) an order passed by the Registrar under Section 128 annulling any resolution or cancelling any order, may, within thirty days of the communication of the order, decision or award to be appealed against, be preferred by the aggrieved party to the authorities mentioned in sub-section (2) in the manner prescribed."

16. The order dated 04.06.2019, which was appealed before the learned appellate authority/Joint Secretary, Cooperative Housing, U.P. Government, Lucknow clearly did not fall within the ambit of Section 98(n) of the U.P. Cooperative Societies Act, 1965 as reproduced above. The order 04.06.2019 does not annul any resolution nor cancel any order as contemplated in Section 98(n) of the U.P. Cooperative Societies Act, 1965.

17. It is well settled law that the appeal is a creature of the statute. The scope of the appellate jurisdiction is defined and circumscribed by statute. The appeal in issue is relatable to Section 98(n) of the U.P. Cooperative Societies Act, 1965. The appellate authority cannot go beyond the statutory mandate of Section 98(n) of the U.P. Cooperative Societies Act, 1965. In this case admittedly it has done so.

18. The discussion has the advantage of good authorities. While deciding the scope of appellate jurisdiction, the Supreme Court in **Arcot Textile Mills Ltd. Vs. The Regional Provident Fund Commissioner and others2** has held as under:

"17. Ms. Aparna Bhat, learned counsel for the respondent Nos. 1 to 3 would contend that the payment of interest by the employer in case of belated payment is statutorily leviable and a specified rate having been provided, the authority has no discretion and, therefore, it is only a matter of computation and there cannot be any challenge to it. Be it noted, it was canvassed by the said respondents before the High Court that an appeal would lie against an order passed under 7Q. On a scrutiny of Section 7I, we notice that the language is clear and unambiguous and it does not provide for an appeal against the determination made under 7Q. It is well settled in law that right of appeal is a creature of statute, for the right of appeal inheres in no one and, therefore, for maintainability of an appeal there must be authority of law. This being the position a provision providing for appeal should neither be construed too strictly nor too liberally, for if given either of these extreme interpretations, it is bound to adversely affect the legislative object as well as hamper the proceedings before the appropriate forum. Needless to say, a right of appeal cannot be assumed to exist unless expressly provided for by the statute and a remedy of appeal must be

legitimately traceable to the statutory provisions. If the express words employed in a provision do not provide an appeal from a particular order, the court is bound to follow the express words. To put it otherwise, an appeal for its maintainability must have the clear authority of law and that explains why the right of appeal is described as a creature of statute. (See: Ganga Bai v. Vijay Kumar and others[3], Gujarat Agro Industries Co. Ltd. v. Muncipal Corporation of the City of Ahmedabad and Ors.[4], State of Haryana v. Maruti Udyog Ltd. and others[5], Super Cassettes Industries Limited v. State of U.P. and another[6], Raj Kumar Shivhare v. Assistant Director, Directorate of Enforcement and another[7], Competition, Commission of India v. Steel Authority of India Limited and another [8]" (emphasis supplied)

19. Consent of parties will not confer jurisdiction of appeal where none has been vested by law. Similarly failure to raise the objection in regard to the jurisdiction to entertain the appeal will not cure the defect of inherent lack of jurisdiction in this case. It is true that issue of jurisdiction has to be raised at the earliest stage. However, it is equally well settled that the plea regarding inherent lack of jurisdiction can be taken at any stage and also in collateral proceedings. Ample authorities in point support these propositions.

20. **Hindustan Zinc Limited Vs. Ajmer Vidyut Vitran Nigam Limited3** reaffirmed the well settled position of law by holding as under:

"We are of the view that it is settled law that if there is an inherent lack of jurisdiction, the plea can be taken up at any stage and also in collateral proceedings."

21. **Kiran Singh and others Vs. Chaman Paswan and others4** affirmed that lack of jurisdiction nullifies the order and challenge to its validity can be set up at any point or forum whenever the order is sought to be enforced or relied upon by holding thus:

"20....It is a fundamental principle well-established that a decree passed by a Court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties. If the question now under consideration fell to be determined only on the application of general principles governing the matter, there can be no doubt that the District Court of Monghyr was coram non judice, and that its judgment and decree would be nullities." (emphasis supplied)

22 . In **Zuari Cement Limited Vs. Regional Director, Employees' State Insurance Corporation, Hyderabad and others5** it was held that acquiescence to jurisdiction where the authority lacked the same is of no avail:

"Para 12. As discussed earlier, in terms of Section 87 of the Act, only the appropriate government has the power to grant exemption to a factory or establishment or class of factories or establishments from the operation of the Act. In fact, the appellant-factory itself has obtained exemption from the appropriate

Government-State Government under Section 87 of the Act for the period from 1986 to 1993. Likewise, the rejection of exemption was also under Section 87 of the Act. While so, seeking the relief of declaration from the ESI Court that the appellant is entitled to exemption from the operation of the Act is misconceived. Contrary to the scheme of the statute, the High Court, in our view, cannot confer jurisdiction upon the ESI Court to determine the issue of exemption. ESI Corporation, of course, did not raise any objection and subjected itself to the jurisdiction of the ESI Court. The objection as to want of jurisdiction can be raised at any stage when the Court lacks jurisdiction, the fact that the parties earlier acquiesced in the proceedings is of no consequence."

Before considering the correctness of the decision of the High Court, we take up for consideration a preliminary objection raised by the appellants that the appellants were estopped from impugning the High Court's decision because they had requested for time to vacate the suit premises and such request had been granted by the High Court. The objection is unsustainable. First, an objection to the maintainability of the appeal, like other points of demurrer, may be relevant at the time of the admission of the appeal. Once the appeal is admitted without reserving the issue of maintainability and the matter is heard on merits, such a preliminary objection does not survive. Second, the appellants had no doubt requested for a stay of the execution of the decree. That had been granted by the High Court subject to furnishing of an undertaking by the appellants to vacate the premises within a period of six months. The appellants did not in fact give any such undertaking. Even if they had, they could not be denied the right to appeal to this Court on any principle of estoppel unless the respondent could show that the appellants had thereby gained an advantage which was otherwise not available to them; for example, if the appellants had given an undertaking and obtained a stay of the order of eviction beyond the period allowed for preferring the appeal or if the landlord had consented not to execute the decree of eviction in consideration of the appellants' undertaking to vacate . If such or other like circumstances exist, this Court may have refused to exercise discretion in favour of the tenant under Article 136 of the Constitution. Otherwise merely giving an undertaking does not foreclose a tenant from availing of any statutory remedies available to him by way of appeal or revision or under the Constitution."

23. The judgment being relied upon by the learned counsel for the respondents handed down in **A.V.G.P. Chettiar and Sons and others Vs. T.Palanisamy Gounder6.** In that case the objection to the jurisdiction was not taken before the High Court where the proceedings were pending. In the instant case the matter was being adjudicated by an appellate authority created by the Uttar Pradesh Cooperative Societies Act, 1965. The distinction between the constitutional courts and statutory authorities is obvious to be stated. Reliance on **A.V.G.P. Chettiar and Sons (supra)** by the learned counsel for the respondents is misconceived. The ruling is not applicable to this case.

24. The impugned order dated 22.06.2021 passed by the learned appellate authority/Joint Secretary, Cooperative

Department, U.P. Government, Lucknow has been passed despite inherent lack of jurisdiction and is a nullity in the eyes of law.

25. In the wake of preceding discussions, the impugned order 22.06.2021 is vitiated. The impugned order dated 22.06.2021 passed by the learned appellate authority/ Joint Secretary, Cooperative Department, U.P. Government, Lucknow is liable to be set aside and is set aside.

26. The writ petition is allowed.

27. It is open to the respondents to avail any other alternative remedy as may be advised in law.

(2022)03ILR A982
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.01.2022

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ C No. 27869 of 2021

Kanika Construction, Meerut ...Petitioner
Versus
State of U.P.& Ors. ...Respondents

Counsel for the Petitioner:
Sri Nipun Singh, Sri Jitendra Kumar, Sri Vikas Tripathi, Sri Vivek Chaubey

Counsel for the Respondents:
C.S.C.

A. Maintainability of a writ petition in contractual matters where monetary claims are sought to be raised.- Where the instrumentalities of the State act unfairly, unjustifiably, unreasonably or arbitrarily in discharge of contractual obligations, the same would be held to be violative of Article 14 and the aggrieved party cannot be precluded from invoking the writ jurisdiction under Article 226 of the Constitution of India nor the court would be denuded of its power of granting proper reliefs.

Writ Petition Allowed. (E-12)

List of Cases cited:-

1. M/S Bio Tech Systems Vs St. of U.P. & ors., 2020 (11) ADJ 488 (DB)

2. ABL International Ltd. & anr. Vs Export Credit Guarantee Corp. of India Ltd. & ors., (2004) 3 SCC 553

(Delivered by Hon'ble Manoj Kumar Gupta, J.
&
Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard Sri Nipun Singh, learned counsel for the petitioner and learned Standing Counsel for the State-respondents.

2. The present petition has been filed seeking a direction to the Respondent no.2 for payment of an amount which is stated to be due and admitted.

3. Pleadings in the petition indicate that in pursuance of certain advertisement inviting tenders for running community kitchen at Baijal Bhawan, Meerut and Olivia Hotel, Meerut, the petitioner company submitted its offer. It was duly accepted and in pursuance thereof, it provided the service of community kitchen at above two places during COVID period. By letter dated 4.6.2020, Respondent no.4 directed the petitioner to close the community kitchen w.e.f. 6.6.2020. A three member Committee had duly verified the quality and quantity of food packets supplied by the petitioner in pursuance of

the contract. The petitioner has been paid certain sum under the contract, but the entire amount has not been paid on account of paucity of funds.

4. The petitioner has placed on record an order dated 5.3.2021 issued by A.D.M. Finance & Revenue, Meerut in which it is recorded that on basis of recommendation of the Committee and the approval granted by the District Magistrate, Meerut on 4.3.2021, the amount of Rs. 3,68,81,217/- received from the Government shall be disbursed amongst various service providers on pro-rata basis. The order itself records that the remaining amount would be paid after release of more funds from the Government. A chart which is part of the said order reveals that in respect of the petitioner, the remaining sum is Rs. 37,32,072/-. Since, the amount has not been paid to the petitioner despite repeated reminders, the instant petition has been filed for a mandamus to Respondent no. 2 to pay the remaining amount forthwith.

5. On 26.11.2021, a Coordinate Bench passed the following order:-

"Services of petitioner were requisitioned to meet out the sudden difficulties occurred due to Covid-19 pandemic. Such services were duly provided, and as per Annexure-8 to the writ petition the admitted dues payable to petitioner stands quantified at Rs.37,32,072/-. However, only the part of the amount has been paid on pro-rata basis depending upon the funds available. Remaining amount has been withheld due to non-availability of funds. Grievance of the petitioner is that though sufficient time has elapsed but the admitted dues have not been released, so far.

In the facts of the case, it would be appropriate to direct the second respondent to examine the petitioner's grievance and file an affidavit clearly disclosing as to how much time would be required to release the dues to the petitioner, by the next date fixed.

Post this matter as fresh, once again, on 15th December, 2021."

6. On 15.12.2021, the matter was again adjourned to enable the competent authority to examine the petitioner's grievance and take necessary action.

7. Learned Standing Counsel is in receipt of instructions from the State Respondents in which the same stand has been taken i.e. as soon as the funds are received from the State Government, payment shall be made.

8. The question whether a writ petition under Article 226 of the Constitution of India is maintainable to enforce a contractual obligation against the State or its instrumentalities, by a aggrieved party, is no longer res integra. The law with regard to the maintainability of a writ petition in contractual matters is fairly well settled. It has been consistently held that there is no absolute bar to the maintainability of a writ petition in such matters. The discretionary jurisdiction under Article 226 of the Constitution of India may, however, be refused in case of money claims arising out of purely contractual obligations where there are serious disputed questions of fact with regard to the claims sought to be raised.

9. The legal position with regard to entertainability of a writ petition in contractual matters where monetary claims are sought to be raised has been considered in extenso in a recent decision of this court in **M/S Bio Tech Systems vs. State of U.P. and Ors.1** and it was held that in a case where the contract entered into between the State and the person aggrieved is of a non-statutory character and the relationship is governed purely in terms of a contract between the parties, in such situations the contractual obligations are matters of private law and a writ would not lie to enforce a civil liability arising purely out of a contract, and the proper remedy in such cases would be to file a civil suit for claiming damages, injunctions or specific performance or such appropriate reliefs in a civil court.

10. While stating the aforementioned broad proposition of law in **M/S Bio Tech Systems** (supra), it was also added that it cannot be held in absolute terms that a writ petition is not maintainable in all contractual matters seeking enforcement of obligations on part of the State or its authorities. The limitation in exercising powers under Article 226 in contractual matters is essentially a self-imposed restriction. A case where the amount is admitted and there is no disputed question of fact requiring adjudication of detailed evidence and interpretation of the terms of the contract, may be an exception to the aforementioned general principle.

11. In a given set of facts, where the State or its instrumentalities are parties to a contract, they would be under an obligation in law to act fairly, justly and reasonably, which is the requirement under Article 14 of the Constitution of India. In such a situation where the instrumentalities of the State act unfairly, unjustifiably, unreasonably or arbitrarily in discharge of contractual obligations, the same would be held to be violative of the constitutional guarantee embedded in Article 14 and the aggrieved party cannot be precluded from invoking the writ jurisdiction under Article 226 of the Constitution of India nor the court would be denuded of its power of granting proper reliefs.

12. While considering the question with regard to maintainability of a writ petition in such matters, it was held in **ABL International Ltd. And Another vs. Export Credit Guarantee Corporation of India Ltd. And Others2** that in appropriate cases, not only a writ petition against a State or instrumentality of State arising out of contractual obligation would be maintainable but the consequential relief of monetary claim would also be entertainable.

13. In the case at hand, it is evident that there is no dispute relating to the amount due and payable to the petitioner. The instructions received by the learned Standing Counsel clearly indicate that the balance amount has not been paid for the reason that necessary funds have not been made available by the State Government so far.

14. Once the petitioner had performed its contractual obligations under the work order and the amount due is admitted, we find no justification on part of the respondents not to make payment. Our attention has been invited towards order passed in Writ-C No. 21018 of 2021 (Saubhagya Industries Ltd. Vs. State of U.P. and 3 others), wherein identical controversy was raised and when this Court directed the concerned respondent therein

to file his personal affidavit disclosing the time frame within which payment of due amount would be made, the respondents made the payment and filed an affidavit to the said effect. It is pointed out that the case of the petitioner is on a similar footing inasmuch as approval for making payment was granted in respect of petitioner as also M/s Saubhagya Industries Ltd. (supra) by the same order dated 5.3.2021 issued by A.D.M., Finance and Revenue, Meerut.

15. We are of considered opinion that in the facts and circumstances noted above, there is no justification in not making payment of the amount due and payable to the petitioner.

16. Accordingly, a writ of mandamus is issued directing the respondents to ensure that the amount due and payable to the petitioner is released in its favour within a period of four weeks from the date of receipt of a true attested copy of the instant order by the second respondent.

17. The writ petition stands **allowed** accordingly.

(2022)03ILR A985
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 03.03.2022

BEFORE

THE HON'BLE MANISH MATHUR, J.

Writ C No. 29566 of 2021

Rajesh Singh Sengar ...Petitioner
Versus
State Of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sanjeev Shukla

Counsel for the Respondents:
C.S.C.

A. Civil Law – Arms Act, 1959 - Rule 17 - Arms Rules, 2016 - Schedule II - Rules 5, 17 - Arms Rules 1962 - Rule 54 -Renewal of Arms License - In case of change in permanent residence to the district where renewal is sought, the licencing authority of such district would hence forward become responsible for watching all future renewals of licence and shall inform the original issuing authority accordingly. It is also provided that the procedure is to be repeated on each subsequent occasion of renewal of licence. (Para 16)

In the present case, once the permanent address of the petitioner had shifted from State of Haryana to State of Uttar Pradesh, he was required to make an application before the District Magistrate Unnao for renewal of his arms licence in that particular district as per Rule 54 of Rules, 1962. It is apparent that petitioner's application for renewal dated 12th January, 2015 was rightly made to the District Magistrate, Unnao in terms of Schedule II of Rules 1962. The renewal thereafter by the District Magistrate, Unnao and intimating the same to District Magistrate Sirsa were completely in accordance with Rule 54 of the said Rules. (Para 17, 22)

It is also evident that petitioner had submitted his application for renewal vide letter dated 15th March, 2021, well before its expiry and the same was required to be considered and decided by the District Magistrate Unnao and not the District Magistrate Sirsa in view of Rules 54 of the Rules 1962 and Rule 5 and 17 of the Rules 2016. **The mere fact that petitioner's issuing authority has been indicated in N.D.A.L. Portal as Sirsa, Haryana is an error by opposite parties themselves, the benefit of which cannot be extended to them to the detriment of petitioner. It was the duty of opposite parties to have updated their records once petitioner's licence stood renewed by the District Magistrate Unnao.** The fact whether District Magistrate, Unnao intimated the District Magistrate Sirsa regarding renewal of petitioner's licence in 2015 and subsequently is

also an inter-departmental procedure with which petitioner has no concern. The opposite parties by means of affidavit filed in support of exemption from personal appearance have also brought on record order dated 22nd February, 2022 whereby petitioner's arms licence has been renewed by the District Magistrate Unnao from 26th March, 2021 till 25th March, 2026 but the same has been made subject to decision of this petition and orders to be passed by the District Magistrate Sirsa. (Para 23, 24)

It is apparent that the renewal of petitioner's arms licence after 2015 by the District Magistrate Unnao was very well in accordance with law. (Para 25)

Writ petition allowed. (E-4)

Present petition challenges order dated 22.03.2021, rejecting petitioner's application for registration/renewal of arms license at his present address.

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

1. Heard learned counsel for petitioner and learned State Counsel for opposite parties.

2. In pursuance to directions issued earlier, Mr. Ravindra Kumar District Magistrate, Unnao and Mr. Narendra Singh Officer Incharge, Arms/Additional District Magistrate, Unnao are present.

3. Petition has been filed against order dated 22nd March, 2021 rejecting petitioner's application for registration/renewal of arms licence at his present address in Uttar Pradesh bearing Licence No. 8820/DM/SSA Revolver No.S2252N.P.bore. Learned counsel for petitioner submits that the petitioner was employed in Indian Air Force and was issued a licence for the aforesaid revolver in the year 2012 on 27th April, 2012 from District Sirsa, State of Haryana. He subsequently took voluntary retirement from service and started residing in district Unnao in State of U.P. in 2014. It is submitted that arms licence was issued by the District Magistrate, Sirsa, Haryana up till 2015 which was thereafter renewed up till 2016.

4. It is submitted that in view of the fact that petitioner subsequently started residing in State of U.P., he gave an application dated 12th January, 2015 to the District Magistrate for registration of the arms licence in State of U.P. It is submitted that subsequently correspondence ensued between the District Magistrate, Unnao and District Magistrate Sirsa regarding details of petitioner's licence and queries of the District Magistrate, Unnao were satisfied by District Magistrate, Sirsa whereafter petitioner's licence was renewed by the District Magistrate Unnao from 2016 till 2018 and thereafter till 25th March, 2021 vide order dated 6the June, 2018.

5. It is further submitted that due to licence expiring in March, 2021 petitioner gave another application to the District Magistrate, Unnao on 15th March, 2021 for renewal of licence but the District Magistrate Unnao instead of renewing rejected it on 22nd March, 2021 which is under challenge in the present writ petition.

6. It is submitted that the aforesaid order was challenged in the present writ petition on 14th December, 2021 whereafter prior to filing of counter affidavit, the District Magistrate, Unnao vide letter dated 7th January, 2022 recommended cancellation of petitioner's licence to the District Magistrate Sirsa on account of the fact that petitioner's renewal has already expired in March, 2021.

7. It is submitted that in pursuance to aforesaid recommendation, the District Magistrate, Sirsa vide order dated 7th February, 2022 has thereafter suspended petitioner's arms licence.

8. It has been further submitted that once petitioner has shifted his place of residence from Haryana and gave an application before the District Magistrate, Unnao intimating the change of residence on 12th January, 2015, the said authority was under statutory duty in terms of Rule 17 of the Rules framed under the Arms Act, 1959 to register petitioner's arms licence in the State of U.P. and to issue a new licence book. As such it is submitted that any default in new registration of petitioner's arms licence in State of U.P. and its subsequent renewal is owing to default on the part of opposite parties themselves. It is further submitted that once petitioner's arms licnece was renewed up till March, 2021 an application for further renewal was also given prior to expiring of the renewal period, it was incumbent upon the opposite parties to have renewed arms licence without requiring the District Magistrate Sirsa to cancel the arms licence.

9. Learned State Counsel upon instructions refuted the submissions advanced by learned counsel for petitioner. It is submitted that initial arms licence of petitioner was issued by the District Magistrate, Sirsa in terms of Schedule II to the Arms Rules, 2016. The initial period of licence was only up till 2015 whereafter it was extended under Item III of Schedule II (Rule 5 of the Arms Rules) for the whole of India by the State Government concerned. It is submitted that once the arms licence of petitioner had been extended for the whole of India, it could have been renewed only by the District Magistrate concerned that is the District Magistrate, Sirsa since subsequent to his change in place of residence, no re-registration of petitioner's arms licence took place and only renewal had taken place. It is submitted that renewal of petitioner's arms licence was done under a misconception which could not be repeated. It is submitted that even while making the application for registration of the arms licence, no licence fee had been deposited by the petitioner due to which there was no occasion for the opposite parties to have registered petitioner's arms lience in the State of U.P. and as such petitioner's arms licence continued to be registered in the State of Haryana. It is thus submitted that due to the said fact that petitioner's arms licence was never registered in State of U.P., there could not have been a question for its renewal by the erstwhile District Magistrate in Unnao in the State of U.P.

10. In view of aforesaid facts, it is submitted that the petitioner's arms licence clearly expired on 25th March, 2021 and the District Magistrate Unnao was very well within his authority to have required the initial registering authority that is the District Magistrate Sirsa to take action for cancellation of petitioner's arms licence since the same was not renewed either in Haryana or in Uttar Pradesh. As such it is submitted that there is no illegality in the action taken by the opposite parties.

11. It is submitted that deferring to directions passed by this Court, licencing authority has thereafter vide order dated 22nd February, 2022 renewed petitioner's arms licence from 26th March, 2021 till 25th March, 2026 which has been made subject to the order to be passed in the present writ petition and the orders to be passed in cancellation proceedings that are

pending in pursuance to the order dated 7th February, 2022 issued by the District Magistrate Sirsa.

12. Considering submissions advanced by learned counsel for parties and upon perusal of material on record, it is admitted case of parties that petitioner's initial arms licence was registered and issued to him in District Sirsa, State of Haryana in 2012, which was valid up to 25th March, 2015. Subsequently it was extended to all of India vide order dated 9th October, 2013 by the State Government in terms of provisions then existing.

13. It is also admitted between the parties that subsequently the petitioner started residing at Unnao, State of Uttar Pradesh which became his permanent residence and thereafter made an application on 12th January, 2015 for registration of his arms licence at the present place of residence in District Unnao, State of U.P.. Upon such an application being made, the office of District Magistrate vide letter dated 29th January, 2015 sought information from the District Magistrate Sirsa, District Haryana pertaining to details of petitioner's arms licence. The said query was replied to vide letter dated 16th February, 2015. Certain other correspondence pertaining to petitioner's arms licence also took place between the two District Magistrates with all the queries being satisfied.

14. In pursuance thereof, the validity of petitioner arms licence was thereafter extended by the District Magistrate, Unnao, State of U.P. up till 25th March, 2018. The validity was thereafter extended up till 25th March, 2021 vide order dated 6th June, 2018. The dispute with regard to extension of petitioner's arms licence validity after 25th June, 2021 commenced with petitioner's application for further renewal vide letter dated 15th March, 2021 with opposite parties taking the stand in the impugned order that once the petitioner's arms licence stood registered in district Sirsa, Haryana and same was being reflected in the NDAL portal, there was no occasion for the District Magistrate, Unnao to renew the arms licence. Apparently in view of the aforesaid stand, the District Magistrate, Unnao wrote a letter dated 7th January, 2022 to District Magistrate Sirsa indicating the fact that petitioner's arms licence had not been renewed subsequent to March, 2021 due to which it was taken into custody by the police station concerned and recommendation was made for cancellation of petitioner's arms licence.

15. From the material on record it transpires that petitioner's licence issued initially had expired in 2015 whereafter petitioner gave an application dated 12th January, 2015 to the District Magistrate Unnao for renewal. It is relevant to indicate that prior to 2016, the Arms Rules, 1962 were holding the field with effect from Ist October, 1962. Provision of renewal of licences is indicated in Rule 54 of the said Rules and are as follows:-

"54. Renewal of licences .

(1) Every licence may, at its expiration and subject to the same condition (if any) as to the grant thereof, be renewed by the authority mentioned in Schedule II as renewin

[Provided that the licence so renewed may be signed in the appropriate column of the licence by such officer as may be specially empowered in this behalf by the State Government under rule 4.]

(2) The authority issuing a licence shall ordinarily be responsible for watching all future renewals of the licence. Where a licence is renewed by an authority other than the authority who granted it, the former shall forthwith inform the latter of the fact of renewal and the period for which such renewal is valid. The applicant for the renewal of a licence under this rule shall always be required to state his permanent residence, and, if he notices a change in his permanent residence to the district in which the renewal is sought, the licensing authority of such district shall hence-forward become responsible for watching all future renewals of his licence and shall inform the original issuing authority accordingly. The procedure shall be repeated on each subsequent occasion of renewal of the licence, the necessary intimation being sent by the renewing authority to the original issuing authority or to the authority who last renewed the licence on a permanent change of residence, as the case may be.

(3) An application for renewal of a licence for arms or ammunition deposited under sub-rule (1) of rule 47 may be made by the depositor, or where it is not practicable to make the application direct, through the dealer or any other person authorised by him in this behalf while the arms or ammunition continue to be so deposited.

(4) The licensing authority may consider an application for renewal of a licence, if the period between the date of its expiry and the date of application is not, in his opinion, unduly alongwith due regard to the circumstances of the case, and all renewal fees for the intervening period are paid; otherwise the application may be treated as one for grant of a fresh licence.

[(5) The licensing authority and the renewing authority at the Centre or at the State level, while grantiilga licence or renewing a licence, the case may be, shall enter the data of the record in an electronic format duly approved by the Central Government or the State Government, as the case may be.

(6) The licensing authority and the renewing authority shall also enter such data as are required in an electronic automated system as developed by the National Informatics Centre for this purpose and the aforesaid electronic automated system shall generate a unique number without which no arms licence shall be considered as valid with effect from the Ist October, 2015]"

16. As would be evident from a perusal of Rule 54(ii) of the Rules that in case of change in permanent residence to the district where such renewal is sought, the licencing authority of such district would hence forward become responsible for watching all future renewals of licence and shall inform the original issuing authority accordingly. It is also provided that the procedure is to be repeated on each subsequent occasion of renewal of licence.

17. In view of aforesaid provision, it is apparent that petitioner's application for renewal dated 12th January, 2015 was rightly made to the District Magistrate, Unnao in terms of Schedule II of Rules 1962. The renewal thereafter by the District Magistrate, Unnao and intimating the same to District Magistrate Sirsa were completely in accordance with Rule 54 of the said Rules.

18. It is also evident that once petitioner's licence was renewed up to 25th

March, 2021, he was required to submit a fresh renewal before the District Magistrate, Unnao and not the District Magistrate, Sirsa. It is also relevant that after 2016, Arms Rules 2016 came into effect on 15th July, 2016 in terms of Rule 1(ii) of the said Rules which superseded earlier Arms Rules of 1962.

19. The provisions pertaining to the present dispute relating to renewal after 25.6.2021 are clearly covered by the Rules 5 and 17 of the Arms Rules, 2016 as well as Schedule II to the said Rules.

20. Schedule II to the Arms Rules indicates the authorities concerned who have been empowered to register or renew the arms licences issued for various purposes. Item III of the said schedule clearly indicates that arms licence can be registered throughout the district or area of jurisdiction by the District Magistrate concerned. With regard to extension to whole of India, the State Government is empowered authority.

21. In the present case, it is seen that initial arms licence of petitioner was issued by the district magistrate concerned but subsequently it was extended to all of India by the State Government on 9th October, 2013. There does not appear to be any provision either in the Arms Act or in the Rules for a licence to be registered separately for a particular district, State or PAN India simultaneously. In such circumstances, it is clear that due to passing of subsequent order dated 9th October, 2013 petitioner's licence registration for Arms Act was extended PAN India by the State Government of Haryana.

22. Rule 17 of the Arms Rules, 2016 pertains to registration of licence outside licencing authority and change of address with existing licencing authority. The said rule indicates the procedure which is required to be followed by a person who requires registration of his licence either within or outside licencing authority and with regard to change of address with existing licencing authority. In the present case, once the permanent address of the petitioner had shifted from State of Haryana to State of Uttar Pradesh, he was required to make an application before the District Magistrate Unnao for renewal of his arms licence in that particular district as per Rule 54 of Rules, 1962. The letter dated 12th January, 2015 by the petitioner to the District Magistrate, Unnao clearly indicates its subject as re-registration of petitioner's licence in District Unnao. The gist and prayer made in the aforesaid letter is in conformity with Rule 54 of Arms Rules 1962.

23. From the narration made herein above, it is evident that renewal of petitioner's licence in 2015 and subsequently were in conformity with the Rules of 1962. Since petitioner had already changed his permanent address prior to advent of Rules of 2016, there was no requirement for re-registration in terms of Rule 17 of the Rules, 2016, which were notified subsequently. As such the opposite parties clearly fell in error in holding that petitioner's licence was not registered in District Unnao. It is also evident that petitioner had submitted his application for renewal vide letter dated 15th March, 2021, well before its expiry and the same was required to be considered and decided by the District Magistrate Unnao and not the District Magistrate Sirsa in view of Rules 54 of the Rules 1962 and Rule 5 and 17 of the Rules 2016. The mere fact that petitioner's issuing authority has been

indicated in N.D.A.L. Portal as Sirsa, Haryana is an error by opposite parties themselves, the benefit of which can not be extended to them to the detriment of petitioner. It was the duty of opposite parties to have updated their records once petitioner's licence stood renewed by the District Magistrate Unnao. The fact whether District Magistrate, Unnao intimated the District Magistrate Sirsa regarding renewal of petitioner's licence in 2015 and subsequently is also an inter departmental procedure with which petitioner has no concern.

24. It has been informed that in pursuance to impugned order, the authorities at Unnao have seized petitioner's fire arm and have furthermore intimated the District Magistrate Sirsa for cancellation of petitioner's licence and in pursuance thereof, the District Magistrate Sirsa has also initiated some proceeding for cancellation of fire arm since it has not been renewed after 25th March, 2021. The opposite parties by means of affidavit filed in support of exemption from personal appearance have also brought on record order dated 22nd February, 2022 whereby petitioner's arms licence has been renewed by the District Magistrate Unnao from 26th March, 2021 till 25th March, 2026 but the same has been made subject to decision of this petition and orders to be passed by the District Magistrate Sirsa.

25. In view of the discussion made herein above, it is apparent that the renewal of petitioner's arms licence after 2015 by the District Magistrate Unnao was very well in accordance with law and therefore there was no occasion for the opposite parties to have rejected petitioner's application for renewal by means of impugned order dated 22nd March, 2021.

26. In view of aforesaid, the impugned order dated 22nd March, 2021 being clearly unsustainable is quashed by issuance a writ in the nature of Certiorari. It is also held that the recommendation issued by the District Magistrate, Unnao dated 7th January, 2022 to the District Magistrate Sirsa, Haryana was clearly not in accordance with law as indicated herein above. A further writ in the nature of Mandamus is issued commanding the opposite parties to return petitioner's revolver S-2252NP bore bearing licence No. 8820/DM/SSA forthwith. It is also directed that the petitioner's arms licence would stand renewed up to 25th March, 2026 as per order dated 22nd February, 2022 issued by the Incharge Arms, Unnao in accordance with this judgment. Resultantly the petition succeeds and is allowed. Parties to bear their own costs.

(2022)03ILR A991
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.03.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE SHREE PRAKASH SINGH, J.

Criminal Appeal No. 474 of 1980

Mauji Lal & Ors. ...Appellants (In Jail)
Versus
State ...Respondent

Counsel for the Appellants:
Sri R.K. Saxena, Sri Bal Mukund, Sri Mohd. Naushad Siddiqui, Sri Satya Dheer Singh Jadaun

Counsel for the Respondent:
D.G.A.

Record of Trial Court pertaining to the Criminal Trial is unavailable or destroyed during the pendency of the criminal appeal before the Appellate Court.

Sections 385 and 386 of Cr.P.C- the situation where the Trial Court record is unavailable or destroyed due to natural calamities or otherwise, the Appellate Court is left with three options (i) to direct for the reconstruction of records, (ii) to direct for re-trial of the case and (iii) to set aside the judgment of Trial Court

where the original records are destroyed on account of natural or unnatural calamities, the Appellate Court should always order for reconstruction of the records. all possible endeavour should be made for reconstruction of record and, in our opinion, following recourse shall be adopted prior to coming to the conclusion of disposal of such appeals:- the duplicate copy of the original records.

ii. Notice shall be issued to concerned police station/prosecuting agency to provide the copy of police report filed after investigation U/s 173 (2) of Cr.PC.

iii. Notice shall be issued to concerned public prosecutor who has contested the case on behalf of State/prosecuting agency to provide the copy of record.

iv. Notice shall be issued to first informant of the case to furnish the records available with him.

v. Notice shall be issued to the counsel for the first informant (if any) who has contested the case on his behalf to furnish the records available with him.

vi. Notice shall be issued to accused/accused persons of the case to furnish the records available with him.

vii. Notice shall be issued to counsel of the accused who has contested the case on his behalf to furnish the records available with him.

viii. Notice shall be issued to the son or legal heir of the appellant in case appellant is dead.

ix. All such notices shall be issued through proper channel.

where Lower Court Record is not traceable; reconstruction of same is not possible and even retrial is not possible is to the effect that in such case, the judgment of the Trial Court shall be quashed and appellant shall be acquitted for all charges. in the absence of original record, it is not possible to arrive at a decision that impugned judgment passed and sentence awarded against appellant is legally justified and in conformity with law. Where the reconstruction of record is not possible which has been lost or destroyed, it is not legally permissible for the Appellate Court to affirm the conviction of the appellant since perusal of the record of the case is one of the essential elements of hearing of the appeal. Further, appellant has a right to satisfy the Appellate Court that the material or evidence available on record did not justify his/her conviction and this right cannot be denied to the appellant.

(Delivered by Hon'ble Shree Prakash Singh, J.)

1. Heard Sri S.D.S. Jadaun, learned counsel for the appellants and Sri L.D. Rajbhar, learned A.G.A. for the State.

2. This appeal has been preferred against the Judgment and order dated 6.3.1980 passed by Second Additional Sessions Judge, Non-Metropolitan Area, Kanpur in Sessions Trial No. 189 of 1978, convicting and sentencing the appellants no.1 and 2 to undergo imprisonment for life under Section 302/34 I.P.C. and to undergo one years rigorous imprisonment under Section 323/34 I.P.C.; and further convicting and sentencing the appellant no.3 to undergo one year rigorous imprisonment under Section 323/34 I.P.C.

3. Perused the record. From the perusal of the order sheet, it is evident that on 9.2.2015, the lower court record was summoned. Later on, after certain correspondence, it was reported by the office on 7.11.2019 that the Record Room,

Kanpur Nagar, vide report dated 31.10.2019, informed through the C.J.M. concerned that the lower court record in Sessions Trial No. 189 of 1978 is not available and the departmental enquiry in this regard has been initiated. Thereafter, on 21.1.2020, the District Judge, Kanpur Dehat, vide covering letter dated 21.1.2020, has intimated that the enquiry in the said matter was done and it was found that one class-III employee Kailash Nath Yagik, the then clerk of Second Additional District and Sessions Judge, Kanpur Dehat, who retired on 31st of March 2008 from service and also died on 4th May 2010, was found responsible for missing of the aforesaid lower court record as the record reveals that he had received said lower court record on 20.7.1992 during his posting as clerk with the Second Additional District and Sessions Judge, Kanpur Dehat. Later on, vide letters dated 17.3.2020 and 21.3.2020, it has been reported that the reconstruction of record and retrial in the aforesaid matter are not possible.

4. After taking into consideration of the aforesaid facts, this Court has passed an order on 20.9.2021 wherein the District Magistrate, Kanpur Dehat and the Senior Superintendent of Police/Superintendent of Police, Kanpur Dehat were directed to inform as to whether papers regarding Sessions Trial No. 189 of 1978 under Sections 302/34 and 323/34 I.P.C. are available with their office so that hearing of the case may proceed. Report dated 21.10.2021 was received from the office of the District Magistrate, Kanpur Dehat wherein it has been stated that no paper is available with regard to the Sessions Trial No. 189 of 1978 in his office including the case diary of the case. After perusal of the aforesaid report, this Court has proceeded to decide the instant appeal.

5. In the aforesaid circumstances, issue of construction of records pertaining to criminal trial has arisen before the Appellate Court on account of situation in which the record of Trial Court pertaining to the Criminal Trial is unavailable or destroyed during the pendency of the criminal appeal before the Appellate Court.

6. Before discussing the legal remedies permissible in law in the situation where Trial Court Records pertaining to Criminal Trial are destroyed, it is significant to elaborate the legal provisions enumerated in the Code of Criminal Procedure, 1872 (hereinafter referred to as the Cr.PC) for adjudication of Criminal Appeal by Appellate Court.

7. Sections 385 and 386 Cr.P.C. deal with the "procedure for hearing appeals not dismissed summarily" and "powers of Appellate Court", which are quoted as under:-

Section 385. Procedure for hearing appeals not dismissed summarily.

(1) If the Appellate Court does not dismiss the appeal summarily, it shall cause notice of the time and place at which such appeal will be heard to be given-

(i) to the appellant or his pleader;

(ii) to such officer as the State Government may appoint in this behalf;

(iii) if the appeal is from a judgment of conviction in a case instituted upon complaint, to the complainant;

(iv) if the appeal is under section 377 or section 378, to the accused, and shall also furnish such officer, complainant

and accused with a copy of the grounds of appeal.

(2) The Appellate Court shall then send for the record of the case, if such record is not already available in that Court, and hear the parties: Provided that if the appeal is only as to the extent or the legality of the sentence, the Court may dispose of the appeal without sending for the record.

(3) Where the only ground for appeal from a conviction is the alleged severity of the sentence, the appellant shall not, except with the leave of the Court, urge or be heard in support of any other ground.

Section 386. Power of the Appellate Court. After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may-

(a) in an appeal from an order or acquittal, reverse such order and direct that further inquiry be made, or that the accused be re- tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction-

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re- tried by a Court of competent jurisdiction subordinate to such Appellate

(ii) alter the finding, maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the Same;

(c) in an appeal for enhancement of sentence-

(i) reverse the finding and sentence and acquit or discharge the accused or order him to be re- tried by a Court competent to try the offence, or

(ii) alter the finding maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, so as to enhance or reduce the same;

(d) in an appeal from any other order, alter or reverse such order;

(e) make any amendment or any consequential or incidental order that may be just or proper; Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement: Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal.
[Emphasis supplied]

8. Thus, from bare perusal of the provisions of Sections 385 and 386 of Cr.P.C., it emerges that the powers of the Appellate Court while dealing with an appeal arising out

of a conviction are delineated in sub-clauses (i),(ii) and (iii) of clause (b) of Section 386 of the Code. The Appellate Court is empowered by Section 386 to reverse the finding and sentence and acquit. Therefore, the acquittal is possible when there is reversal of the finding and sentence. The Appellate Court is also empowered to discharge the accused. The third category which seems to be applicable to the present case is a direction for re-trial by a court of competent jurisdiction subordinate to the Appellate Court. For exercise of the powers in cases of first two categories, obviously a finding on merits after consideration of the materials on record is imperative. Where that is not possible because of circumstances like the case in hand i.e. destruction of the records, the proper course for the Appellate Court would be to direct re-trial after reconstruction of the records if in spite of positive and constructive efforts to reconstruct the records the same was impossible. If on the other hand, from the copies available with the prosecuting agency or the defence and/or their respective counsel, reconstruction is possible to be made, said course should be adopted and the appeal can be disposed of as it deserved under course indicated in clauses (i) and (ii). After perusal of the records and hearing appellant's pleader and public prosecutor under Section 377 or 378, the exercise of power as indicated above can be resorted to. Hon'ble Apex Court was pleased to observe in **Bani Singh and others Vs. State of U.P. (1996 (4) SCC 720)** that plain language of Section 385 makes it clear that if the Appellate Court does not consider the appeal fit for summary dismissal, it must call for the records and Section 386 mandates that after record is received, the Appellate Court may dispose of the appeal after hearing as indicated.

9. Prior to deal with the situation where the records of Trial Courts are unavailable or destroyed due to natural or unnatural calamities, it would be fruitful to discuss the nature of documents known or called as records of Lower/Trial Court.

10. The proviso appended to Chapter XII of the General Rules (Criminal), 1977, deals with the Rules with respect to "Destruction of Records". The relevant Rules of Chapter XII of the General Rules (Criminal), 1977 pertaining to Records are as under -

i. Rule 117. Classes of Records

ii. Rule118. Destruction of paper

iii. Rule 119. Destruction of paper

iv. Rule 120. Retention of Retention of register books, etc.

v. Rule 121. Retention of other papers.

vi. Rule 122. Retention of other papers.

vii. Rule 123. Destruction of register, book

viii. Rule 124. Notice to be given before destruction of original documents.

11. The Trial Court Records may be segregated/classified in two parts. The first part of the records are in form of the police report filed after the investigation by the police U/s 173 (2) of Cr.P.C. containing the First Information Report, chick FIR, statements of witnesses recorded during investigation U/s 161 of Cr.P.C., inquest report, post mortem report, medical/injury reports, site plan, statement recorded U/s

164 Cr.P.C. etc. as well as other documentary evidences collected by investigating officer during investigation depending upon the veracity of case. To be more precise, the police report submitted by police after conclusion of investigation before the Court of competent jurisdiction, which requires to be served upon accused in compliance of section 207 of Cr.P.C., can be termed as first part of the Trial Court Record.

12. The second part of the Trial Court Record is the record containing the testimonies of prosecution witnesses deposed before Trial Court, statement of accused recorded U/s 313 of Cr.P.C., testimonies of defence witnesses, Court witnesses examined before Trial Court.

13. Now, addressing to the situation where the Trial Court record is unavailable or destroyed due to natural calamities or otherwise, the Appellate Court is left with three options (i) to direct for the reconstruction of records, (ii) to direct for re-trial of the case and (iii) to set aside the judgment of Trial Court.

14. Dealing with the situation where the original records are destroyed on account of natural or unnatural calamities, the Appellate Court should always order for reconstruction of the records. It has been the consistent view taken by several High Courts that when records are destroyed by fire or on account of natural or unnatural calamities, reconstruction should be ordered. In **Queen Empress Vs. Khimat Singh (1889 A.W.N. 55)**, the view taken was that the provisions of Section 423 (1) of the Criminal Procedure Code, 1898, make it obligatory for the Court to obtain and examine the record at the time of hearing. In case when it is not possible to do so, the only available course was a direction for re- construction. The said view was reiterated more than six decades back in Re *Sevugaperumal and Ors. (AIR 1943 (Madras).* The view has been reiterated by several High Courts as well, even thereafter.

15. At many a times, the records of the pending appeals before this Court are missing at the district level and after enquiry, it is found that either the record keeper or such employee, who had been entrusted to keep the records, has retired or died. But, in such a situation, the ultimate goal of dispensation of justice is hampered and if it is not being taken seriously or if it is not stopped, this practice would become a module for delinquent persons who are involved to get the record destroyed.

16. In the light of the facts and circumstances discussed as above, all possible endeavour should be made for reconstruction of record and, in our opinion, following recourse shall be adopted prior to coming to the conclusion of disposal of such appeals:- the duplicate copy of the original records.

ii. Notice shall be issued to concerned police station/prosecuting agency to provide the copy of police report filed after investigation U/s 173 (2) of Cr.PC.

iii. Notice shall be issued to concerned public prosecutor who has contested the case on behalf of State/prosecuting agency to provide the copy of record.

iv. Notice shall be issued to first informant of the case to furnish the records available with him.

v. Notice shall be issued to the counsel for the first informant (if any) who has contested the case on his behalf to furnish the records available with him.

vi. Notice shall be issued to accused/accused persons of the case to furnish the records available with him.

vii. Notice shall be issued to counsel of the accused who has contested the case on his behalf to furnish the records available with him.

viii. Notice shall be issued to the son or legal heir of the appellant in case appellant is dead.

ix. All such notices shall be issued through proper channel.

17. After adopting the aforementioned recourses if records are made available and produced before the Appellate Court, the appeal shall be heard and decided by Appellate Court in terms of sections 385 and 386 of Cr.P.C.

18. Now, dealing with the situation where records pertaining to the case diary/police report filed by prosecuting agency U/s 173 (2) of Cr.P.C. and which are served upon the accused by Court in compliance of section 207 of Cr.P.C. are only made available, it would be expedient in the interest of justice for the Appellate Court to order for re-trial of the case for the reason that those basic documents pertaining to evidence collected by the prosecuting agency along with the list of witnesses upon which prosecution is relying to prove its case against accused are available. In such a case, re-trial from the stage of serving police report to accused in compliance of Section 207 Cr.P.C. followed by procedure of sections 226, 227 and 228 of Cr.P.C. shall be ordered by Appellate Court to secure ends of justice.

19. It is relevant to mention here that the police report filed by prosecuting agency in compliance of section 173 (2) of Cr.P.C. contains First Information Report, chick F.I.R., statements of witnesses recorded during investigation U/s 161 of Cr.P.C., inquest report, post mortem report, medical/injury reports, site plan, statement recorded U/s 164 Cr.P.C. etc. and are for the limited purposes of omissions, corroborations, improvement and contradictions only when confronted to the witnesses in the Trial Court by defence and, therefore, their duplicate copies will have the same relevancy and admissibility as of being original one. It is the ocular testimonies of witnesses recorded on oath before Trial Court as well as the documents/records of the police report or otherwise proved by the related witness leads to the conviction or acquittal of the accused. After the order of re-trial, ocular testimonies of witnesses recorded on oath before Trial Court will lead to the fate of Trial.

20. Now, the point of consideration is that if it is not possible to reconstruct any record pertaining to trial then what legal recourse shall be adopted by Appellate Court ? Hon'ble Supreme Court of India as well as this High Court has propounded the legal proposition in the aforesaid regard in catena of judgments, which are discussed as follows:-

21. In **Shyam Deo Pandey Vs. State of Bihar, 1971 (1) SCC 855**, the Apex Court held that fulfillment of requirement for availability of record is necessary to enable the court to adjudicate upon the

correctness or otherwise of the order or judgment appealed against nor only with reference to the judgment but also with reference to the records which will be the basis on which the judgment is founded. Relevant part of the judgment is extracted as under:-

"18. Coming to Section 425, which has already been quoted above, it deals with powers of the Appellate Court in disposing of the appeal on merits. It is obligatory for the Appellate Court to ,send for the record of the case, if it is not already before the Court. This requirement is necessary to be complied with to enable the court to adjudicate upon the correctness or otherwise of the order or judgment appealed against not only with reference to the judgment but also with reference to the records which will be the basis on which the judgment is founded. The correctness or otherwise of the findings recorded in the judgment on the basis of the attack made against the same, cannot be adjudicated upon without reference to the evidence, oral and documentary and other materials relevant for the purpose. The reference to "such record" in "after perusing such record" is to the record of the case sent for by the Appellate Court."

22. In **Sita Ram and Others Vs. State 1981 Cri.L.J. 65**, the Court held that in absence of the original record, it is not possible to arrive at a decision that impugned judgment is supported by the evidence on record and order of conviction passed and the sentence imposed on the appellants is legally justified and proper. Where it is not possible to reconstruct the record, which has been lost or destroyed, it is not legally permissible for the appellate court to affirm the conviction of the appellant since perusal of the record of the case is one of the essential elements of the hearing of the appeal. The appellant has a right to try to satisfy the Appellate Court that the material on record did not justify his conviction and that right cannot be denied to him. The relevant part of the judgment reads as under :

"4. Section 385, Cr. P.C. provides that if the appellate court does not dismiss the appeal summarily, it shall cause notice of the time and place at which such appeal will be heard to be given (i) to the appellant or his pleader; (ii) to such officer as the State Government may appoint in this behalf; (iii) if the appeal is from a judgment of conviction in a case instituted upon complaint, to the complainant; (iv) if the appeal is under Section 377 or Section 378, to the accused, and shall also furnish such officer, complainant and accused with a copy of the grounds of appeal. Sub-section (2) provides that the appellate court shall then send for the record of the case, if such record is not already available in that Court, and hear the parties: provided that if the appeal is only as to the extent or the legality of the sentence, the Court may dispose of the appeal without sending for the record. Section 386 prescribes the powers of the appellate court. That power has to be exercised after perusing the record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears. In Queen-Empress v. Khimat Singh 1889 All WN 55 this Court observed "the appellant is entitled in law to have a hearing in this Court of his appeal, but the loss of the record has deprived him of the only means of making good the pleas of the appeal...." A Division Bench of the Calcutta High Court in Abbash Ali v. Emperor (1913) 19 Ind Cas 182 : 14 Cri LJ 182 observed that the appellate court must peruse the record

before deciding the appeal. A decision upon a perusal only of the judgment appealed against is not legal.

5. Since it is incumbent on the appellate court to send for the record and peruse it and hear the counsel for the parties before it can exercise its power under Section 386, the present appeal cannot possibly be heard and decided on merit.

6. The appellants have a right to show to this Court that the decision arrived at by the court below was not supported by the evidence on record. They can legitimately contend that material evidence and circumstances have either been ignored or incorrectly appraised. This right cannot be denied to the appellants. In the absence of the original record it is not possible for us to arrive at a decision that the impugned judgment is supported by the evidence on record and the order of conviction passed and the sentence imposed on the appellants is legally justified and proper.

7. In such a situation two courses are open to the Court; (1) to order retrial after setting aside the impugned judgment; or (2) to acquit the appellants. A situation like the present one arose before Courts earlier also. In re Sevugaperumal AIR 1943 Mad 391 (2) : 44 Cri LJ 611 the accused were convicted under Sections 457, 395 and 397 Penal Code, and sentenced to various terms of imprisonment. Following the decision of this Court in Queen-Empress v. Khimat Singh 1889 All WN 55 (supra) the Madras High Court ordered retrial after setting aside the convictions. From the reports of these decisions it is not clear how much time had elapsed between the incident and the date when retrial was directed. In the Madras case the impugned order of the trial court was dated 22-6-1942. The appeal was filed on 6-8-1942 and the original record was destroyed by fire on 17-8-1942. The appeal came up for hearing on 5-11-1942. It may be that the time lapse between the date of the incident and the date of decision by the appellate court was not long. Moreover the Public Prosecutor conceded in those cases that no other course was possible under the circumstances.

8. In ***Madhusudhan v. State 1963 (2) Cri LJ 103 (Orissa)*** *the appellant was convicted under Section 302, I.P.C. and sentenced to imprisonment for life by an order of the Sessions Judge dated 17-4-1962. The incident had taken place on 29-3-1962. The appeal came up for hearing on 12-12-1962. The appellate court directed retrial of the case. It may be noted that the order for retrial was passed well within two years of the incident.*

9. A similar situation arose before this Court in Zillar v. State 1956 All WR (HC) 613. In this case the appellants were convicted by the Sessions Judge on 21-1-1951 under Sections 304 and 148, I.P.C. in respect of the offence committed on 2-4-1950. The appeal was filed in this Court on 24-1-1951 which came up for hearing in April 1956 when it was brought to the notice of the Court that the entire record of the case had been lost. Attempt was made to reconstruct the record but it proved futile. This Court refused to direct retrial of the case on the reasoning that the case related to an offence which was committed more than six years ago and five years had elapsed since the judgment of the Sessions Judge convicting the appellants was passed. The court took into account the further fact that even the copies of the

F.I.R. and the statements of witnesses taken under Section 161 Cr. P.C. were not available as they had been weeded out in the ordinary course.

10. A Division Bench of this Court in Criminal Appeal No. 3235 of 1971 (Jit Narain v. State) decided on 15-3-1978 in similar circumstances allowed the appeal and acquitted the appellants instead of directing their retrial.

11. On a careful consideration of the relevant statutory provisions and the principle laid down in the cases cited before us we are of the opinion that where it is not possible to reconstruct the record which has been lost or destroyed it is not legally permissible for the appellate court to affirm the conviction of the appellant since perusal of the record of the case is one of the essential elements of the hearing of the appeal. The appellant has a right to try to satisfy the appellate court that the material on record did not justify his conviction and that right cannot be denied to him. We are further of the opinion that if the time lag between the date of the incident and the date on which the appeal comes up for hearing is short, the proper course would be to direct retrial of the case since witnesses normally would be available and it would not cause undue strain on the memory of witnesses. Copies of F.I.R., statements of witnesses under Section 161, Cr. P.C. reports of medical examination etc. would also be normally available if the time gap between the incident and the order of retrial is not unduely long. Where, however, the matter comes up for consideration after a long gap of years, it would neither be just nor proper to direct retrial of the case, more so when even copies of F.I.R. and statements of witnesses under Section 161, Cr. P.C. and other relevant papers have been weeded out or are otherwise not available. In such a situation even if witnesses are available, apart from the fact that heavy strain would be put on the memory of witnesses, it would not be possible to test their statements made at the trial with reference to the earlier version of the incident and the statements of witnesses recorded during investigation. Not only that the accused will be prejudiced but even the prosecution would be greatly handicapped in establishing its case and the trial would be reduced to a mere formality entailing agony and hardship to the accused and waste of time, money and energy of the State.

12. In the present case the incident took place on 23-8-1971. The appellants were convicted by the Sessions Court by an order dated 18-11-1974. The appeal has been pending in this Court for about six years. We are informed that copies of the First Information Report and statements of witnesses recorded under Section 161, Cr. P.C. have been weeded out and are not available. All attempts to reconstruct the record have proved futile. In such a situation it is not permissible for us to affirm the order of conviction of the appellants, since in the absence of the record we cannot possibly feel satisfied that the appellants have been rightly convicted. Due to lapse of time and non-availability of papers like First Information Report, statements under Section 161, Criminal Procedure Code etc, we do not consider it either just or expedient to order retrial of the case."

23. In **Bhunda and Others Vs. State of U.P., 2002 Cri.L.J. 3898,** the Court observed and held as under :

"7. After admission of the appeal, record of the Lower Court was requisitioned from the Sessions Judge concerned. The report of the Sessions Judge, Jhansi dated 19-2-2001 shows that the record of the Lower Court was weeded out on 31-10-1992. The Sessions Judge had ordered reconstruction of the record. According to report of First Additional Sessions Judge, Jhansi reconstruction of the record was not possible as no documents relating to the case were available.

8. The question which crops is as to whether the appeal can be decided for want of record of the Lower Court.

9. Similar situation arose before this Court in the case of Sita Ram v. State of U.P., 1981 Cri LJ 65. The Division Bench hearing the appeal held as below (Paras 4 and 5) :-

Section 385, Cr. P.C. provides that if the appellate Court does not dismiss the appeal summarily, it shall cause notice of the time and place at which such appeal will be heard to be given (i) to the appellant or his pleader, (ii) to such officer as the State Government may appoint in this behalf; (iii) if the appeal is from a judgment, of conviction in a case Instituted upon complaint, to the complainant; (iv) if the appeal is under Section 377 or Section 378, to the accused, and shall also furnish such officer, complainant and accused with a copy of the grounds of appeal. Sub-section (2) provides that the appellate Court shall then send for the record of the case, if such record is not already available in that Court, and hear the parties, provided that if the appeal is only as to the extent or the legality of the sentence, the Court may dispose of the appeal without sending for the record. Section 386 prescribed the powers of the appellate Court. That power has to be exercised after perusing the record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears. In Queen-Empress v. Khirnat Singh, 1989 All WN 55 this Court observed 'the appellant is entitled in law to have a hearing in this Court of his appeal, but the loss of the record has deprived him of the only means of making good the pleas of the appeal...' A Division Bench of the Calcutta High Court in Abbash Ali v. Emperor, (1913) 19 Ind Cas 182 : 14 Cri LJ 182 observed that the appellate Court must peruse the record before deciding the appeal. A decision upon a perusal only of the Judgment appealed against is not legal.

Since it is incumbent on the appellate Court to send for the record and peruse it and hear the counsel for the parties before it can exercise its power under Section 386, the present appeal cannot possibly be heard and decided on merit.

It was further held as below (Para 11):-

Where it is not possible to reconstruct the record which has been lost or destroyed it is not legally permissible for the appellate Court to affirm the conviction of the appellant since perusal of the record of the case is one of the essential elements of the hearing of the appeal. The appellant has a right to try to satisfy the appellate Court that the material on record did not justify his conviction and that right cannot be denied to him. We are further of the opinion that if the time lag between the date of the incident and the date on which the appeal comes up for hearing is short, the proper course would be to direct retrial

of the case since witnesses normally would be available and it would not cause undue strain on the memory of witnesses. Copies of F.I.R. statements of witnesses under Section 161, Cr. P, C. reports of medical examination etc. would also be normally available if the time gap between the incident and the order of retrial is not unduly long. Where, however, the matter comes up for consideration after a long gap of years, it would neither be just nor proper to direct retrial of the case, more so when even copies of F.I.R. and statements of witnesses under Section 161, Cr. P.C. and other relevant papers have been weeded out or are otherwise not available. In such a situation even if witness are available, apart from the fact that heavy strain would be put on the memory of witnesses, it would not be possible to test their statement made at the trial with reference to the earlier version of the incident and the statements of witnesses recorded during investigation. Not only that the accused will be prejudiced but even the prosecution would be greatly handicapped in establishing its case and the trial would be reduced to a mere formality entailing agony and hardship to the accused and waste of time, money and energy of the State.

10. The above case of Division Bench was further relied on by subsequent Division Bench in the case of Ram Nath v. State, 1982 All Cri C 128.

11. In the instant case the report of the Sessions Judge, Jhansi shows that reconstruction of record was not possible despite of all attempts taken in this regard. this Court, therefore, is not in a position to confirm the conviction recorded by the trial Court.

12. So far as the question of ordering retrial is concerned the occurrence in this case took place as late as on 20-5-1975 i.e. as far back as 26 years. In such situation it will not be justifiable to direct retrial.

In this view of the matter, I have no option but to allow the appeal and set aside the conviction and sentence of the appellants."

24. In **State of U.P. v. Abhai Raj Singh (2004) 4 SCC 6**, the Court observed and held as under :

"The powers of the appellate court when dealing with an appeal from a conviction are delineated in sub-clauses (I), (ii) and (iii) of clause (b) of section 386 of the code. The appellate court is empowered by section 386 to reverse the finding and sentence and acquit. Therefore, the acquittal is possible when there is reversal of the finding and sentence and acquit. Therefore, the acquittal is possible when there is reversal of the finding and sentence. The appellate court of competent jurisdiction subordinate to the appellate court or committed for trial . For exercise of the powers in cases of first two categories, obviously a finding on merits after consideration of the materials on record is imperative. Where that is not possible because of circumstances like the case at hand i.e. destruction of the records , the proper course for the appellate court would be to direct retrial after reconstruction of the records the same was impossible. If on the other hand, from the copies available with the prosecuting agency or the defence and/or their respective counsel, reconstruction is possible to be made, the said course indicated in sub-clause (i) and (ii). After perusal of the records and hearing the appellant's pleader and Public Prosecutor

under section 377 or 378, the exercise of power as indicated above can be resorted to. As was observed in Bani Singh v. State of U.P. (1996) 4 SCC 720 . The plain language of section 385 makes it clear that if the appellate court does not consider the appeal fit for summary dismissal, it must call for the records and section 386 mandates that after record is received, the appellate court may dispose of the appeal after hearing as indicated.

A question would further arise as to what happens when reconstruction is not possible. Section 386 empowers the appellate court to order that the case be committed for trial and this power is not circumscribed to cases exclusively triable by the Court of Session.(See State of U.P. v. Shankar AIR 1962 SC1154).

It has been the consistent view taken by several High court that when records are destroyed by fire or on account of natural or unnatural calamities reconstruction should be ordered. In Queen Empress v. Khimat Singh 1889 AWN 55 the view taken was that the provisions of section 423(1) of the criminal procedure code,1898(in short " the old code") made it obligatory for the court to obtain and examine the record at the time of hearing. When it was not possible to do so, the only available course was a direction for reconstruction. The said view was reiterated more than six decades back in Sevuaperumal,Re AIR1943 Mad 391(2). The view has been reiterated by several high Courts as well,even thereafter.

The High court did not keep the relevant aspects and consideration in view and came to the abrupt conclusion that reconstruction was not possible merely because there was no response from the Session Judge. The order for reconstruction was 1-11-1993 and the judgement of the high court is in Criminal Appeal No. 1970 of 1979 dated 25-2-1994. the order was followed in Criminal Appeal No. 1962 of 1979 disposed of on 16-9-1995. it is not clear as to why the high court did not require the session court to furnish the information about reconstruction of records; and/or itself take initiative by issuing positive directions as to the manner, method and nature of attempts,efforts and exercise to be undertaken to effectively achieve the purpose in the best interests of justice and to avoid ultimately any miscarriage of justice resulting from any lapse,inaction or inappropriate or perfunctory action,in this regard; particularly when no action was taken by the high court to pass necessary orders for about a decade when it received information about destruction of record. The course adopted by the high court, if approved, would encourage dubious persons and detractors of justice by allowing undeserved premium to violators of law by acting hand in glove with those anti-social elements coming to hold sway,behind the screen, in the ordinary and normal course of justice.

10. We , therefore, set aside the order of the high court and remit the matter back for fresh consideration. It is to be noted at this juncture that one of the respondents i.e. om pal has died during the pendency of the appeal before this court .The High court shall direct reconstruction of the records within a period of six months from the date of receipt of our judgment from all available or possible sources with the assistance of the prosecuting agency as well as the defending parties and their respective counsel. If it is possible to have the records reonstructed to enable the high

court itself to hear and dispose of the appeals in the manner envisaged under section 386 of the code,rehear the appeals and dispose of the same, on their own merits and in ordering retrial interest of justice could be better served-adopt that course. If only reconstruction is not possible to facilitate the high court to hear and dispose of the appeals and the further course of retrial and fresh adjudication by the sessions court is also rendered impossible due to loss of vitally important basic records- in that case and situation only, the direction given in the impugned judgement shall operate and the matter shall stand closed. The appeals are accordingly disposed of."

25. In **Pati Ram & Another Vs. State of U.P., 2010 Cri.L.J. 2767**, the Court observed and held as under :

"12. I have given my thoughtful consideration to the rival submissions made by the parties counsel. It is true that another Bench of this Court in the case of Raj Narain Pandey (Supra) has decided the appeal on merit in the absence of lower court record on the basis of the impugned judgement only, but in my considered opinion, the appeal can not be decided on merit in the absence of lower court record. Unless the evidence is available for perusal, in my opinion, the appeal can not be considered and decided on merit merely on the basis of the lower court judgement, as evidence is essentially required to consider the merit of the impugned judgement and merely on the basis of the said judgement, no order on merit can be passed in the appeal.

13. As is evident from the report of IVth Addl. Sessions Judge, Bareilly, no paper of the case is available. In spite of best efforts made by the courts below, the lower court record could not be reconstructed. Since no paper of the case is available, hence there is no possibility of re-trial at this stage after more than thirty years. Therefore, in view of the observations made by the Hon'ble Apex Court in the case of State of U. P. Vs. Abhay Raj Singh (supra) there is no alternative except to acquit the appellants, as hearing of the appeal in accordance with the arrangement made in section 386 cr. p. c. can not be made and retrial also is not possible.

14. Consequently, the appeal is allowed. The impugned judgement and order are set aside and the appellants-accused Pati Ram and Ram Swarup are hereby acquitted of the offence under section 304 read with section 34 ipc for want of trial court record and there being no possibility of retrial."

26. In **Laukush and Another Vs. State of U.P., 2013 (7) RCR(Cri) 493, t**he Court observed and held as under :

"2.These two criminal appeals emanate from the same judgment and order dated 30.7.1982 passed in Session Trial No. 496 of 1981-State Vs. Laukush and others, by IXth Additional Session Judge, Kanpur Nagar, whereby the appellants Basdeo, Chhedi Lal, Beni, Shiv Ram, Ramesh, Shyam Lal (appellants in Criminal Appeal No. 1877 of 1982) and two other appellants Laukush and Chhote Lal, who are appellants in Criminal Appeal No. 1878 of 1982, were convicted under Sections 302/149, 147, 307/149, 323/149 I.P.C. and were sentenced to life imprisonment, one year R.I., five years R.I. and six months R.I. respectively. Thus, the appellants have challenged the impugned judgment and

order dated 30.7.1982 whereby their conviction and sentence as stated above, was recorded.

3. Both the appeal Nos. 1878 of 1982 and 1877 of 1982 were admitted on 11.8.1982 and at the time of admission, the appellants were granted bail by this Court and since that date, the appellants continued to be on bail.

4. For disposal of these appeals, the lower court record was requisitioned which could not be available inspite of best possible efforts. As per report of the then District Judge, Kanpur Nagar dated 19.6.2003, the original record was received by the then Assistant Record Keeper Sri Mahesh Katiyar on 30.5.1983 who expired 7-8 years ago. The report to this effect was sent by the District Judge, Kanpur Nagar. The report of the District Judge, Kanpur Nagar dated 19.6.2003 was put up before the Division Bench of this Court on 23.8.2007 when this Court passed the following order:-

"In this view of the matter, the District Judge, Kanpur Nagar shall immediately take steps for trying to get the record of the case reconstructed and utilise the assistance of the counsel for the accused and State and submit compliance report to this Court

List on 24.9.2007."

5. A reminder was issued to the District Judge, Kanpur Nagar by this Court on 24.9.2007 directing the case to be listed on 29.10.2007. The District Judge, Kanpur Nagar vide his report dated 12.2.2008 apprised this Court that efforts for reconstruction of the record were entrusted to Sri R.P. Pandey, Additional District & Sessions Judge, Court No. 9, Kanpur Nagar. Sri Pandey could not complete the work of reconstruction of the record. The report of the District Judge, Kanpur Nagar dated 12.2.2008 was put up before this Court on 10.4.2012. When this Court was not satisfied with the reasons mentioned in the report for not reconstructing the lower court record, the District & Sessions Judge, Kanpur Nangar was directed to take effective steps in reconstruction of the lower court record without fail within two months and the case was directed to be listed on 10.7.2012. It was further directed that in case lower court record is not reconstructed, the District & Sessions Judge, Kanpur Nagar shall appear in person to explain the reasons as to why the lower court record has not been reconstructed.

6. It is in compliance of the order dated 10.4.2012, passed by this Court, that a report dated 9.7.2012, sent by the Incharge District Judge, Kanpur Nagar to this Court has been placed before us. This report is taken on record which shall form part of this appeal.

7. According to the report dated 9.7.2012, sincere efforts were made at different levels including C.M.O., C.M.S., Superintendent Hallet Hospital, S.H.O. Sachendi, Kanpur and D.I.G., Kanpur Nagar but the reconstruction of the record of the said Sessions Trial could not be possible despite multi pronged approach. According to this report, Smt. Janak Dulari, informant of this case had died long back and it was also informed by the injured persons of this case that their counsel was quite aged and was not practising for last several years and no document was available with them. A letter was also written by enquiry officer/ Additional District & Sessions Judge, Court No. 9,

Kanpur Nagar to D.G.C. (Crl.), Kanpur Nagar for furnishing original/ copy of the case diary of the said case. The D.G.C. (Crl.), Kanpur Nagar has also informed that no document is available in the office relating to the said Sessions Trial. The report dated 9.7.2012 of the Incharge District Judge is detailed one mentioning of all efforts made by the Inquiry Officer/ Additional District & Session Judge, Court No. 9, Kanpur Nagar.

8. Affidavits of six accused persons have been filed to the effect that the documents of the aforesaid case are not available with them and their counsel had died long back. According to this report, two accused persons Shiv Ram and Shyam Lal had died. This lengthy and detailed report of the Incharge District Judge, Kanpur Nagar dated 9.7.2012 makes it evident that reconstruction of the said record is not possible.

9. In the absence of original record, since reconstruction is not possible, remanding the appeal back for retrial will not serve any useful purpose at all.

10. From the impugned judgment, it transpires that the incident had occurred on 8.6.1979, more than 30 years ago and the appellants were released on bail in the year 1982 by this Court.

11. Since reconstruction of the record is not possible, we apply the decision of the Apex Court in State of U.P. Vs. Abhai Raj Singh (2004) 4 SCC 6, wherein the Hon'ble Apex Court has been pleased to observe as under :-

"If only reconstruction is not possible to facilitate the High Court to hear and dispose of the appeals and the further course of retrial and fresh adjudication by the Sessions Court is also rendered impossible due to loss of vitally important basic records- in that case and situation only, the direction given in the impugned judgment shall operate and the matter shall stand closed."

12. In view of the aforesaid, we allow both the appeals and the impugned judgment of conviction and sentence of the appellants are hereby set aside and they are set at liberty and are acquitted of the charges. The appellants are on bail, they need not surrender. Their bail bonds and surety bonds are discharged."

27. In **Sukhlal and others Vs. State of U.P., 2014 (5) All LJ 485**, the Division Bench of this Court held as under:-

"As discussed above, re-trial of the case is not possible on account of absence of the essential prosecution papers i.e. first information report, Chik FIR, site plan, inquest report, post mortem examination report, charge sheet, case diary, injury reports etc. Even affidavit filed by Sri N. Kolanchi, Superintendent of Police, Pilibhit dated 13.02.2014 unambiguously discloses information regarding the period for preservation of the prosecution papers and consequent thereto weeding out of the same after lapse of the stipulated period. In para 9 of the affidavit, it has been disclosed that the relevant prosecution papers have been weeded out due to which the deponent is handicapped to reconstruct the documents pertaining to the present case. In view of the above particular circumstances, the order of re-trial will not serve any purpose after gap of around 35 years when the incident took place on 12.05.1978.

In view of the relevant case law discussed hereinabove and particularly guidelines provided by Hon'ble Apex Court

in the case of Abhai Raj (supra), it is our considered opinion that all the three options open in such case virtually impel us to conclude that but for loss of the missing prosecution papers, it would not be feasible to record any finding on merits of the appeal. As per the settled principles of criminal jurisprudence, every accused carries with him presumption of innocence even at appellate stage. Therefore, as per guidelines laid down in the case of Abhai Raj (supra), we conclude that the lower court judgment of conviction and sentence dated 29.01.1980 is liable to be set aside."

28. In **Bani Singh and others Vs. State of U.P., 1996 AIR (SC) 2439**, the Hon'ble Apex Court has elaborated meaning of Section 385 of Criminal Procedure Code 1973 in Para No. 8 of the Judgment which is being reproduced hereinbelow:-

"Section 385 (2) clearly states that if the Appellate Court does not dismiss the appeal summarily, it `shall', after issuing notice as required by sub-section (1), send for the record of the case and hear the parties. The proviso, however, posits that if the appeal is restricted to the extent or legality of the sentence, the Court need not call for the record. On a plain reading of the said provision, it seems clear to us that once the Appellate Court, on an examination of the grounds of appeal and the impugned judgment, decides to admit the appeal for hearing, it must send for the record and then decide the appeal finally, unless the appeal is restricted to the extent and legality of the sentence. Obviously, the requirement to send for the record is provided for to enable the Appellate Court to peruse the record before finally deciding the appeal. It is not an idle formality but casts an obligation on the court to decide the appeal only after it has perused the record. This is not to say that it cannot be waived even where the parties consent to its waiver. This becomes clear from the opening words of Section 386 which say that `after perusing such record' the Court may dispose of the appeal. However, this Section imposes a further requirement of hearing the appellant or his pleader, if he appears, and the public prosecutor, if he appears. This is an extension of the requirement of Section 385(1) which requires the Court to cause notice to issue as to the time and place of hearing of the appeal. Once such a notice is issued the accused or his pleader, if he appears, must be heard."

29. In **State of U.P. Vs. Malooka, 2013 (3) All Cri 3051,** Division Bench of this Court in para 15 held as under:-

"15. Now reverting back to the same bizarre situation involved in the present appeal, again we find that except the certified copy of the impugned judgement & order there is no other record available before us. FIR, post mortem report, site plan, inquest report, recovery memos, and all other documentary pieces of evidence are traceless and unavailable. None of the depositions of the witnesses produced in the court are on the record. As has already been narrated above, the efforts to get the record reconstructed also could not bear any fruit. There is no way to reassess the evidence and find whether the findings recorded by the trial Judge are in consonance with the evidence produced or not. Reappraisal of the evidence can simply not be done in the absence of evidence itself. As we also had the occasion to observe in the case of Om Prakash (Supra), in this matter too more than 32 years have elapsed after the incident. What

shall be the prospect of retrial and what shall be the legitimacy of its out come are serious questions to be pondered over. Even in Abhai Raj Case the Apex Court had entertained the possibility of retrial only in the event of the availability of 'vitally important basic documents' and had not recommended the retrial in their absence. If at all we decide to order the retrial after 32 years of the incident in question, it is not very difficult to understand that in the total absence of all previous statements of all the witnesses and also in absence of all other contemporary documentary evidence, there shall be scarcely any basis to adjudge the reliability of the depositions made in the court. Even otherwise what shall be the trustworthiness of the deposition of witnesses, if at all they are found alive and forced to recapitulate the events that took place more than three decades ago, is a self defeating question."

30. In **Brahmanand Shukla Vs. State of U.P., 2010 (69) ACC 749**, the Division Bench of this Court in para 15 held as under:-

"In the present case, as we have mentioned in the earlier part of the judgment only a copy of the trial Court's Judgment is available and no other documents like FIR, post-mortem report, copies of the documents which had been filed by the prosecution and were exhimited during tiral, the statement of the witnesses recorded under Section 161, Cr.P.C. are available despite various attempts to reconstruct the record. The incident is of the year 1979 i.e., the incident took place about 30 years back. In these circumstances, no fruitful purpose would be serve by ordering retrial as the same cannot be conducted at all in absence of these documents."

31. Law framed by Hon'ble the Apex Court as well as the High Courts on the law point, i.e, where Lower Court Record is not traceable; reconstruction of same is not possible and even retrial is not possible is to the effect that in such case, the judgment of the Trial Court shall be quashed and appellant shall be acquitted for all charges.

32. Reasons for reaching to the aforesaid conclusion is that in the absence of original record, it is not possible to arrive at a decision that impugned judgment passed and sentence awarded against appellant is legally justified and in conformity with law. Where the reconstruction of record is not possible which has been lost or destroyed, it is not legally permissible for the Appellate Court to affirm the conviction of the appellant since perusal of the record of the case is one of the essential elements of hearing of the appeal. Further, appellant has a right to satisfy the Appellate Court that the material or evidence available on record did not justify his/her conviction and this right cannot be denied to the appellant.

33. In view of the above mentioned discussions and observations and in light of settled proposition of law propounded by Hon'ble Supreme Court of India as well as this High Courts, we are left with no other option but to quash the impugned judgement passed by Trial Court and to acquit the appellant.

34. Resultantly, the present Criminal Appeal is allowed. The impugned judgment and order dated 6.3.1980 passed by Second Additional Sessions Judge, Non-Metropolitan Area, Kanpur in Sessions Trial No. 189 of 1978 is hereby quashed.

35. Before parting with the order, we are cautious that orders passed by Appellate Court acquitting the Appellants for the reason of destruction or unavailability of records are likely to be misused. The same stand has been taken by Hon'ble Supreme Court in case of **Akalesh Kumar @ Mithun Sharad Mishra Vs. State of Maharashtra 2010 SCC 390** wherein the Hon'ble Supreme Court in paragraph no. 10 has held :

"Though in this case, we may have to adopt the course of acquitting the appellant, we are conscious of the fact that such orders are likely to be misused. It is possible for a person who is involved in a gross case of murder and who has least chance of success, not to file appeal for a long period and then after destruction of record, come to this court and pray that he may be acquitted. As per Chapter XV of the Bombay High Court Appellate Side Rules, 1960, papers which are required to be preserved permanently shall be classified "A" and kept in File "A". Papers, which are required to be preserved for 30 years shall be classified "B" and kept in File "B". Papers which are required to be preserved for 5 years shall be classified "C" and kept in File "C" and papers which are required to be preserved for one year are classified as "D" and kept in File "D".

36. It is relevant to mention here that there are certain Rules enacted for the preservation and upkeep of the record, which are duly inserted in the General Rule Criminal 1977. They are applicable to all the criminal courts subordinate to High Court of Judicature at Allahabad and the same is expected to have been circulated or communicated to all the District Courts existing within the State of Uttar Pradesh. The cases have been classified according to the nature of offences not only as per the Indian Penal Code but also other various provisions amendable to Criminal Court whether it is being tried either by the Court of Sessions or Court of Magistrate. According to Rule 118, record of the cases, which are triable by courts of sessions, shall be retained and be preserved in some of the situations uptil 50 years irrespective of nature of conviction or quantum of punishment. The records are to be weeded out in accordance with the norms and procedures framed for weeding out the same. While weeding out the file, the records are to be weeded out under certain orders, preserving the stamp, court fees, original documents, papers forming part of the record, certified copy of each documents and papers with regard to list of notes of fact. From the Rules framed under the General Rule (Criminal), it is evident that any record which is purported to be weeded out, responsibility lies upon the District Judge to enquire the pendency of the proceedings before this Court before directing the office concerned to weed out the record.

37. Therefore, we are inclined to frame certain guidelines for preserving and upkeeping the records of Trial Court which are as follows:-

i. In terms of the Rule 118, record of the cases, which are triable by courts of sessions, shall be retained and preserved for 50 years irrespective of nature of conviction or quantum of punishment.

ii. The records are to be weeded out in accordance with the norms and procedures framed for weeding out the same.

iii. While weeding out the file, the records are to be weeded out under

certain orders preserving the stamp, court fees, original documents, papers forming part of the record, certified copy of each documents and papers with regard to list of notes of fact.

iv. In terms of the Rules framed under the General Rule (Criminal), if any record, which is purported to be weeded out, the District Judge shall enquire the pendency of the proceedings before this Court before directing the office concerned to weed out the record.

v. While transmitting the original Trial Court Record to Appellate Court as called upon by Appellate Court the Trial Court shall ensure to retain duplicate copy of entire records in two sets and shall ensure the retention/upkeep of duplicate copy.

vi. Trial Court shall maintain a register in which the details of Trial Court Records transmitted to the Appellate Court shall be entered.

vii. District Judge shall, on regular basis, supervise the up keep and retention of duplicate copies of Lower Court Records transmitted to Appellate Court.

viii. The investigating agency shall procure/retain the duplicate copy of the police report filed before the Court U/s 173 (2) Cr.PC for a period of 50 years and shall transmit the same to the Court concerned whenever called for.

ix. The prosecuting agency shall maintain a data of the duplicate police report retained after filing the original before Court.

x. As far as possible now the records shall be digitized before sending notice so that it may be retrieved, if needed.

38. The Registrar General of this Court is directed to circulate a copy of this order to all District Judges subordinate to High Court of Allahabad and to Chief Secretary to the State of U.P for its necessary compliance.

(2022)03ILR A1010
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.03.2022

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.
THE HON'BLE CHANDRA KUMAR RAI, J.

Criminal Appeal No. 1921 of 2011
with
Criminal Appeal No. 1922 of 2011
with
Criminal Appeal No. 1920 of 2011
with
Criminal Appeal No. 2439 of 2011

Ramswaroop ...Appellant (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Rajiv Lochan Shukla, Sri K.K. Pandey, Sri K.K. Mishra, Sri Manvendra Singh, Sri Amit Daga, Sri Sandeep Kumar Srivastava, Sri Pradeep Kumar Srivatava

Counsel for the Respondent:
Smt. Manju Thakur, A.G.A.

101. Special Report cases - the delay in sending special report to the concerned Magistrate is not explained-after preparation of inquest, report of the incident was written and lodged. All these facts fully demonstrate that FIR is ante-timed.

no independent witness was produced by the prosecution specially when the eye-witnesses totally failed to prove the prosecution case which casts a doubt on the prosecution case

in the postmortem report it is mentioned that stomach contained semi-digested food, small intestine was empty and large intestine filled with fecal matter and gases. P.W.-6 Doctor in his cross-examination stated that deceased must have taken food 2-3 hour before but from the FIR and statement of P.W.-2 and P.W.-3, it has come that deceased was going to take food in the *Tilak* ceremony. So prosecution case is false and cannot be believed.

that plea of alibi set up with respect to accused Ram Swaroop @ Chotka and Dashrath has been proved from the examination-in-chief and cross-examination of D.W.-1, as no question was asked by prosecution on this point, hence plea of alibi is proved.

the evidence of the alleged eye witnesses produced by prosecution does not inspire confidence. There exists a doubt whether they are eye-witnesses of the incident. Oral evidence is also not consistent with the medical evidence, FIR is ante-timed and there are no independent witness of the incident. Prosecution has failed to prove the charges against the appellants-accused beyond reasonable doubt.

(Delivered by Hon'ble Chandra Kumar Rai, J.)

Heard Sri Rajiv Lochan Shukla assisted by Sri K.K. Pandey and Sri K.K. Mishra, learned counsels for the appellants and Smt. Manju Thakur, the learned AGA for theState.

1. These criminal appeals have been preferred against the judgment and order dated 18.3.2011 passed by the Additional Sessions Judge, Court No.8, Fatehpur in Sessions Trial No. 309 of 2006, arising out of Case Crime No.50/2006, State vs. Darshrath and others, under Sections 302/34 IPC and Section 7 of the Criminal Law Amendment Act, P.S. Ashothar, District Fatehpur, convicting and sentencing the accused- appellants Dashrath @ Badka, Ramswaroop @ Chotka, Suresh and Shivpersona @ Bantwa for life imprisonment and fine of Rs.7000/- and in default of payment of fine, they have to further undergo imprisonment of 1 year and sentencing them under Section 7 of the Criminal Law Amendment Act for imprisonment of 3 months and all the sentences will run concurrently. Further accused-appellant Ramswaroop @ Chotka was also convicted under Section 25 of the Arms Act in S.T. No.312 of 2006, arising out of Case Crime No.64/2006, State vs. Ramswaroop, P.S. Ashothar, District Fatehpur and sentenced for rigorous imprisonment of 3 years and a fine of Rs.2000/- and in default of payment of fine, he has to further undergo imprisonment of 3 months and all the sentences will run concurrently. Further accused appellant Suresh was also convicted under Section 25 of the Arms Act in S.T. No. 313/2006, arising out of Case Crime No.56/2006, P.S. Ashothar, District Fatehpur and sentenced for rigorous imprisonment of 3 years and a fine of Rs.2000/- and default of payment of fine, he has to undergo imprisonment of 3 months and all the sentences will run concurrently.

2. Since all the four appeals have been filed against the same judgment, hence all the four appeals are being heard and decided jointly by common judgment.

3. Briefly the facts of the case are as follows:-

First informant Asha Devi, wife of Shri Shiv Singh is resident of village-Bensari, P.S. Asothar, District Fatehpur.

On 4.5.2006, her husband, Shiv Singh aged about 36 years along with son Ajeet and Sujeet and Dewar Jai Singh went in the Tilak Ceremony of Shiv Pratap, brother of Ram Ashrey Gupta of the same village, there was too much rush there and everybody was sitting in order to take dinner of Tilak Ceremony and it was 9.00 P.M. Dashrath @ Badka, Ramswaroop @ Chotka, sons of Ram Dularey, Shiv Prakash Yadav, brother-in-law of Chotka, resident of village- Ajhei and Suresh, son of Sita Ram came to her husband from whom dispute relating to house is going on, they dragged the husband towards the hand pipe of Hemchandra Yadav, thereafter, Shiv Prakash and Badka catch hold her husband and Ramswaroop @ Chotka and Suresh who were armed with country-made pistol in their hand, fired and murdered his husband. Her son and Dewar rushed up to escape him but accused pushed them so they fell down. Due to dragging her husband and open firing, resulting into murder , stampede occurred on the spot and people were running away, leaving the dinner. Accused went in east direction with country-made pistol in their hand, the dead body of her husband is lying on spot. Prayer was made to lodge the report and legal action be taken.

4. On the basis of written report (Ext. Ka-8), chik no. 36 of 2006, case crime no. 50 of 2006 under Section 302 IPC and Section 7 of Criminal Law Amendment Act was registered on 4.5.2006 at 22.30 with P.S. Ashothar against accused Dashrath @ Badka, Ramswaroop @ Chotka, Shiv Prakash Yadav and Suresh. chik FIR is on record as Ext. Ka-15. The investigation of the case was taken up by Sri Anand Kumar Singh, S.O. Asothar and relevant entry was made in general diary vide rapat no. 28 at 22.30 (Ext. Ka-6). On 5.5.2006 at 00.05 inquest was conducted on the dead body of deceased Shiv Singh and prepared inquest report (Ext. Ka-21). He also prepared letter to C.M.O. (Ext. Ka-22), letter to R.I. (Ext. Ka-23), challan nash (Ext. ka-24), photo nash (Ext. Ka-25). He then sent the body for postmortem by Constable Anil Kumar Shukla and Constable Sarfaraz Haider. Postmortem report is (Ext. Ka-7). Investigating Officer inspected the place of incident and prepared a site plan (Ext. Ka-1). Statement of witnesses were recorded. On 11.5.2016 accused Suresh was arrested and on his pointing out the country-made pistol was recovered from the place situated in the eastern side of village, the recovery memo is Ext. Ka-2, the spot plan of recovery place is Ext. Ka-3.

5. On 12.5.2006, statement of witnesses were recorded by Investigating Officer. On 19.5.2006, accused Ramswaroop was taken in police custody remand in the court of Chief Judicial Magistrate and at the pointing out of accused Ramswaroop, country-made pistol used in the murder was recovered, the recovery memo is Ext. Ka-4, the site plan of recovery place was prepared which is Ext. Ka-5.

6. Chik FIR under Section 25 of the Arms Act against accused Ramswaroop @ Chotka is Ext. Ka-19 and chik FIR under Section 25 of the Arms Act against accused Suresh is Ext. Ka-17. Investigation in respect to incident under Section 25 of the Arms Act was handed over to S.I. Shyam Bihari Singh who conducted the investigation, the charge-sheet (Ext. Ka-14), under Section 25 of the Arms Act was submitted against Ramswaroop @ Chotka and charge-sheet (Ext. Ka-11), under Section 25 of the Arms Act was submitted against Suresh. I.O. Anand Kumar Singh

submitted charge-sheet (Ext. Ka-6) against accused Dashrath @ Badka, Ramswaroop @ Chotka, Suresh and Shivperson @ Bachcha under Section 302 IPC and Section 7 of the Criminal Law Amendment Act. Cognizance was taken by the courts below on the charge-sheet submitted by the Investigating Officer and after summoning the accused-appellants, committed the case for the trial of the accused to the court of Session.

7. On the basis of the material available on record, learned Sessions Judge framed charge on 28.7.2006 against all the four accused Ramswaroop @ Chotka, Suresh, Dashrath @ Badka and Shivperson @ Bachcha under Section 302 IPC and Section 7 of the Criminal Law Amendment Act and on 28.7.2006, charges under Section 25 of the Arms Act were framed against Ramswaroop @ Chotka and Suresh. The accused pleaded not guilty and claimed trial.

8. The prosecution in order to prove its case examined P.W.-1 Asha Devi (1st informant and wife of deceased). P.W.2 Sujit (son of deceased who was minor on the date of incident as well as on the date of statement). P.W. 3 Jaisingh (younger brother of deceased). P. W. 4 Ram Asrey, P.W. 5 S.I. Anand Kumar Singh, P.W. 6 Dr. Vivek Nigam, P.W. 7 Shyam Singh, P.W.-8. S.I. Shyam Bihari Singh, P.W. 9 Constable Raghubar Yadav, P.W.10 Constable Sudhir Kumar Mishra.

9. The Accused - appellants in their statements recorded under Section 313 Cr.P.C. denied the prosecution case and disputed the veracity of the evidence adduced by the prosecution.

10. PW-1 Asha has stated in her examination-in-chief that Shiv Singh was my husband. Incident is of 4.5.2006, time was 9:00 P.M. My husband was murdered when he went to attend the Tilak Ceremony organised in the house of Ram Asrey Gupta. Her sons Ajit and Sujit also went there. The name of her brother in-law (dewar) is Jai Singh who also went there. Ram Swaroop, Shiv Parson, Dashrath dragged him, Ram Swaroop and Suresh are present in court today. Dashrath and Shivperson are also present. They dragged her husband and carried him towards hand pipe of Hemchandra and thereafter Ram Swaroop and Shivperson fired with country-made pistol resulting into his death. They tried to save him but they murdered her husband and went in the eastern side. She know Shyam Singh, who had written the written report of the incident. She thumb-marked the same and went to the police station along with application. She further stated that she knows accused Suresh and he has not fired at all.

11. P.W.2 Sujit has stated in his examination-in-chief that Shiv Singh was his father. He was murdered. Incident has taken place about 2 year before. He went to give water to the guest of Tilak Ceremony organised in the house of Ram Asrey Gupta. Apart from me, his uncle Jai Singh, brother Ajit and his father went there. His father Shiv Singh was ready to take food, Dashrath and Shivperson caught hold him and Ramawaroop fired and thereafter Suresh fired near the handpipe of Hemchandra, the time was about 9.00 P.M. His father died due to the fire received by him. Accused are present in Court.

12. P.W.3 Jai Singh has stated in his examination-in-chief that incident is of 4.5.2006. IInd year is going on and 2 year will complete on 4th May of this year.

They went in the *Tilak* invitation of Ram Asrey Gupta on the date of incident. He, his sister-in-law Asha Devi and his nephews Ajit and Sujit also went there. Several persons of the village also came there. It was 9.00 PM. when the incident has taken place. Two persons Dashrath and Shivperson caught hold his elder brother Shiv Singh before him, dragged him near the handpipe of Hemchandra and Ramswarop and Suresh fired him. After receiving the fire shot, his elder brother Shiv Singh fell down and died. Ajit and Sujit, sons of deceased saw the incident. Suresh and Ramswaroop are present in Court. Dashrath and Shivperson are also present.

13. P.W. 4 Ram Asrey in his examination-in-chief has stated that there was Tilak in his house on the day of murder. Incident is of 2 and 2 ½ years before, time is of 10.00 P.M. He was inside the house as *Tilak* Ceremony was going on inside the house and nasta / dinner, etc was going on outside the house. Having heard the fire sound, everybody runaway. When he came outside, nobody was present, everybody runaway. He saw the dead body of Shiv Singh is lying near the handpipe of Hemchandra.

14. PW 5 S.I. Anand Kumar Singh in his examination-in-chief has stated that from 4.12.2005 to 15.7.2006, he was posted as Station Officer, Asothar. On 4 5.2006 when he received the information with respect to murder of Shiv Singh of Village - Besari, they reached on spot along with force. After completing the necessary legal formalities, investigation of the case was started, statements were recorded and he prepared the inquest report and other documents, dead body challan, letters addressed to the authorities for conducting postmortem of the dead body of the deceased, thereafter, he sealed the dead body of the deceased and dispatched it for postmortem. Country-made pistol was recovered at the pointing out of accused Suresh, the site plan was prepared in respect of recovery place of country-made pistol, the fard was accordingly prepared. Another country-made pistol was recovered at the pointing out of accused Ramswaroop from the cow-dung manure pit. The site plan and fard was accordingly prepared in respect of the same.

15. PW 6 Dr Vivek Nigam in his examination-in-chief has stated that on 5.5.2006, he was posted as Senior Medical Officer at District Medical Hospital, Fatehpur and on that day, his duty was on postmortem. He Conducted the post-mortem of deceased Shiv Singh at 2:30 PM on the aforementioned date.

External Examination:-

Deceased was of average height. Regor mortis was present on both upper arm and in both the legs. Mouth was closed.

Ante-Mortem injuries:-

1. Fire-arm wound of entry 4cm x 3cm x cavity deep on the back of head. 7cm behind the right ear. Blackening present over the wound.

2. Fire-arm wound of exit 10 cm x 8 cm x cavity deep on the left side of head just above the left ear.

3. Fire-arm wound of entry 4 cm x 3cm x cavity deep on the left side of

back of head, 5 cm above and behind the left ear. Blackening present.

4. Fire-arm wound of exit 7cm x 5cm in the upper part of right side of face including the right eye.

5. Fire-arm wound of entry 5cm x 3cm on the back of left forearm, 4 cm below the left elbow. Blackening present. Underlying bones fractured.

6. Firearm wound of exit 6cm x 4cm on the left forearm just below the left elbow and this is connecting with the injury no. 5.

7. Abrasion 3cm x 2cmon the left arm, 4cm below the left shoulder.

8. Abrasion 6cm x 4cm on the back of the left side, 8 cm below the left shoulder.

Internal Examination:-

In Injury No. 1, 2, 3, 4, the underlying bones were broken. Heart was empty while both the lungs were pale, stomach contained about 40 ml. semi digested food. Small intestine was empty and large intestine was filled with fecal matter and gasses, Liver, spleen and Kidney were pale, Gall blader was half filled and urinary bladder was empty.

16. P.W.7, Shyam Singh has stated in his examination-in- chief that paper No- 3 Ka/2 is written in his hand writing, this was written on the dictation of Asha Devi wife of deceased, document was signed by him and thumb marked by Asha Devi, written report was marked as Ext. Ka-8.

17. P.W. 8 Sub Inspector Shyam Bihari Singh has stated in his examination-in-chief that he was posted as Sub-Inspector at PS- Asolhar District Fatehpur in the year 2006. Station Officer Anand Kumar Singh who was Investigating Officer of Case Crime No. 50 of 2006, under section - 302 IPC and Section- 7 Criminal Law Amendment Act, arrested accused Suresh Yadav on 4.5.2006 and on his pointing out, weapon was recovered whereupon Case Crime No- 56 of 2006, (State vs. Suresh Yadav), under Section 25 of the Arms Act was registered and investigation was conducted by him. Statements of Constable Raghubar Yadav (FIR writer) and accused Suresh Yadav were recorded on 11.5.2006. On 12.5.2006, statement of Om Prakash Yadav was recorded. On his pointing out, site plan was prepared after inspection which are paper no. Ext. Ka-9. Ext. Ka-12, the charge-sheet in case no. 56 of 2006 and 64 of 2006 were filed by him after completion of investigation, under Section 25 of the Arms Act, which are paper no. Ext. Ka-11 and Ext. Ka-14.

18. P.W.9 Constable Raghubar Yadav has stated in his examination-in-chief that he registered the chik FIR on the basis of written report of Asha Devi which was written by Shyam Singh. He proved chik F.I.R. Ext. ka-1. He identified Ext. Ka-17 and Ext. Ka-18

19. P.W.10 Constable Sudhir Kumar Singh has stated in his examination-in-chief that on 19.5.2006, he was posted as Constable at P.S. - Asolhar, on that day he prepared chik F.I.R. in his handwriting on the basis of Ext. Ka-5. GD is Ext. Ka-20.

20. DW-1 Bisun Dayal has stated in his examination-in-chief that he knows

Ramswaroop @ chhotka and Dashrath @ Badka who are sons of Ram Dularey. On 4.5.2006 he came to their village. He came to house of Ram Sumer on that day for the Tilak ceremony of Komal, son of Ram Sumer. He reached at 4-5 P.M. He stayed there for whole night and in the morning upto 8 A.M. Ramswaroop @ Chhotka and Dashrath @ Badka met him in the Tilak, both the persons were with him from 4-5 PM to 8.00 AM next morning. They were with him and did not go anywhere else. He further said that the day he went in the Tilak he heard about the murder of Shiv Singh.

21. The learned Sessions Judge, Court No.8, Fatehpur, after hearing the parties and perusal of the record, passed the impugned judgment. Hence this appeal.

22. Counsel for the appellants submits that recovery and place of incident is doubtful. The recovery of country-made pistol from the ditch and another from the manure pit filled with cow-dung, cannot be said to be in working condition unless there is satisfaction that weapon were in working condition, the country-made pistol recovered on 19.5.2016 from the manure pit filled with cow-dung, cannot give smell of gun powder. In forensic examination, only one country-made pistol matched. So far as place of incident is concerned in site plan, place of blood stains are not mentioned as such the place of incident is doubtful. P.W.-1 in the First Information Report says that she saw the incident while in the statement under Section 161 Cr.P.C., she says that she came to place of incident when her sons and brother-in-law informed her about the incident. In the same manner, in the FIR, name of accused Suresh is mentioned but in examination-in-chief as well as in cross-examination, P.W.-1 says that Suresh has not fired at all, only rest of the three accused were involved in the incident, P.W.-7 Shyam Singh, scribe of FIR in his cross-examination states that after Panchayatnama, report was written on the dictation of Daroga ji but later on says that report was written on the dictation of Asha Devi. Similarly, there are so many contradictions in the statement of P.W.-2. Counsel for the appellant further submits that P.W.-1, P.W.-2 and P.W.-3 are unreliable witnesses as all the three were not present nor they have seen the incident. P.W-3 in his cross-examination has stated that in dinner only, he went from his house. P.W.-3 in his examination-in-chief states that he, his nephew Sujit and Ajit as well as his sister-in-law Asha Devi went in Tilak ceremony. In the same manner, P.W.'s- 1 and 2 were unreliable witnesses, they say one thing at one place and some thing at another place. P.W.-2 is tutored witness as he stated that he is 16 year of age and he is giving statement as told by the counsel so P.W.-2 is also unreliable witness. It is further submitted that medical evidence also belies the prosecution case. Counsel for the appellants submitted that in the postmortem report, it is mentioned that stomach contained semi-digested food, small intestine was empty and large intestine filled with fecal matter and gases. P.W.-6 Doctor in his cross-examination stated that deceased must have taken food 2-3 hours before death. However, from the FIR and statements of P.W.-2 and P.W.-3, it has come that deceased was going to take food in the Tilak ceremony so prosecution case is false and cannot be believed. It is further submitted that the First Information Report is anti-timed. This argument is pressed on the ground that P.W.-9 in his cross-examination stated that he is not aware about sending of special report of this case by whom and when, in G.D. there

is no reference of sending the special report of this case, in the chik FIR (Ext. ka-15), there is signature of C.O. but no date is mentioned. The same was sent before Magistrate on 11.5.2016. P.W.-9 further stated that in coloumn no. 3 of chik FIR no time and date is mentioned. No signature and thumb impression of first informant is mentioned in the relevant coloum of chik FIR. In inquest only crime number is mentioned, nothing else is mentioned on the top of inquest. P.W.-7 Shyam Singh, scribe of FIR in his cross-examination, states that after the inquest, report of the incident was written. All these facts indicate that prosecution case is false.

23. Counsel for the appellant placed reliance upon paragraph-101 of the police regulation which is as follows:-

"101. Special Report cases.- Whenever the occurrence of an offence of any of the following kinds is reported-

(1) dacoity, (2) robbery except unimportant cases such as snatching ear-rings, (3) torture by police, (4) escape from police custody, (5) forging of currency notes (6) manufacture of counterfeit coin, (7) serious defalcations of public money including theft of notes or hundis from letters, (8) important cases of murder, rioting, burglary and theft, breaches of the peace between different classes, communities or political groups and other cases of special interest, copies of the report will be sent immediately in red envelopes to the Superintendent, the District Magistrate, the Sub-Divisional Magistrate and the Circle Inspector by post or hand whichever may be the quicker method of conveyance. The telephone or telegraph when available, and the department telegraphic code, copies of which have been supplied to all police stations near telegraph offices should also be used to give the Superintendent early news of such offences."

24. Counsel for the appellant further submitted that independent witnesses of the incident have not been examined although in the *Tilak* ceremony, there were number of people of the village which also falsifies the prosecution case. The counsel for the appellant further submitted that plea of alibi set up with respect to accused Dashrath has been proved from the examination-in-chief and cross-examination of D.W-1.

25. Counsel for the appellants cited judgment of the Apex Court and submitted that appeals filed by accused appellants be allowed, particulars of the judgments are as follows:-

(1994) 5 SCC 188, Mehraj Singh vs. State of U.P., (2006) 2 SCC 450, Radha Mohan Singh @ Lal Saheb and Others vs. State of U.P., (2006) 9 SCC 731, Budh Singh and Others vs. State of U.P.

26. Learned AGA, Smt. Manju Thakur on the other hand supported the impugned judgment and orders of conviction by contending that no delay has been caused in lodging the FIR. Recovery memo and recovery of country-made pistol from accused Ramswaroop @ Chotka and Suresh fully make out the case against accused / appellants. Prosecution case is fully proved from the statement of P.W.-1, P.W.-2 and P.W.-3. The appeals filed by accused - appellants have no merit and are liable to be dismissed.

27. Upon hearing learned counsel for the parties and perusal of record, first of all we are considering the argument raised on the point of contradictions in the statement of P.W.-1, P.W.-2 and P.W.-3, unreliable witnesses and tutored witness. P.W.-1 in the First Information Report says that she saw the incident while in the statement under Section 161 Cr.P.C., she says that she came to place of incident when her sons and brother-in-law informed her about the incident. In the same manner, in the FIR, name of accused Suresh is mentioned but in examination-in-chief as well as in cross-examination, P.W.-1 says that Suresh has not fired at all, only rest of the three accused were involved in the incident, P.W.-7 Shyam Singh, scribe of FIR in his cross-examination states that after Panchayatnama report was written on the dictation of Daroga ji but later on says that report was written on the dictation of Asha Devi. In the same manner, there are so many contradiction in the statement of P.W.-2. The counsel for the appellant further submits that P.W.-1, P.W.-2 and P.W.-3 are unreliable witnesses as all the three were not present nor they have seen the incident. P.W-3 in his cross-examination has stated that he was the sole member of his family who went to the Tilak. But in his examination-in-chief states that he, his nephew Sujit and Ajit as well as his sister-in-law Asha Devi went in Tilak ceremony. In the same manner, P.W.'s- 1 and 2 were unreliable witnesses, they say same thing at one place and some thing at another place.

28. P.W.-4 in his cross-examination states that from every house of the village, only one person of the house was given an oral invitation of Tilak. He further stated that he invited Shiv Singh. Therefore, from the statements of P.W.-1, P.W.-2, P.W.-3 and P.W.-4, the presence of eye-witnesses P.W.-1, P.W.-2 and P.W.-3 at the time and place of incident is doubtful and due to contradiction in their statements, P.W.'s- 1 to 3 do not inspire confidence.

29. The next argument advanced by learned counsel for the appellants is that the F.I.R. is ante-timed. In support of this argument, counsel placed the statement of P.W.-9 which is as follows:-

" पी0डब्लू0दक9 कां0 2416 रघुवर यादव थाना शिवपुर जनपद वाराणसी श्श्शपथ पूर्वक बयान किया कि ंदक

दिनांक 4.5.06 को थाना असोथर जनपद फतेहपुर थाना कार्यालय में तैनात था। उस दिन मैने वादिनी आशा देवी की तहरीर जो श्याम सिंह के द्वारा लिखी थी। के आधार पर मुकदमे की चिक एफ0आई0आर0 तैयार थाने पर की थी। चिक एफ0आई0आर0 पेपर नं0 3अ/1 को देखकर गवाह ने कहा कि यह वही चिक एफ0आई0आर0 है अपने लेख व हसताक्षर की शिनाख्त किया। मैने कायमी मुकदमा का इन्द्राज जी0डी0 की रपट संख्यांदक28 समय 22.30 जिसमें 4.5.06 को मेरे द्वारा किया गया था। असल जी0डी0 मै लाया हूॅ। मेरे समने है। असल जी0डी0 की फोटो कापी मै सत्यप्रतिलिपि प्रमाणित लिखकर दाखिल कर रहा हूॅ। फोटो कापी पर प्रदर्श कंदक16 डाला गया।

11.5.06 को भी मै बहैसियत सी0 क्लर्क नियुक्त था। उस दिन मैने फर्द बरामदगी के आधार पर मुलजिम सुरेश के विरूद्ध 25 आर्म्स ऐक्ट का मुकदमा कायम किया था चिक एफ0आई0आर0 श्श्शामिल पत्रावली पेपर नं0 3अ/1 को देखकर कहा कि यह मेरे लेख व हस्ताक्षर में हे जिस पर प्रदर्श कंदक17 डाला गया।

कायमी मुकदमा का इन्द्राज जी0डी0 की रपट संख्या 23 समय 16.30 पर मेरे द्वारा दिनांक 11.5.06 को किया गया था असल जी0डी0 मै लाया हूॅ। मेरे सामने है। मूल के साथ कार्वन लगाकर तैयार की गयी कार्वन कापी पत्रावली में उपलब्ध है। असल के साथ प्रमाणित पत्र लिखाकर हस्ताक्षर बनना कहा है। जी0डी0 की कार्वन कापी पर प्रदर्श कंदक18 डाला गया।

x x x x क्रास बाई डिफेंस फार एक्ज्यूड फार दशरथ एण्ड राम स्वरूप

यह कहना गलत है कि थाना अध्यक्ष आनन्द कुमार सिंह के अधीनस्थ होने के कारण दबाब वश एंटी टाइम कार्यवाही की हो।

यह भी कहना गलत है कि विभागीय होने के कारण गलत बयान दे रहा हूँ।

x x x x क्रास बाई डिफेंस फार एक्ज्यूड सुरेश

यह मुकदमा 4.05.06 को 22.30 बजे कायम हुआ। इस मुकदमे के कायमी के पूर्व उस दिन थाने में कोई दस्तनाजी रिपोर्ट दर्ज नही हुयी थी। इस मुकदमे के कायमी के बाद भी उस दिन यानि 4.5.06 को कोई दस्तन्दाजी रिपोर्ट थाने पर कायम नही हुयी।

मै यह नही बता सकता कि इस मुकदमे की कायमी के बाद 5.5.06 को कोई दस्तान्दाजी थानें में कायम हुई कि नही।

दिनांक 4.5.06 को मै जी0डी0 में इस मुकदमे की स्पेशल रिपोर्ट भेजे जाने का कोई उल्लेख जी0डी0 में नही है। इस मुकदमे की स्पेशल रिपोर्ट किसके द्वारा और कब भेजी गयी मुझे नही मालूम है।

चिक एफ0आई0आर0 धारा 302 प्रदर्श कंदक15 मे सी0ओ0 के हस्ताक्षर है लेकिन कोई तारीख नही है। मजि0 के यहॉ प्रपत्र कंदक15 मजि0 के यहॉ 11.5.06 को प्राप्त होने का उल्लेख है।

उस कालम में कोई तारीख व समय नही लिखा डाक दूसरे दिन भेजी जाती हैं चिक में वादी के निशान अंगूठा व हस्ताक्षर का कालम है। लेकिन चिक व प्रदर्श ंदक15 में न तो वादी का निशान अंगूठा है और न हस्ताक्षर ही।

यह कहना गलत है कि मुकदमे की एफ0आई0आर0 व तहरीर एंटी टाईम व एंटी डेट करने सलाह मशविरा के बाद में तैयार की गयी है।

जी0डी0 के अनुसार एस0ओ0 आनन्द कुमार सिंह के रवानगी थाने में दिनांक 4.5.06 को किशनपुर क्षेत्र के लिए 12.30 बजे रवानगी दर्ज है। वहॉ से उनके वापसी का कोई उल्लेख सी0डी0 में नही है। उस जी0डी0 और एस0ओ0 की रवानगी जिस कार्य के लिए थाने से हुई व किस स्थान के लिए हुई उसका उल्लेख नही है।

यह कहना गलत है कि जी0डी0 की इंट्री एंटी टाईम एवं एंटी डेट करके लिखी गयी हो।

दिनांक 11.5.06 को क्राइम नं0 50/06 अन्तर्गत धारा 25 आर्म्स ऐक्ट 16.30 बजे कायम किया गया था। उस मुकदमें की कायमी से पूर्व समय 12.10 पर मुकदमा कायम हुआ था।

यह कहना गलत है कि मु0नं0 50/06 धारा 25 आर्म्स ऐक्ट तथा सुरेश का मुकदमा एस0ओ0 आनन्द सिंह के कहने व प्रभाव में होने के कारण फर्जी एंटी टाईम व एंटी डेट करके लिखा गया है।

x x x x क्रास बाई डिफेंस फार एक्ज्यूड शिव परसन

चिक एफ0आई0आर0 में रिपोर्ट में दिनांक व समय का कालम हैं। उसमें दिनांक 4.5.06 के नीचे समय पडा है जिसमें ओवर राईटिंग की गयी है। यह करेंक्शन रिपोर्ट लिखने के बाद किया गया है। हाथ से लिख रहे थे सहवन गलती हो सकती है।

यह कहना गलत है कि पहले समय दूसरा डाला था और सलाह मशविरा के बाद दूसरा समय डाला गया है। जब मै रिपोर्ट कर रहा था उस समय एस0ओ0 साहब भी थे।

यह कहना गलत नही है कि वादिनी को एस0ओ0 साहब पहले मौका देखने के लिए लेकर गये उसके बाद वापस आकर पहले का समय डालकर वादिनी को बोल कर यह तहरीर लिखवाई थी।

मेरे बोलने पर वाचक द्वारा लिखा गया।

बयान सुनकर तस्दीक किया।
17-2-010 **

30. From a reading of the entire statement of P.W.-9, the delay in sending special report to the concerned Magistrate is not explained. The statement of P.W.-7 will be also relevant which is as follows:-

'पी0डब्लू0ंदक7 श्याम सिंह पुत्र श्री राम रतन सिंह उम्र 45 वर्ष लगभग पेशा किसानी निवासी विष्ठी थाना असो0 जिला फतेहपुर।

शपथपूर्वक बयान किया किंदक

कागज संख्या 3अ/2 मेरे हाथ का लिखा हुआ है यह मेने मृतक की पत्नी आशा देवी के बोलने पर लिखी थी। जो आशा देवी ने मुझे बोला था उसी के आधार पर मैने लिखा था क्योंकि मैं मौके पर नहीं था। तहरीर लिख जाने बाद मैंने अपने हस्ताक्षर किये थे और आश देवी का अंगूठा निशान लगवाया था। अंगूठा निशान लगवाने से पहले मैंने आशा देवी को तहरीर प

कागज संख्या 3अ/2 मेरे हाथ का लिखा हुआ है यह मेने मृतक की पत्नी आशा देवी के बोलने पर लिखी थी। जो आशा देवी ने मुझे बोला था उसी के आधार पर मैने लिखा था क्योंकि मैं मौके पर नहीं था। तहरीर लिख जाने बाद मैंने अपने हस्ताक्षर किये थे और आश देवी का अंगूठा निशान लगवाया था। अंगूठा निशान लगवाने से पहले मैंने आशा देवी को तहरीर पढ़कर सुनई गई थी। तहरीर पर आदर्श कंदक8 डाला गया।

Cross by Defence for accused Shiv Parsan

यह तहरीर मैंने रात्रि मे लगभग 12 बजे लिखी थी। थाने मे यह तहरीर लिखी गई थी। 11.30 या 12 बजे के बीच मे आशा देवी के साथ थाने पहुॅचा था।

यह कहना सही है कि मैंने तहरीर पर लगे निशानी अंगूठा पर नाम नहीं खोला है।

मुझे आशा देवी ने जितने मुल्जिमान के नाम बतलाये थे उन सभी के नाम मैंने तहरीर मे लिख दिये थे। मैंने किसी व्यक्ति का नाम अपने तरफ से नहीं लिखा था आशा देवी के तहरीर में शिवपरसन का नाम नहीं लिखवाया था।

Cross by Defence for Accused Suresh

मुझसे दरोगा जी ने थाने में पंचायतनामा भरने के बाद बोल बोल कर तहरीर लिखवायी थी। फिर कहा कि मृतक कि पत्नी आशा देवी ने बोल बोल कर लिखवाई थी। दरोगा जी मृतक की पत्नी को अपने साथ थाने ले गये थे मैं घटना के समय मौके पर मौजूद नही था दरोगा जी ने मेरा कोई बयान नहीं लिया।

Cross by Defence for Accused Dasrath and Ram Swaroop

जिरह का अवसर दिया गया। जिरह नहीं किया। जिरह का अवसर समाप्त किया गया।

मेरे बोलने पर हस्तलिपि द्वारा लिखा गया।

बयान सुनकर तस्दीक किया।

ह0 अस्पष्ट

30-10-2009 **

31. The abovementioned statement of P.W.-7 fully reveals that after preparation of inquest, report of the incident was written and lodged. All these facts fully demonstrate that FIR is ante-timed.

32. The case law cited by counsel for the appellant on the point of ante-timed FIR, reported in **(1994) 5 SCC 188, Mehraj Singh vs. State of U.P**. will be relevant. Paragraph No. 12 of the judgment is as follows:-

"12. FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eyewitnesses, if any. Delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story. With a view to determine whether the FIR was lodged at the time it is alleged to have been recorded, the courts generally look for certain external checks. One of the checks is the receipt of the copy of the FIR, called a special report in a murder case, by the local Magistrate. If this report is received by the Magistrate late it can give rise to an

inference that the FIR was not lodged at the time it is alleged to have been recorded, unless, of course the prosecution can offer a satisfactory explanation for the delay in despatching or receipt of the copy of the FIR by the local Magistrate. Prosecution has led no evidence at all in this behalf. The second external check equally important is the sending of the copy of the FIR along with the dead body and its reference in the inquest report. Even though the inquest report, prepared under Section 174 CrPC, is aimed at serving a statutory function, to lend credence to the prosecution case, the details of the FIR and the gist of statements recorded during inquest proceedings get reflected in the report. The absence of those details is indicative of the fact that the prosecution story was still in an embryo state and had not been given any shape and that the FIR came to be recorded later on after due deliberations and consultations and was then ante-timed to give it the colour of a promptly lodged FIR. In our opinion, on account of the infirmities as noticed above, the FIR has lost its value and authenticity and it appears to us that the same has been 'ante-timed and had not been recorded till the inquest proceedings were over at the spot by PW 8."

33. The other judgment cited by counsel for the appellant on the point of ante-timed FIR is reported in **(2006) 9 SCC 731, Budh Singh and Others vs. State of U.P. Paragraph nos. 20 to 22 of the judgment is as follows:-**

"20. Yet again, to P.W. 8, Shailesh Tyagi, clear suggestion was given that "writing of diary was stopped" and FIR was recorded when Investigating Officer returned in the afternoon on 13.4.1992 from the place of occurrence and thereafter the special report was sent. The FIR, according to the said witness, was sent by post. He merely stated that the Constable who went to the police station, which was at a distance of 50 kms. from the Headquarter, took with him the FIR also but no date or case number had been mentioned in the prescribed column.

21. He accepted that the FIR was produced before the Court of Chief Judicial Magistrate on 18.4.1992.This Court in Meharaj Singh v. State of U.P., as regards the requirement of sending of the FIR to the Court, the inquest report as also the requirements to comply with other formalities provided for external checks, categorically held:

"FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eyewitnesses, if any. Delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version of exaggerated story. With a view to determine whether the FIR was lodged at the time it is alleged to have been recorded, the courts generally look for certain external checks. One of the checks is the receipt of the copy of the FIR, called a special report in a murder case, by the local Magistrate. If this report is received by the Magistrate late it can give rise to an inference that the FIR was not lodged at the

time it is alleged to have bee recorded, unless, of course the prosecution can offer a satisfactory explanation for the delay in despatching or receipt of the copy of the FIR by the local Magistrate. Prosecution has led no evidence at all in this behalf. The second external check equally important is the sending of the copy of the FIR along with the dead body and its reference in the inquest report. Even though the inquest report, prepared under Section 174 Cr.P.C., is aimed at serving a statutory function, to lend credence to the prosecution case, the details of the FIR and the gist of statements recorded during inquest proceedings get reflected in the report. The absence of those details is indicative of the fact that the prosecution story was still in an embryo state and had not been given any shape and that the FIR came to be recorded later on after due deliberations and consultations and was then ante-time to give it the colour of a promptly lodged FIR. In our opinion, on account of the infirmities as noticed above, the FIR has lost its value and authenticity and it appears to us that the same has been ante-timed and had not been recorded till the inquest proceedings were over at the spot by PW 8." The said decision of this Court was followed by a Three Judge Bench of this Court in Thanedar Singh v. State of M.P., [2002] 1 SCC 487 and also in, Rajeevan and Anr. v. State of Kerala, [2003] 3 SCC 355 and Bijoy Singh and Anr. v. State of Bihar, [2002] 9 SCC 147.

22. We are, however, not oblivious of the fact that Meharaj Singh (supra) has been distinguished in Rajesh @ Raju Chandulal Gandhi and Anr. v. State of Gujarat, [2002] 4 SCC 426, stating :

"Relying upon the judgment of Meharaj Singh v. State of U.P. the learned counsel appearing for the appellants has submitted that FIR in a criminal case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led in the trial. The object of insisting upon prompt lodging of the FIR is to obtain information regarding the circumstances in which the crime was committed including the names of actual culprits and the part played by them, the weapon of offence used as also the names of the witnesses. One of the external checks which the courts generally look for is the sending of the copy of the FIR along with the dead body and its reference in the inquest report. The absence of details in the inquest report may be indicative of the fact that the prosecution story was still in embryo and had not been given any shape and that the FIR came to be recorded later on after due deliberations and consultation and was then ante-timed to give it a colour of promptly lodged FIR. The reliance of learned counsel for the appellant on Meharaj Singh case is of no help to him in the instant case inasmuch as all requisite details are mentioned in panchnama Exhibit P-32. Mere omission to mention the number of the FIR and the name of the complainant in Ext. P-37 has not persuaded us to hold that the FIR was ante-timed in view of the peculiar facts and circumstances of the case as noticed by the trial court, the High Court and by us hereinabove."

34. The next argument advanced by counsel for the appellants that in the Tilak ceremony, large number of villagers were present but no independent witness was produced by the prosecution specially when the eye-witnesses totally failed to prove the prosecution case which casts a doubt on the prosecution case, also appears to be correct. The further contention of counsel for the appellants is that medical evidence also

belies the prosecution case. In support thereof, it was argued that in the postmortem report it is mentioned that stomach contained semi-digested food, small intestine was empty and large intestine filled with fecal matter and gases. P.W.-6 Doctor in his cross-examination stated that deceased must have taken food 2-3 hour before but from the FIR and statement of P.W.-2 and P.W.-3, it has come that deceased was going to take food in the *Tilak* ceremony. So prosecution case is false and cannot be believed. Accordingly, medical evidence also falsifies the prosecution case.

35. The last contention raised by learned counsel for the appellant that plea of alibi set up with respect to accused Ram Swaroop @ Chotka and Dashrath has been proved from the examination-in-chief and cross-examination of D.W.-1, as no question was asked by prosecution on this point, hence plea of alibi is proved. The contention of counsel for the appellant has force.

36. In view of the facts and circumstances of the case and evidence available on record, as discussed above, we find that the evidence of the alleged eye witnesses produced by prosecution does not inspire confidence. There exists a doubt whether they are eye-witnesses of the incident. Oral evidence is also not consistent with the medical evidence, FIR is ante-timed and there are no independent witness of the incident. Prosecution has failed to prove the charges against the appellants-accused beyond reasonable doubt.

37. Accordingly, the appeals are **allowed**. The impugned judgment / orders of conviction and sentence dated 18.3.2011 are set aside. Appellants are acquitted of the charges framed against them. The accused- appellant Ramswaroop @ Chotaka in Criminal Appeal No.1921 of 2011 is in jail. He shall be released from jail forthwith. Accused-appellant Dashrath @ Badka in Criminal Appeal No. 1922 of 2011, accused - appellant Suresh in Criminal Appeal No.1920 of 2011 and accused - appellant Shivperson @ Bantwa @ Baccha @ Shiv Prakash @ Shiv Darshan in Criminal Appeal No.2439 of 2011 are on bail. Their bail bonds and sureties are discharged.

38. Let a copy of the judgment along with the original record be sent to the court below for compliance

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