

A.F.R.

Reserved on 02.08.2019

Delivered on 19.09.2019

Court No. - 28

Case :- APPLICATION U/S 482 No. - 38644 of 2016

Applicant :- Jaspreet Singh Garewal

Opposite Party :- State Of U.P.And Another

Counsel for Applicant :- Sikandar B. Kochar

Counsel for Opposite Party :- G.A.,Anoop Trivedi

Hon'ble Rajeev Misra,J.

Ref: Criminal Misc. Recall Application No. 4345 of 2017

1. This application under Section 482 Cr.P.C. has been filed by applicant- Jaspreet Singh Garewal (a co-accused) challenging the order dated 02.12.2016 passed by Additional Sessions Judge, Court No.1, Bareilly in Sessions Trial No.123 of 2013 (State Vs. Nirmal Singh Garewal and others) under Sections 452 and 307 I.P.C. P.S. Kotwali Bareilly, District-Bareilly arising out of Case Crime No. 2568 of 2012 under Sections 452, 307 I.P.C. P.S. Kotwali Bareilly, District-Bareilly, whereby application (Paper No. 309 Kha) filed by accused under Section 309 Cr.P.C. has been rejected.

2. It transpires from record that during pendency of S.T. No. 123 of 2013 (State Vs. Nirmal Singh Garewal and 2 others) one of the accused Nirmal Singh Garewal, the applicant herein, filed an application under Section 309 Cr.P.C. (Paper No. 309 Kha) praying therein that S.T. No. 123 of 2013 (State Vs. Nirmal Singh Garewal and others) under Sections 452 and 307 I.P.C. P.S. Kotwali Bareilly, District-Bareilly arising out of Case Crime No. 2568 of 2012 under Sections 452, 307 I.P.C. P.S. Kotwali Bareilly, District-Bareilly be tried alongwith Complaint Case No. 1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal and others) under Sections

307, 436, 392, 380, 504 and 506 I.P.C., P.S. Kotwali Bareilly, District-Bareilly, arising out of Case Crime No. 2675 of 2012 under Sections 307, 452, 427, 504, 506, 380, 426 and 392 I.P.C., P.S. Kotwali Bareilly, District-Bareilly, as both the cases are cross cases.

3. The aforesaid application was opposed by opposite party no.2 herein namely Nitin Jaiswal. Accordingly, an objection (Paper No. 323 Kha) was filed by opposite party no.2 opposing the aforesaid application.

4. The Additional Sessions Judge Court No.1, Bareilly, vide order dated 02.12.2016 rejected the aforesaid application (Paper No. 309 Kha) filed by accused-applicant Nirmal Singh Garewal. While rejecting the application (Paper No. 309 Kha), Court below has held that evidence has been recorded and trial is at the stage of Section 313 Cr.P.C. Secondly, it would not be appropriate to try Complaint Case No. 1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal and others) under Sections 307, 436, 392, 380, 504 and 506 I.P.C., arising out of Case Crime No. 2675 of 2012, under Sections 307, 452, 427, 504, 506, 380, 426 and 392 I.P.C. alongwith the present Sessions Trial as according to accused-applicant Case Crime No. 2675 of 2012 is pending consideration before the Magistrate. In the aforesaid complaint case the accused have not yet appeared, nor the concerned Magistrate has passed any such order on the basis of which, it could be said that Case Crime No. 2675 of 2012 is cross version of Case Crime No. 2568 of 2012. Moreover, the complaint case has not yet been committed to the Court of Sessions. Further, without perusal of record of Complaint Case No. 1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal and others) under Sections 307, 436, 392, 380, 504 and 506 I.P.C., it cannot be said that above mentioned complaint case is a cross case. Lastly, the record of the complaint case cannot be summoned as the Hon'ble High Court has directed for early disposal of the Sessions Trial itself and if possible on day to day basis. For ready reference order dated 23.07.2015 which has been referred to in the order dated 02.12.2016 is reproduced herein-under:.

“Heard learned counsel for the applicant and the learned AGA and have been taken through the record.

By means of the present application under section 482 Cr.P.C. the applicant has invoked inherent jurisdiction of this Court with a prayer to direct the court concerned to conclude the Sessions Trial No 123 of 2013 arising out of Case Crime No. 2568 of 2012 under section 452/307 IPC, Police Station Kotwali District Bareilly pending in the court of learned Addl. District & Sessions Judge, Court No.1 Bareilly.

It is submitted by the learned counsel for the applicant that the applicant lodged the first information report against the opposite party no.2 and his sons under sections 452/307 IPC. The investigating officer after conducting the investigation submitted charge sheet dated 30.11.2012. The opposite party no.2 filed Criminal Misc. Bail Application No. 17956 of 2013 (Nirmal Singh Versus State of U.P.) before another Bench of this Court . The Hon'ble Single Judge was pleased to release the opposite party no.2 on bail vide order dated 25.7.2013 stipulating certain conditions and also directing the trial court to decide the case expeditiously. The opposite party no.2 after being released on bail, has adopted subterfuge of stalling and dilating the trial. The trial is proceeding at snail's pace and till date, the opposite party no.2 has not allowed the evidence of the doctors to be completed and the cross examination is going on by the opposite party no.2 since last 7 months so as to elongate the proceedings. The witnesses have also not been cross-examined whereby the trial is being obstructed. There is specific direction of this Court that the trial may be concluded speedily avoiding undue delay. The applicant is getting constant threats by the opposite party no.2 and his comrades. There is imminent danger of his life and property due to hanging of trial hence the court below may be directed to conclude the trial within stipulated period as granted by this Hon'ble Court. Learned counsel for the applicant has relied upon the decision of this Court dated 25.11.2013 passed in Special Leave to Appeal (Crl) No. 24066 of 22013 (Mohd. Rashid Vs. State of U.P.) wherein Hon'ble Apex Court held the trial court

should strictly comply with the direction issued by High Court and take effective steps to ensure that the trial be conducted on day to day basis and the presence of the witnesses be secured by adopting, if necessary coercive means. The Administrative Judge of the District concerned should monitor the progress of trial proceeding in order to ensure that the trial court does not defy the orders issued by High Court with impunity.

Learned AGA did not oppose the contention of learned counsel for the applicant and submitted that speedy trial is the quintessence of the code which cannot be withheld years together on flimsy grounds.

Having considered the rival submission advanced by the learned counsel for the parties, there are serious consequences where the trial is unnecessarily delayed. Speedy trial is a right of every person in public interest and serves the social requirement of the present day, therefore, it is provided that the court below shall make earnest endeavour to conclude the aforesaid trial as expeditiously as possible preferably on day to day basis within six months from the date of production of a certified copy of this order.

This application is disposed of as above. ”

Aforesaid order dated 23.7.2015 was subsequently corrected, vide order dated 7.8.2015. It was now provided that Court below shall endeavor to conclude S.T. No. 123 of 2013 (State Vs. Nirmal Singh) within a period of two months. For ready reference, order dated 7.8.2015 is reproduced herein below:

“Criminal Misc. (Correction) Application No. 253536 of 2015 is allowed.

Necessary correction has been made in the original order.

Order dated 23.7.2015 will stand corrected as follows:

In the 6th line of fifth paragraph six months should be read as two months.

Office is directed to correct the certified copy of the aforesaid order, if already issued to the learned counsel for the applicant as per Rule of the court. ”

On aforesaid findings, Court below rejected the application (Paper

No. 309 Kha) filed by accused-applicant, vide order dated 02.12.2016.

5. Feeling aggrieved by order dated 02.12.2016 passed by Additional Sessions Judge, Court No. 1, Bareilly, rejecting the application (Paper No. 309 Kha) filed by accused-applicant, he has now approached this Court by filing present application under Section 482 Cr.P.C.

6. Present Criminal Misc. Application came up for admission on 15.12.2016 and same was disposed of finally by this Court on the same day, vide order dated 15.12.2016, which is quoted herein under:-

“Supplementary affidavit filed today, the same is taken on record.

Heard learned counsel for the applicant and learned A.G.A.

The present application has been filed with a prayer to quash the order dated 2.12.2016 passed by the Additional Sessions Judge, Court No. 1 Bareilly in Sessions Trial No. 123 of 2013 (State Vs. Nirmal Singh Garewal and others) arising out of Case Crime No. 2568 of 2012, under sections 452, 307 IPC, Police Station Kotwali Bareilly, District Bareilly whereby the application of the applicant filed under section 309 Cr.P.C. has been rejected.

Learned counsel for the applicant contended that civil dispute with regard to the property is pending between applicant and O.P. No. 2 and the O.P. No. 2 is trying to illegally took the possession of the property in question, on account of which the incident took place. Admittedly, cross version were lodged by both the sides.

It is contended that initially O.P. No. 2 initiated the proceeding of the incident which took place on 21.10.2012 against the applicant, his father and his brother under sections 452, 307 IPC in Case Crime No. 2568 of 2012. It is contended that on the same day applicant went for lodging the first information report but same was not lodged by the police, then application was moved under section 156(3) Cr.P.C. on 22.10.2012 which was allowed, pursuant to which a FIR was lodged by the police against O.P. No. 2 and five others under sections 307, 452, 427, 504, 506, 380, 436, 392 IPC in Case Crime No. 2675 of 2012. It is further contended that Investigating Officer of Case Crime No. 2675 of 2012 of Sessions Trial No. 123 of 2013 filed report on 19.12.2012 wherein it was

mentioned that it was a cross version. It is next contended that applicant's father filed a protest petition, which was treated as a complaint case and after the statement recorded under sections 200 and 202 Cr.P.C. opposite party No. 2 and others were summoned by the Magistrate vide order dated 5.9.2016 under sections 143, 456 and 427 IPC in Complaint Case No. 1716 of 2016. It is contended that in spite of having knowledge of the same, the opposite party No. 2 and 5 others did not appear before the court concerned till date with the sole intention that the case against the applicant may proceed and the cross version of complaint case No. 1716 of 2016 may remain pending. It is contended that the Sessions Trial No. 123 of 2013 is proceeded on day to day basis because of the direction given by this Court vide order dated 24.10.2016 passed in Crl. Misc. Application U/s 482 Cr.P.C. No. 27370 of 2016 to be concluded the the trial if possible within two months on day to day basis.

Learned counsel for the applicant further contended that opposite party No. 2 did not bring this fact to the notice of the Court that opposite party No. 2 and others have already been summoned in Complaint Case No. 1716 of 2016. It is further contended that application under section 323 Cr.P.C. was filed before the Additional C.J.M., Court No. 2, Bareilly for committing the case to the court of sessions where Sessions Trial No. 123 of 2013 is proceedings and both the admitted cross case be heard and decided in view of the law laid down by this Court as well as by the Apex Court. Learned Magistrate vide order dated 19.11.2016 rejected the aforesaid application on account of the fact that accused persons had not appeared, therefore, no order could be passed. Copy of the aforesaid order has been filed as Annexure-10 to the accompanying affidavit. It is contended that as there is no dispute with regard to the fact that Sessions Trial No. 123 of 2013 and Complaint Case No. 1716 of 2016 are cross cases, therefore, an application was moved under section 309(2)(a) Cr.P.C. for adjournment of the proceedings till the complaint case is committed to the Court of sessions which application has been rejected by the order impugned. Learned counsel has cited the judgement of Sudhir Vs. State of M.P. 2001 SCC (Crl.) 387 and relied upon the paragraphs No. 8,9,10 and 11 of the aforesaid judgment indicating that the Apex Court has held that if there are cross cases, the same shall be

disposed of by the same Court by pronouncing judgements on the same day. Paragraphs No. 8,9,10 and 11 are quoted below:

8. *It is a salutary practice, when two criminal cases relate to the same incident, they are tried and disposed of by the same court by pronouncing judgments on the same day. Such two different versions of the same incident resulting in two criminal cases are compendiously called : case and counter-case" by some High Courts and 'cross-cases" by some other High Courts. Way back in the nineteen hundred and twenties a Division Bench of the Madras High Court (Waller and Cronish, JJ.) made a suggestion (Goriparthi Krishtamma, IN re that 'a case and counter-case arising out of the same affairs should always, if practicable, be tried by the same Court; and each party would represent themselves as having been the innocent victims of the aggressions of the others:*

9. *Close to its heels Jackson, J., made an exhortation to the then legislature to provide a mechanism as a statutory provision for trial or both cases by the same court (Vide Krishna Pannadi Vs. Emperor). The learned Judge said thus:*

"There is o clear law as regards the procedure in counter-cases, a defect which the legislature ought to remedy. It is a generally recognized rule that such cases should be tried in quick succession by the same Judge, who should not pronounce judgement till the hearing of both cases is finished."

10. *We are unable to understand why the legislature is still parrying to incorporate such a salubrious practice as a statutory requirement in the Code. The practical reasons for adopting a procedure that such cross-cases shall be tried by the same court, can be summarised thus: (1) it staves off the danger of an accused being convicted before his whole case is before the court. (2) It deters conflicting judgments being delivered upon similar facts; (3) In reality the case and the counter-case are, to all intents and purposes, different or conflicting versions of one incident.*

11. *In fact, many High Courts have reiterated the need to follow the said practice as a necessary legal requirement for preventing conflicting decisions regarding one incident. This Court has given its approval to the said practice in Nathi LalV. State of U.P. The procedure to be followed in*

such a situation has been succinctly delineated in the said decision and it can be extracted here: (SCC pp. 145-46, para 2)

"2. We think that the fair procedure to adopt in a matter like the present where there are cross-cases, is to direct that the same learned Judge must try both the cross-cases one after the other. After the recording of evidence in one case is completed, he must hear the arguments but he must reserve the judgment. Thereafter he must proceed to hear the cross-case and after recording all the evidence he must hear the arguments but reserve the judgment in that case. The same learned Judge must thereafter dispose of the matters by two separate judgments. In deciding each of the cases, he can rely only on the evidence recorded in that particular case. The evidence recorded in the cross-case can not be looked into. Nor can the judge be influenced by whatever is argued in the cross-case. Each case must be decided on the basis of the evidence which has been placed on record in that particular case without being influenced in any manner by the evidence or arguments urged in the cross case. But both the judgments must be pronounced by the same learned Judge one after the other."

It is contended by learned A.G.A. that it is not disputed that both the cases being Complaint Case No. 1716 of 2016 and Sessions Trial No. 123 of 2013 are cross cases.

In view of the above, this matter requires re-consideration. Accordingly the order dated 2.12.2016 passed by Additional Sessions Judge, Court No. 1 Bareilly in Sessions Trial No. 123 of 2013 is set aside and matter is remitted back to the court concerned for reconsideration afresh, in accordance with law as well as the observations made above within a period of three week from the date a certified copy of this order is produced before him. Learned counsel for the applicant undertakes to file the certified copy of this order before the court concerned within two weeks from today.

Accordingly, this application is disposed of. It is clarified that the proceeding of sessions trial No. 123 of 2013 may go on but final orders may not be passed."

7. Feeling aggrieved by order dated 15.12.2016, opposite party no.2, Nitin Jaiswal, who admittedly was not heard at the time of passing of order

dated 15.12.2016, has filed Criminal Misc. Recall Application No. 4345 of 2017 seeking recall of order dated 15.12.2016.

8. During pendency of above mentioned recall application, Criminal Misc. Application No.25681 of 2018 (Nitin Jaiswal Vs. State of U.P. and another) was filed challenging the order dated 25.01.2018 passed by Additional District Judge, Court No.1, Bareilly, in Complaint Case No. 1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal and others), under Sections 307, 436, 392, 380, 504 and 506 I.P.C., P.S. Kotwali Bareilly, District-Bareilly, whereby application (Paper No. 70 Kha) filed by Nirmal Singh Garewal-Complainant was allowed and also the order dated 23.06.2018 passed by Additional District Judge Ist, Bareilly, by which application No. 71 Kha-1 filed by Nitin Jaiswal and others, has been rejected. Vide order dated 23.06.2018, Court below held that proceedings of Complaint Case No. 1716 of 2018 (Nirmal Singh Garewal Vs. Nitin Jaiswal and others) under Sections 307, 436, 392, 380, 504 and 506 I.P.C., P.S. Kotwali Bareilly, District-Bareilly, shall proceed in accordance with Chapter 18 Cr.P.C., whereas vide order dated 23.06.2018, Court Below fixed 25.06.2018 as the next date for framing of charges under Sections 147, 458, 427 I.P.C. against Nitin Jaiswal, Adesh Jaiswal, Sachin Jaiswal, Raju Jaiswal. Annu Jaiswal and Manish Goel.

9. Criminal Misc. Application U/S 482 Cr.P.C. No. 25681 of 2018 (Nitin Jaiswal Vs. State of U.P. and another) came up for admission on 03.08.2018 and this Court passed the following order:

“Heard Mr. Anoop Trivedi, learned counsel for the applicant in length and detail, the learned A.G.A. for the State and the Mr. Sikandar Kochar, Advocate, who has put in appearance on behalf of the opposite party No. 2 by filing his vakalatnama in Court today, which is taken on record.

This application under section 482 Cr. P. C. has been filed with the following prayer:-

"It is, therefore, most respectfully prayed that this Hon'ble Court

may very kindly be pleased to allow this application and to quash the orders dated 25.01.2018 passed by the Additional District Judge, Bareilly in Complaint Case no. 1716 of 2016 whereby the application no. 70 kha of the opposite party no. 2 has been allowed and the order dated 23.6.2018 passed by the Additional District Judge, First, Bareilly in Case No. 1716 of 2016 (Nirmal Singh Garewal Versus Nitin Jaiswal and other) under Sections 456, 427 and 143 I.P.C. and by which the application no. 71 (kha) (1) has been rejected."

Mr. Anoop Trivedi, learned counsel for the applicant submits that the applicant had filed an application (Paper No. 71 kha), whereby it was prayed that entire consequential proceedings subsequent to the order dated 8.2.2016 are null and void. The said prayer was made on the ground that since second final report had already been rejected, vide order dated 6.4.2015, therefore, by rejecting the said final report by means of the order dated 8.2.2106 and directing that the protest petition shall be treated as complaint and consequently proceeding thereafter in the matter as a complaint case has rendered the entire consequential proceedings illegal. He thus submits that subsequent to the order dated 6.4.2015 passed by the Magistrate, whereby the second final report was rejected and the protest petition was allowed with a direction for further investigation, the case was further investigated by the police and the third final report dated 20.8.2015 has been submitted, which is pending consideration before the Magistrate.

On the aforesaid factual premise, the legal submission urged by the learned counsel for the applicant is that in the absence of an order rejecting the final report no direction can be issued by the Magistrate that the protest petition shall be treated as a complaint and accordingly to be proceeded with as a complaint case.

It is further submitted that the Court below while passing the impugned order dated 23.6.2018, whereby the application (Paper No. 71 Kha) had been rejected has travelled beyond the controversy and has also acted in excess of jurisdiction vested in it at that stage by observing that in view of the material on record,

charges under sections 147, 458, 427 are also liable to be framed and for that purpose fixed the matter for 25.6.2018.

Sri Anoop Trivedi, learned counsel for the applicant at this stage submits that the Court below has no jurisdiction to pass the impugned order when the real issue was not answered one way or the other way.

It was next contended that by means of the impugned order dated 25.1.2018, the Court below has allowed the application (Paper No. 70 Kha) filed by the opposite party No. 2. From the record, it appears that the said application was filed by the opposite party No. 2 with a prayer that he be provided a Government counsel as the said case is going on in the Court of Sessions. The applicant his objection dated 21.12.2017. However, the Court allowed the same.

From the perusal of this bulky record, it transpires that one of the issues engaging the attention of the Court is whether the transfer of the complaint case to the Court of Sessions in exercise of power under section 409 Cr. P. C. is valid or not.

Learned counsel appearing on behalf of the opposite party No. 2 submits that the issue has become final and it cannot be open at this stage.

*Perusal of the order dated 06.11.2017 passed by the Apex Court clearly shows that this question as to whether the Sessions Judge was empowered to transfer the **complaint case under section 409 Cr. P. C. has been left open.** It is admitted to the parties that pursuant to the order passed by the Apex Court, the said question has not been decided till date. It further transpires that the consolidation of the cases i.e. the State case and Complaint case has taken place in the light of the observations contained in the order dated 15.12.2016 passed by His Lordship Hon'ble Mr. Justice R.D. Khare. A perusal of the said order will go to show that in the proceedings in which the aforesaid order has been passed, a concession was made by the learned A.G.A. that both the cases are cross cases and on the basis of the said concession, the Court below passed the order dated 15.12.2016.*

Learned counsel for the applicant submitted that the applicant has filed a recall application seeking recall of the order dated 15.12.2016 which is pending.

In the light of the aforesaid facts, it is desirable that the recall application filed by the applicant in Criminal Misc. Application No. 38644 of 2016 be also heard along with the present application.

Put up this case along with the record of Criminal Misc. Application No. 38644 of 2016 as unlisted case on 10.08.2018.

Till then, the Court below is restrained from proceeding with the above mentioned complaint case pending before the Court of Sessions.”

10. However, order dated 03.08.2018 was corrected by this Court, vide order 26.07.2019. It was now provided that in place of Section 409 Cr.P.C. occurring in 4th line of third last paragraph Section 408 Cr.P.C. shall be read.

11. Subsequently, Office submitted the report dated 23.05.2019 and on the basis of office report dated 23.05.2019, Hon'ble the Senior Judge, vide order dated 24.05.2019 nominated Criminal Misc. Application No. 25681 of 2018 (Nitin Jaiswal Vs. State of U.P. and another), Criminal Misc. Application No. 38644 of 2016 (Jaspreet Singh Garewal Vs. State of U.P. and another) and Criminal Misc. Application No.11932 of 2014 (Nirmal Singh Garewal Vs. State of U.P. and another) before this Court. Accordingly, the above mentioned Criminal Misc. Applications have come up before this Bench.

12. It may be noted here that against interim order dated 03.08.2018 passed in Criminal Misc. Application No.25681 of 2018 (Nitin Jaiswal Vs. State of U.P. and another) which has been quoted herein-above, S.L.P. (Criminal) No.16536 of 2019 (Nirmal Singh Garewal Vs. State of U.P. and another) was filed before the Apex Court. The same was disposed of finally, vide order dated 10.05.2019, which is reproduced herein-under.

“ Delay condoned.

These petitions by special leave have been filed against the interim orders passed by the High Court in an application under Section 482 Cr.P.C.

Learned counsel for the petitioner has submitted that the matter is already fixed for hearing on 17.05.2019. The application being pending, we are of the view that the High Court shall take steps for early disposal of the matter looking into the nature of issues which have been raised in the Application under Section 482 Cr.P.C. Learned counsel for the petitioner has relied upon an order of this Court dated 06.11.2017 passed in SLP (Crl.) No. 8152 of 2017.

The special leave petitions are disposed of accordingly.”

13. I have heard Mr. Anoop Trivedi, learned Senior Counsel assisted by Mr. Abhinav Gaur, learned counsel for opposite party no.2 Nitin Jaiswal, who has filed the recall application seeking recall of order dated 15.12.2016, Mr. Sikandar B. Kochar, learned counsel for applicant and learned A.G.A. for the State.

14. Mr. Anoop Trivedi, learned Senior Counsel appearing for opposite party no.2, who has filed recall application seeking recall of order dated 15.12.2016 submits that recall application has been filed primarily on the grounds that opposite party no.2 was not heard before order dated 15.12.2016 was passed. Admittedly, opposite party no.2 was not represented through counsel nor any notice was issued to opposite party no.2 affording him an opportunity of hearing before order dated 15.12.2016 was passed. Further Criminal Misc. Application No. 482 Cr.P.C. came up for admission on 15.12.2016 and this Court allowed the application on same day. As such order dated 15.12.2016 is ex-parte against opposite party no.2. which is contrary to the Rules of natural justice enshrined in the principle *Audi alteram partem*.

15. The order dated 15.12.2016 passed by this Court has caused serious prejudice to opposite party no.2 as on account of aforesaid order disposal of S.T. No. 123 of 2013 (State Vs. Nirmal Singh Garewal and others),

under Sections 452 and 307 I.P.C., P.S.-Kotwali Bareilly, District-Bareilly, arising out Case Crime No. 2568 of 2012 under Sections 452, 307 I.P.C. P.S. Kotwali Bareilly, District-Bareilly, has come to a halt. It is submitted that this Court while deciding bail application No. 17956 of 2013 (Nirmal Singh Garewal Vs. State of U.P), vide order dated 25.7.2013, directed trial Court to expeditiously decide S.T. No. 123 of 2013 (State Vs. Nirmal Singh Garewal and another) under Sections 452 and 307 I.P.C. P.S. Kotwali Bareilly, District-Bareilly, arising out of case Crime No. 2568 of 2012, under Sections 452, 307 I.P.C. P.S. Kotwali Bareilly, District-Bareilly.

16. It is then submitted that as no progress was being made in aforesaid Sessions Trial as proceedings were being prolonged by filing applications by accused, three criminal misc. applications under section 482 Cr.P.C. came to be filed before this Court. Application U/s 482 No. 3811 of 2014 (Nirmal Singh Garewal Vs. State of U.P. and Another) was filed challenging the order dated 18.1.2014, whereby trial court summoned the witnesses and documents other than those mentioned in the charge sheet; Application U/s 482 No. 6775 of 2014 (Nirmal Singh Garewal Vs. State of U.P. and Another) was filed challenging order dated 18.1.2014, whereby Court below declined prayer made by accused for furnishing copies of statements of witnesses to them. Application U/s 482 No. 6095 of 2014 (Nitin Jaiswal Vs. State of U.P. and Another) was filed by complainant for expeditious disposal of case. All the above mentioned criminal misc. applications came to be decided vide order dated 9.4.2014. Criminal Misc. Application No. 3811 of 2014 (Nirmal Singh Garewal Vs. State of U.P. and Another) and Criminal Misc. Application No. 6775 of 2014 (Nirmal Singh Garewal Vs. State of U.P. and Another) were dismissed, whereas Criminal Misc. Application No. 6095 of 2014 (Nitin Jaiswal Vs. State of U.P. and Another) was disposed of with a direction to proceed with trial expeditiously irrespective of pendency of any application or petition before this Court except where specific order of

stay has been passed.

17. Then reference was made to the order dated 23.7.2015 as corrected vide order dated 7.8.2015, which have been quoted in paragraph 4 of present judgement. Lastly reference was made to order dated 24.10.2016, passed in Criminal Misc. Application No. 27370 of 2016 (Nitin Jaiswal Vs. State of U.P. and Others) and Criminal Misc. Application No. 27511 of 2016 (Taranpreet Garewal @ Dimpal Vs. State of U.P. and Another). Criminal Misc. Application No. 27370 of 2016 (Nitin Jaiswal Vs. State of U.P. and Others) was allowed with further direction to trial Court to proceed with trial on day to day basis and conclude same, within two months from date of production of certified copy of order, whereas Criminal Misc. Application No. 27511 of 2016 (Taranpreet Garewal @ Dimpal Vs. State of U.P. and Another) was dismissed. For ready reference, order dated 24.10.2016 is reproduced herein below:

“The application No.27370 of 2016 has been moved by the first informant for issuing appropriate direction to the trial court for concluding the trial of Sessions Trial No.123 of 2013 (State of U.P. vs. Nirmal Singh Garewal and others) pending in the Court of Additional District and Sessions Judge Court No.1 Bareilly within a time frame of one month from the date of receiving the certified copy of the order passed by this court.

and

The Application No. 27511 of 2016 has been moved for quashing the order dated 27.08.2016 passed by Additional Sessions Judge Court No.1 Bareilly in Sessions Trial No 123 of 2013 (State Vs. Nirmal Singh Garewal and others) rejecting the application Under Section 311 Cr.P.C. moved by the accused applicant.

The learned counsel for the first informant Sri Anoop Triwedi counsel for applicant in Misc. Application No. 27370 of 2016 filed Vakalatnama on behalf of opposite party No.2 in Misc. application No.27511 of 2016 moved by accused Taran Preet Garewal and similarly the learned counsel for the accused applicant, Sri Sikandar B. Kochar in Application No.27511 of 2016 filed Vakalatnama on the behalf of the accused opposite party No.2 Nirmal Singh Garewal in Misc. Application No. 27370 of 2016.

The two applications under Section 482 Cr.P.C., one by first informant and the other by accused, have been moved in respect of and arise out of the one and the same Sessions Trial No. 123 of 2013 pending before Additional Sessions

Judge Court No.1, Bareilly, were heard together on request of the learned counsel for the parties and are being disposed off by common order.

The learned counsel for the applicant-accused in Application No. 27511 of 2016 contended that the opposite party No.2 has stated in F.I.R. that "due to indiscriminate firing by the applicant and two other co-accused persons, Sachin Jaiswal the brother of first informant as well as Gaurav, Bhagwan Das and Veer Bahadur sustained gun shot injuries"; that the prosecution did not produce all the witnesses and got discharged the witnesses Gaurav, Bhagwan Das and Veer Bahadur on the application of first informant dated 04.06.2013; that the evidence of above witnesses is necessary for bringing truth before this Court and so the applicant moved an application under Section 311 Cr.P.C. for summoning them, which has wrongly been rejected by the trial court vide impugned order dated 27.08.2016; that the above order of trial court/ the Additional Sessions Judge Court No.1 Bareilly is bad on the facts of law and is liable to be quashed.

Per contra, learned counsel for Nitin Jaiswal the first informant/ opposite party No.2 contended that the applicant had moved the application under Section 311 Cr.P.C. for summoning the witnesses with malafide intention to delay the disposal of trial after a period of more than three years from the date when they were discharged; that the application moved by applicant and co-accused persons was malafide and misconceived; that the above witnesses Gaurav, Bhagwan Das and Veer Bahadur, need not be examined before the Court and they have been rightly discharged by the prosecution; the accused persons, if finds their evidence necessary and beneficial to them, may produce them as defence witnesses; that the applicant and co-accused persons are habitual of making abuse process of Court by moving one application or the other, to delay the disposal of trial as well as to flout various orders passed by this court for expeditious disposal of trial; that the prosecution evidence was concluded on 23.10.2015 and due to the misconduct of applicant-accused persons, their statements under Section 313 Cr.P.C. could be recorded on 27.08.2016 after a period of over 10 months; that since 27.08.2016 was fixed for recording the statements of accused persons under Section 313 Cr.P.C, this application was moved on 26.08.2016 just one day before the date fixed, so that the proceeding of case may further be adjourned; that the application under Section 482 Cr.P.C. has been moved with malafide intention to further delay the disposal of trial and is liable to be rejected.

In application No.27370 of 2016 learned counsel for the applicant/ the first informant contended that regarding incident dated 21.10.2012, committed by the Opposite party No.2 along with his two sons Jaspreet and Taranpreet, a prompt F.I.R. was lodged by applicant on the same day under Sections 452 & 307 IPC, in which the bail application of accused/opposite party no.2 was dismissed by this court by order dated 21.01.2013 at Annexure No.2, with a direction to trial Court to conclude the trial expeditiously on day to day basis

preferably within a period of six months from the date of production of copy of the order; that in above order at Annexure No.2, this Court observed that the bailed out applicant Nirmal Singh Garewal, opposite party No.2 is a lawyer, but has no respect to the judicial system and on rejection of his bail application by Session Judge, Bareilly, several members of bar at his instance vandalized the court room of Sessions Judge, Bareilly and stormed entire Court campus at Bareilly; that opposite party No.2 moved second bail application, which was allowed by this court by a detailed order dated 25.07.2013 at Annexure No.3, with a further direction to trial court for expeditious disposal of the case; that opposite party no.2 again moved three applications under Section 482 Cr.P.C., which were disposed of by this Court by common order dated 09.04.2014 at Annexure No.4, with the direction to trial court not only to proceed with the trial expeditiously, but also to proceed with the trial, even if, any application or petition is pending before this court, except where specific order of stay has been passed by this court; that the delaying tactics adopted by unscrupulous type of accused persons can be measured from the chart at Annexure No.6, which shows that cross examination with prosecution witnesses Nitin Jaiswal-the first informant continued for 35 dates, in 137 pages, of Scahin Jaiswal-injured witness for 9 dates in 59 pages, of Constable-Rakshpal Singh for 7 dates, of Prashant Kumar for 27 dates in 102 pages, and of Dr. Brijeshwar Singh for 12 dates in 28 pages and so on; that on another application of applicant (first informant) under Section 482 Cr.P.C., this Court vide order dated 23.07.2015, at Annexure No.10, directed the trial court for expeditious disposal of trial on day to day basis, if possible, within six months, which period was reduced to two months by way of correction order dated 07.08.2015, at Annexure No.11; that despite repeated orders of this court as mentioned above, the opposite party No.2 and his sons, the co-accused persons are continuing to move one frivolous application after the other including the applications for transfer of the case, which were rejected by the trial court vide order dated 14.03.2016, at Annexure No.13; that another application moved before the Sessions Judge, Bareilly for transfer of trial was rejected by the Sessions Judge, Bareilly vide order dated 23.0.2016, at Annexure No.14 whereafter the accused-applicant approached this Court through transfer application No.179 of 2016, which was dismissed by this Court by detailed order dated 08.07.2016, at Annexure No.15; that inspite of rejection of above applications, the illegal designs of accused persons did not stop; that the opposite party no.2 and co-accused persons continued to make misuse the process of court, and approached the Apex Court against the order dated 08.07.2016 passed by this Court rejecting the transfer application, which too was dismissed by Apex Court vide order dated 08.08.2016, at Annexure No.16; that after rejection of S.L.P. against the rejection of transfer application, the accused persons again moved Application Nos. 235-B, 236-B, 232-B before the trial court, which were dismissed with costs of Rs.1,000/- on accused vide order dated 22.08.2016 at Annexure No.17; that the chart at Annexure No.12

shows that the accused persons moved as many as 13 applications for adjournment of case apart from various frivolous applications every now & then; that the certified copy of order sheet of trial court at Annexure No.19, makes it clear that opposite party No.2 and his sons, the three accused persons in this case, are willfully and deliberately flouting the orders of this Court being Advocate and sons of Advocate; that despite being Advocate, the opposite party no.2 has no respect even for the orders of this Court what to say about respecting the Court of Sessions Judge or Additional Sessions Judge/ trial court; that in the circumstances, trial court was directed to decide the trial as expeditiously possible within six months from 21.01.2013, but after lapse of over 44 months from the above initial order followed by subsequent orders as well as last order dated 07.08.2015 (more than 13 months ago) for expeditious disposal within two months, the trial court may again be directed to decide the trial expeditiously within a period of one month from the date of production of copy of order before it.

Per contra, learned counsel for the opposite party No.2 contended that opposite party No.2 has not committed any abuse of process of Court that in (2015) 3 Supreme Court Cases (Criminal) 862 in the Case of Bablu Kumar Vs. State of Bihar, the Apex Court has held that the direction for conclusion of trial within a fixed duration does not mean mechanical conclusion of trial anyhow, regardless of whether justice is miscarried and the trial court can always seek extension of time from that court to ensure fair trial.

Upon hearing the learned counsel for the parties and perused the record, I have come to the conclusion that the application Under Section 313 Cr.P.C. moved by accused-applicant Taran Preet Garewal and another on 26.08.2016 (after a period of 10 months from completion of prosecution evidence on 23.10.2015), for summoning the witnesses, which were discharged 3 years ago on 04.06.2013, was malafide and misconceived and has been rightly rejected by the trial court. The learned counsel for the accused-applicant Taran Preet Garewal failed to show any illegality, irregularity, incorrectness or impropriety in the impugned order dated 27.08.2016 rejecting the application of accused under Section 311 Cr.P.C. The learned counsel for the applicant has failed to show that the impugned order dated 27.08.2016 if allowed to stand, may cause any miscarriage of justice or injury to the accused persons and that quashing of the same is necessary in order to secure the ends of justice. From material on record, I find that the learned counsel for the applicant has failed to show any sufficient ground, which may require exercise of inherent powers by this court for preventing any alleged abuse of process of Court. It is proved from the material brought on record that the accused themselves are committing abuse of the process of Court by flouting the repeated orders of this Court for expeditious disposal of the case. The application under Section 482 Cr.P.C. No.27511 of 2016 is frivolous, vexatious and devoid of merits and is liable to be dismissed.

It is clear from the material on record that the accused persons including bailed out accused Nirmal Singh Garewal, an advocate are committing abuse of process of court by moving one frivolous application or the other and approaching this Court every now and then by filing one frivolous application or the other under Section 482 Cr.P.C. or under Section 397/401 Cr.P.C. or even transfer application. In the circumstances, it is necessary to observe that the bailed out accused Nirmal Singh Garewal, who is also an Advocate, with co-accused persons, his sons, is making misuse of his professional degree. The conduct of accused persons indicates that they have no respect for the Courts as well as orders passed by Court. The law relied on behalf of opposite party Sri Nirmal Singh Garewal has no application to the facts of the case.

In view of the facts and circumstances brought before this Court through application No.27370 of 2016 and in view of the earlier orders dated 25.07.2013, 09.04.2014, 23.07.2015 and 07.08.2015 of this Court directing expeditious disposal of the trial in time bound period, the application No.27370 of 2016 is liable to be allowed with further direction to trial court for expeditious disposal of the trial by proceeding from day to day and if possible within two months from the date of submission of copy of this order before this Court without granting any unnecessary adjournment to the accused-persons.

However, if the trial Court finds that the opposite party Nirmal Singh Grewal or his sons the co-accused persons are continuing to follow the same delaying tactics by moving frivolous applications, the same shall be disposed of expeditiously in accordance with law by appropriate orders, including order for imposition of special costs on accused-persons if so required. If the trial is not concluded within a period of 2 months due to misconduct of accused persons, it will be deemed that opposite party Nirmal Singh Grewal is making misuse of liberty of bail and on being approached, this Court shall be compelled to curtail the liberty so granted and cancel the bail granted to him vide order dated 25.07.2013.

Accordingly, application No.27370 of 2016 is allowed with the directions to the trial court for expeditious disposal of trial within two months from the date of production of copy of order before it and application No.27511 of 2016 is dismissed with costs."

18. He, therefore, submits that in view of facts as noted herein above and also findings recorded in the order dated 2.12.2016, passed by Additional Sessions Judge, Court No. 1, Bareilly, rejecting the application under section 309 Cr.P.C. filed by accused, it is explicit that the trial is at an advanced stage. Evidence has already been recorded and now only the accused have to give their defence testimony as provided under Section 313 Cr.P.C. The order dated 15.12.2016 runs counter to the order dated

23.07.2015 passed by this Court in Criminal Misc. Application U/S 482 Cr.P.C. No. 20143 of 2015 (Nitin Jaiswal Vs. State of U.P. and another) as corrected, vide order dated 7.8.2015, wherein it was provided that Sessions Trial 123 of 2013 (State Vs. Nirmal Singh Garewal and others) be decided on day to day basis within a period of two months.

19. The incident giving rise to Complaint Case No. 1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal and others) under Sections 307, 436, 392, 380, 504 and 506 I.P.C., P.S. Kotwali Bareilly, District-Bareilly, arising out of Case Crime No.2675 of 2012 under Sections 307, 452, 427, 504, 506, 380, 426 and 392 I.P.C. P.S.-Kotwali Bareilly, District-Bareilly and S.T. No. 123 of 2013 (State Vs. Nirmal Singh Garewal and others) under Sections 452 and 307 I.P.C. P.S.-Kotwali Bareilly, District-Bareilly, arising out of Case Crime No. 2568 of 2012 under Sections 452 and 307 I.P.C. P.S.-Kotwali Bareilly, District-Bareilly, are not similar and therefore the two cases are not cross-cases. He further submits that in case a parallel is drawn between the two F.I.Rs. or the Two Case Crime numbers following distinctions are clearly evident. The F.I.R. dated 25.11.2012 registered as Case Crime No. 2675 of 2012 under sections 307, 452, 427, 504, 506, 380, 426, 392 IPC, lodged by Nirmal Singh Garewal is in respect of an incident, which took place on 21.10.2012 at 3 a.m. and the place of occurrence has been shown as 126, Civil Lines, situate in Southern direction and at a distance of 3 km. from Police Station Kotwali Sadar, District Bareilly. However, F.I.R. dated 21.10.2012 registered as Case Crime No. 2568 of 2012 under sections 452, 307 IPC contains a recital that the incident took place on 21.10. 2012 at 6 a.m. at 126A, Civil Lines, situate at a distance of 2 km. and in the Southern direction from the Police Station Kotwali Sadar, District Bareilly.

20. It is then contended that the last direction of order dated 15.12.2016, whereby it has been directed that the proceedings of S.T. No. 123 of 2013 may go on, but no final order may be passed amounts to a perpetual injunction on the power of the Court restraining it from deciding a case,

which is not permissible under law.

21. He has further submitted with vehemence that various facts have been concealed in the present application, which can be brought to the notice of the Court when the matter is heard and opportunity of hearing is afforded to opposite party no.2. In support of aforesaid submission, reliance is placed upon paragraphs 32 to 55 of the affidavit filed in support of recall application.

22. It is also contended that applicant has concealed materials facts as stated in paragraphs 32 to 35 of the affidavit filed in support of recall application and in that eventuality, the present application under Section 482 Cr.P.C. filed by accused-applicant Jaspreet Singh Garewal is liable to be dismissed on the ground of concealment of material facts.

23. On the aforesaid factual and legal premise, it is vehemently urged by Mr. Anoop Trivedi, learned Senior Counsel that recall application and pending Criminal Misc. Application may be heard and decided together finally. To sum up his arguments, Mr. Anoop Trivedi, learned Senior Counsel has submitted that recall application is being pressed on limited grounds that the order dated 15.12.2016, whereby the application under Section 482 Cr.P.C. filed by accused-applicant Jaspreet Singh Garewal has been decided ex-parte inasmuch as even though, the applicant Nitin Jaiswal was impleaded as the opposite party No. 2 in the memo of petition, but no notice was issued to him and the final order has been passed against him without affording any notice or opportunity of hearing causing serious prejudice to the opposite party no.2. It is then urged that the petition as presented suffers from the vice of concealment of material facts and once an opportunity is granted to the applicant-opposite party no.2 to bring on record those facts then in that eventuality, the petition itself is liable to be dismissed.

24. To lend legal support to his submissions, learned Senior Counsel has relied upon judgement of Apex Court in the case of *Vishnu Agarwal*

Vs. State of U.P. and another reported in 2011 (14) SCC 813, Judgement of learned Single Judge of Allahabad High Court in *Jawahar Lal @ Jawahar Lal JalaJ Vs. State of U.P.* reported in 2015 (91) ACC 128, judgement of Apex Court in *State of Punjab Vs. Devendar Pal Singh Bhullar and others* reported in 2011 (14) SCC 770, judgement of Apex Court in *Makkapati Nagaswara Sastri Vs. S.S. Satyanarayan* reported in 1981 (1) SCC 62, the Full Bench decision of Rajsthan High Court in the case of *Habu Vs. State of Rajsthan* reported in AIR 1987 RAJ 83, the Full Bench decision of this Court in the case of *Rajnarayan and others Vs. The State of U.P.* reported in A.I.R. 1959 ALL 315 and judgement of Apex Court in *Khoday Distillers Ltd. (Now known as Khoday India Limited and others) Vs. Sri Mahadeshwara Sahakara Sakkare Karkhane Ltd. Kollegal (Under Liquidation) Represented by the Liquidator* reported in 1995 SCC (1) 574.

25. Per-contra, Mr. Sikandar B. Kochar, learned counsel for applicant has opposed the recall application filed by opposite party No. 2. Countering the submissions made by learned Senior Counsel appearing for opposite party no.2, he submits that prior to passing of the order dated 15.12.2016 by this Court, Investigating Officer while submitting final report dated 19.12.2012 in Case Crime No. 2675 of 2012 had opined that Case Crime No. 2675 of 2011 and Case Crime No. 2568 of 2012 appear to be in the same sequence of events. He thus submits that the concession given by learned A.G.A. before his Lordship Hon'ble Mr. Justice R.D. Khare at the time of hearing of the present application on 15.12.2016 cannot be said to be contrary to facts on record.

26. Attention of the Court was then invited to order dated 13.7.2017 passed by Sessions Judge, Bareilly, whereby Misc. Case/Transfer Application No.113 of 2017 (Nirmal Singh Garewal Vs. Nitin Jaiswal and 6 others) filed by Nirmal Singh Garewal was allowed and Additional Chief Judicial Magistrate Court No.2, Bareilly, was directed to transfer

Complaint Case No. 1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal) under Sections 456, 427, 143 I.P.C., arising out of Case Crime No. 2675 of 2012 under Sections 307, 452, 427, 504, 506, 380, 426 and 392 I.P.C., P.S.-Kotwali Bareilly, District-Bareilly to the Court of 1st Additional Sessions Judge, Bareilly, to buttress the submission that even the Sessions Judge, Bareilly, while considering the transfer application had opined that where the Magistrate refuses to transfer the cross-case to the Court of Sessions by exercising powers under Section 323 Cr.P.C. then in that eventuality the Sessions Court by taking recourse to Section 408 (1) Cr.P.C. can transfer the cross-case to the Court of Sessions. It is pertinent to mention here that while passing the order dated 13.07.2017, the Sessions Judge, Bareilly, relied upon the earlier order dated 15.12.2016, which is sought to be recalled, passed by His Lordship Hon'ble Mr. Justice R.D. Khare and on the basis of the said order, opined that the transfer application needs to be allowed with a direction to the Additional Chief Judicial Magistrate Court No. 2, Bareilly, to transfer the record of Complaint Case No. 1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal) under Sections 307, 436, 392, 380, 504 and 506 I.P.C., P.S. Kotwali Bareilly, District-Bareilly to the Court of Ist Additional Sessions Judge, Bareilly. On the aforesaid facts, it is thus urged that Complaint Case No. 1716 of 2016 and S.T. No. 123 of 2016 are cross-cases and therefore, the concession conceded by learned A.G.A. at the time of passing of order dated 15.12.2016 cannot be said to be illegal.

27. Order dated 13.07.2017 was challenged by Nitin Jaiswal by filing Criminal Misc. Application U/S 482 Cr.P.C No. 22262 of 2017 (Nitin Jaiswal Vs. State of U.P. and another), which was dismissed, vide order dated 29.08.2017. For ready reference order dated 29.08.2017 is reproduced herein-below:

“ Heard Sri Anoop Trivedi, learned counsel for the applicant, Sri Sikander B. Kocher as well as the learned A.G.A. for the State and perused the record.

By means of the instant 482 petition the applicant has invoked the power of this court under Section 482 Cr.P.C. to quash the order dated 13.7.2017 passed by the learned Sessions Judge, Bareilly in Criminal Misc. Transfer Application No. 113 of 2017 (Nirmal Singh Garewal Vs. Nitin Jaiswal and others).

The transfer application moved by the respondent no. 2 along with an affidavit with a prayer to transfer the Case No. 1716 of 2016, under Sections 456, 427 and 143 I.P.C., police station Kotwali, district Bareilly from the court of Additional Chief Judicial Magistrate, Bareilly to the court of First Additional Sessions Judge, Bareilly where S.T. No. 123 of 2013 (State vs. Nirmal Singh and others), under Sections 307 and 452 I.P.C. is pending.

It is submitted by the learned counsel for the applicant that a first information report was lodged by the applicant against the respondent no. 2 Nirmal Singh Garewal and two others, namely, Jasprit Singh Garewal and Taranpreet Singh Garewal under Sections 452, 307 I.P.C on 21.10.2012 at 6.55 A.M. with respect to the incident dated 21.10.2012 at 6 A.M. In respect of the aforesaid offence the accused/respondents are facing trial in pursuance of the aforesaid first information report lodged by Nitin Jaiswal in S.T. No. 123 of 2013. This court by order dated 21.1.2013 directed the trial court to conclude the trial expeditiously on day to day basis preferably within a period of six months. On account of dilatory tactics played by the opposite party no.2 and his sons the trial has yet not been decided besides four years have elapsed despite this court has passed specific orders in several other 482 petitions filed on behalf of the applicants or by the opposite party no. 2. At a very belated stage, the opposite party no.2 moved an application under Section 309 (1) (a) Cr.P.C. on 29.11.2016 contending therein that a cross case is pending before the court of Additional Chief Judicial Magistrate, Court No. 2, Bareilly and hence an appropriate order be passed. The said application was rejected by the learned Additional Sessions Judge, Court No. 1, Bareilly vide order dated 2.12.2016. Jasprit Singh Garewal filed a 482 petition before this Court, which was numbered as 482 Petition No. 38644 of 2016, which was

finally disposed of by another Bench of this Court on 15.12.2016. Pursuant to the order dated 15.12.2016 an application was moved by the opposite party no. 2 to pass appropriate order in the light of the observation made in the said order. The transfer application, which was moved by the opposite party no. 2 was only to delay the trial proceeding before the court of Sessions by the opposite party no. 2 and other when there was a specific order of this court for early disposal of the case within a stipulated period but without considering any aspect of the matter the learned Sessions Judge has proceeded to pass the order impugned by which the Additional Chief Judicial Magistrate, Court No. 2, Bareilly has been directed to transmit/transfer the file of Case No. 1716 of 2016 (Nirmal Singh Vs. Nitin Jaiswal) under Sections 456, 427 and 143 I.P.C. forthwith to the court of Additional Sessions Judge, Bareilly. The order passed by the learned Sessions Judge is absolutely without jurisdiction as the learned Sessions Judge is not empowered to transfer the trial, which is cognizable by the court of Magistrate as it is against the provisions of Section 408 Cr.P.C. Section 408 Cr.P.C. do not authorize the District Judge to assign the trial of a case triable exclusively by a court of Magistrate to court of Sessions. The application for transferring the case pending before the Chief Judicial Magistrate to the court of Sessions with regard to an application under Section 309 (1) (a) Cr.P.C. is pending in the court of Chief Judicial Magistrate, Court No. 2 Bareilly hence the application moved under Section 408 Cr.P.C. by the opposite party no. 2 before the District Judge, Bareilly is not maintainable on the ground that an application filed by the opposite party no. 2 under Section 323 Cr.P.C. in case No. 1716 of 2016 in the court of Additional Chief Judicial Magistrate, Court No. 2, Bareilly was rejected by the court concerned by an order dated 19.11.2016. The said order has attained finality and thus the order under challenge passed by the District Judge exercising power under Section 408 Cr.P.C. for transferring the trial of Case No. 1716 of 2016 from the court of Additional Chief Judicial Magistrate, Court No. 2, Bareilly to the court of District & Sessions Judge, Barielly is per se without jurisdiction, arbitrary unreasonable and illegal,

which is in gross contravention of the provision of Section 209 Cr.P.C. It is further contended that the sessions court gets jurisdiction to deal with the matter only after the case is instituted upon by police or otherwise is committed by the court of Magistrate. When the power conferred under Section 209 or under Section 323 is exercised only then the provisions of Chapter XVIII would be applicable to such cases. The order passed by the court below is also in contravention of the various orders passed by this court to conclude the trial on day to day basis within two months, which was passed in Criminal Misc. Application No. 20143 of 2015, thus the opposite party no. 2 is somehow trying to elongate the proceeding in which the opposite party no. 2 along with two others are the accused persons and the trial is at the fag end thus by moving the transfer application the opposite party no. 2 has somehow obtained favourable order by the impugned order whereby it has been directed to transfer the case which is pending before the concerned Magistrate to the court of Additional Sessions Judge, Bareilly, which is unsustainable in the eye of law, hence liable to be rejected by this Court.

Learned counsel appearing on behalf of the opposite party no.2 has submitted that in respect of the incident which had taken place on 21.10.2012 the first information report was lodged against the opposite party no. 2 Nirmal Singh Garewal and his two brothers under Sections 452 and 307 I.P.C. as case Crime No. 2568 of 2012 on the same day the opposite party no. 2 also went for lodging the first information report but the same was not lodged by the police, then an application was moved under Section 156 (3) Cr.P.C. on 22.10.2012 pursuant to which a first information report was lodged by the police against the applicant and five others under Sections 307, 452, 427, 504, 506, 380, 436 and 392 I.P.C. as case Crime No. 2675 of 2012. The matter was investigated by the Investigating Officer and a final report was filed on 19.12.2012 and after further investigation the police again submitted the second final report on 16.8.2013. The matter was again sent further investigation and the police reiterated the final report and then the opposite party no.2 filed a protest petition

before the court below and the court below proceeded to pass the order on 8.2.2016 rejecting the final report and treated the protest petition as complaint Case No. 1716 of 2016. After the statements of the complainant and witnesses were recorded under Sections 200 and 202 Cr.P.C. the applicant and others were summoned by the learned Magistrate by order dated 5.9.2016 under Sections 143, 456, 427 I.P.C. in complaint Case No. 1716 of 2016. The applicant did not appear before the court despite having full knowledge of summoning order with the sole intention that the case against the opposite party no. 2 may proceed and the cross version of complaint Case No. 1716 of 2016 may remain kept pending. Pursuant to the order of this court it was directed to proceed with the case on day to day basis and trial be concluded if possible within two months. Since the applicant and others had already been summoned in complaint case the application under Section 323 Cr.P.C. was filed before the Additional Chief Judicial Magistrate for committing the case to the court of sessions where S.T. No. 123 of 2013 is proceeding so that both the cases be heard and decided in accordance with law. It is settled law as held by the Hon'ble Apex Court in number of cases that counter or cross cases should be decided by the same court hence the learned Sessions Judge after considering that the date of incident in both the cases is the same, which took place between both the parties on the same date passed the order impugned that both the cases have to be tried by the same court. The learned District Judge has committed no error in allowing the application moved by the opposite party no. 2 exercising power under Section 408 (2) Cr.P.C. directing the Additional Chief Judicial Magistrate, Court No. 2, Bareilly to transmit the record of Case No. 1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal) under Sections 456, 427 and 143 I.P.C to the court of Ist Additional District & Sessions Judge, Bareilly. By challenging the order passed by the learned District Judge the applicant himself is trying to elongate the proceeding when the order passed by the learned Sessions Judge was well within its jurisdiction. The cases cited by the learned counsel for the applicant is not applicable in the present facts and circumstances of the case. There is no infirmity in the

order passed by the court below, hence the petition may be dismissed with special costs as fraud and perjury has been committed by the applicant while filing the instant application for which an application has already been moved under Section 340 and 195 Cr.P.C. for initiating proceedings to take cognizance for the fraud played by the applicant upon the court of law which should not be ignored.

I have considered the submissions of the learned counsel for the parties. From the perusal of the record it is not disputed that both the sides have lodged cases against each other in respect of the incident of the same date. The first information report, which was lodged by the applicant the trial has been proceeded against the opposite party no. 2 and other persons. The first information report in respect of the incident of the same date could not be lodged on behalf of the opposite party no. 2 against the applicant and others and on account of repeated submissions of final report the protest petition was filed by the opposite party no. 2 and on the basis of the statement of the complainant and witnesses under Sections 200 and 202 Cr.P.C the learned Magistrate treating the protest petition as a complaint proceeded to pass order summoning the applicant and other persons to face trial. It is an admitted fact that there is cross case which should be heard and decided by the same court. In view of the law laid down by the Hon'ble Apex Court in Nathi Lal and others reported in 1990 SCC Criminal 638 that the counter cases should be tried in quick succession by the same judge by the same court who should not pronounce the judgment till the hearing of both the cases is finished. After recording of evidence in one case is completed the trial judge must hear the argument and reserve the judgment and thereafter he must proceed to hear the cross case and after recording of the evidence he must hear the argument and reserve the judgment and thereafter dispose of the matter by two separate judgments. In other words case must be decided on the basis of the evidence, which has been placed on record in that particular case without being influenced in any manner by the evidence or arguments urged in the cross case. In Sudhir and

others Vs. State of M.P. reported in A.I.R. 2001 SC 826 while relying upon the aforesaid decision in (Natthi Lal) supra the Hon'ble Apex Court has exhaustively dealt with the case and counter case relating to the same incident and even one of those cases involves offence not exclusively triable by Sessions Court, could be tried in the manner indicated in Natthi Lal's case. The practical reason in adopting the procedure that such cross cases shall be tried by the same court has been summarized thus;

(I) It staves off the danger of an accused being convicted before his whole case is before the court;

(ii) It deters conflicting judgments being delivered upon similar facts; and (iii) In reality the case and the counter case are to all intents and purposes different or conflicting versions of one incident.

The Hon'ble Apex Court has further observed that from the aforesaid decisions it is crystal clear that in a situation where one of the two cases relating to the same incident is charge sheeted, involves offence or offences exclusively triable by a court of Sessions, but none of the offences involved in other case is exclusively triable by the court of Sessions, the Magistrate before whom the former case reaches has no escape from committing the case to the Sessions Court as provided in Section 209 of the Code. Once the said case is committed to the court of Sessions court, thereafter it is governed by the provisions subsumed in Chapter XVIII of the Code. Though the cross case cannot be committed in accordance with Section 209 of the Code, the Magistrate has nevertheless power to commit the case to the Court of Sessions, albeit none of the offences involved therein is exclusively triable by the Sessions Court. Section 323 is incorporated in the Code to meet similar cases also. The Sessions Judge has to exercise discretion regarding the cases, which he has to continue for trial in his court and the case, which has to be summoned from the court of Chief Judicial Magistrate. When earlier 482 petition was filed by the respondents there was clear observations that there are two cross cases for which the direction was given for re-consideration of the matter. The present

impugned order has been passed, which has been challenged by means of the instant petition under Section 482 Cr.P.C. The learned Sessions judge is fully empowered to withdraw any case at any time before the trial of the case from one court to another court in his session division. The trial in both the cases must be decided by the same judge one after the other. This court does not find any illegality or perversity in the impugned order which was passed against the applicant and six others but the applicant alone has challenged the order on flimsy ground installing the entire proceeding which is pending against the applicant and others as complaint case.

In view of the above prolix and verbose discussion, the petition lacks any merit and is accordingly dismissed.

The learned court below is directed to proceed with the police case and the cross case instituted by the complainant by way of complaint and decide the trial in both the matter in the light of the direction given herein above. It is further directed that the learned court below will accord priority to the cross case and dispose of both the cases expeditiously”

28. Against order dated 29.08.2017, Special Leave to Appeal (Crl.) No. 8152 of 2017 was filed by Nitin Jaiswal before the Apex Court, which was decided finally, vide order dated 06.11.2017. For ready reference order dated 06.11.2017 is reproduced herein-below:

“In the peculiar facts of this case, we are not inclined to entertain the present petition as the order of consolidation of two cases is substantially correct. However, we leave the question open as to whether the Additional Sessions Judge had the power to order consolidation of the cases under Section 408 of the Cr.P.C., even when we find that the Additional Sessions Judge did not have the power to do so.

We are also conscious of the fact that insofar as the case filed by the petitioner is concerned, it has already reached the advanced stage of final arguments. In these circumstances, we would impress the Trial Court to have expeditious trial of the case which is filed by the respondent, possibly within one year.

The Special Leave Petition is disposed of.

Pending applications(s), if any, stands disposed of accordingly.”

29. It is thus urged by Mr. Sikandar B. Kochar, learned counsel for applicant that in view of order dated 06.11.2017 passed by Apex Court, this Court cannot sit in appeal over order dated 06.11.2017 and consequently, recall application filed by opposite party no.2 is liable to be rejected.

30. In continuation of his opposition to the recall application, it was then submitted by Mr. Sikandar B. Kochar, learned counsel for the applicant that His Lordship Hon'ble Mr. Justice B.K. Narayan passed interim order dated 17.4.2014 in Criminal Misc. Application No. 11932 of 2014. For ready reference, order dated 17.04.2014 is reproduced herein below:

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

Notice on behalf of the opposite party no. 1 has been accepted by learned AGA. He prays for and is allowed six weeks' time to file counter affidavit.

Issue notice to opposite party no. 2, who may also file counter affidavit within the same period.

Rejoinder affidavit may be filed within two weeks thereafter.

List after expiry of the aforesaid period.

It is contended that this is cross case. In the case registered against the opposite party no. 2 at the behest of the applicant final report has been submitted against which he has preferred a protest petition which is pending before the concerned Magistrate, while the instant case in which the applicant is an accused is proceeding. He further submitted that that the investigation in the matter was done by the I.O. in an extremely unfair manner with the object of conferring undue benefit on the opposite party no. 2, who is under the influence of opposite party no. 2 and accordingly further investigation is required.

Considering the submissions made by learned counsel for the applicants, it is directed that till the next date of listing, the proceedings of the

Sessions Trial no. 123 of 2013, Case Crime no. 2568 of 2012, State Vs. Nirmal Singh Garewal and others, under sections 452, 307 IPC, P.S. Kotwali, District Bareilly may go on but the judgement will not be pronounced.”

31. The aforesaid Criminal Misc. Application was filed with a prayer that further proceedings of Case Crime No. 2568 of 2012 (Nirmal Singh Garewal Vs. State of U.P. and another) under sections 452, 307 IPC pending in the Court of Additional Sessions Judge, Court No.1, Bareilly be stayed, with a further prayer that direction for further investigation of the Case Crime No. 2568 of 2012 under sections 452, 307 IPC, P.S. Kotwali Sadar, District Bareilly by the C.B.I or any other investigating agency be passed. Feeling aggrieved by interim order dated 17.04.2014, opposite party no.2 therein namely Nitin Jaiswal filed a recall application, which was registered as Criminal Misc. Recall Application No.172452 of 2014. This recall application came to be allowed, vide order dated 23.12.2014 passed by Hon'ble Mr. Justice B. K. Narayana. For ready reference order dated 23.12.2014 is reproduced herein below:

“This application has been moved on behalf of the opposite party no. 2, Nitin Jaiswal with the prayer to recall the interim order dated 17.4.2014 passed by this Court in the present case. The recall application is supported by a counter affidavit sworn by Sri Nitin Jaiswal, opposite party no. 2.

Rejoinder affidavit and supplementary affidavits which have been filed by Sri Sikandar B. Kochar on behalf of the applicant today are kept on record.

Learned counsel for the opposite party no. 2 submitted that the applicant Nirmal Singh Garewal, who is facing trial for the offences punishable under Sections-452 and 307 IPC in S. T. No. 123 of 2013 has obtained an ex parte interim order in his favour from this Court on 17.4.2014 in this case by suppressing material facts including the earlier orders passed by this Court in different proceedings arising out of the same session trial. He further submitted that this Court while rejecting the first bail application being Criminal Misc. Bail Application No. 364 of 2013 filed

by the applicant by order dated 21.1.2013, copy whereof has been filed as Annexure-CA, had directed the trial court to conclude the trial expeditiously on day to day basis preferably within a period of six months from the date of receiving of the copy of the order of this Court. He also drew the attention of this Court to the order dated 25.7.2013 passed by this Court in Criminal Misc. Bail Application No. 17956 of 2013, copy whereof has been filed as Annexure CA 3 to the counter affidavit, by which the applicant was enlarged on bail by this Court with a specific direction to the trial court to decide the case expeditiously. Sri Anoop Trivedi, learned counsel for the opposite party no. 2 next referred to the order of this Court dated 21.5.2013 passed in Criminal Misc. Application (U/s 482 Cr. P. C.) No. 16535 of 2013; Nirmal Singh Garewal Versus State of U. P. and another, copy whereof has been filed as Annexure CA 2, by which this Court rejected the aforesaid application filed by the applicant against the order dated 27.4.2013 passed by the Additional Sessions Judge, Court No. 1, Bareilly in Session Trial No. 123 of 2013, under Sections-452, 307/34 IPC, P. S.-Kotwali, district-Bareilly whereby application moved by the applicant before him for conducting spot inspection was rejected as well as the order dated 9.4.2014 passed by this Court whereby three applications under Section-482 Cr. P. C. nos. 3811 and 6775 of 2014 preferred by the applicant and 6095 of 2014 preferred by the complainant-opposite party no. 2 before this Court were finally disposed of with a direction to the trial court not only to proceed with the trial expeditiously but also to proceed with the trial irrespective of the pendency of any application or petition before this Court except where specific order of stay has been granted by this Court (Annexure 5 to the affidavit accompanying recall application). This Court while deciding the aforesaid applications had issued several directions to the trial court for concluding the trial expeditiously on day to day basis.

Advancing his submissions further, Sri Trivedi urged that in case abovenoted orders were brought to the notice of this Court by the applicant, he may not have succeeded in obtaining any ex parte interim order in his favour from this Court.

He lastly submitted that the applicant having failed to approach this Court with clean hands and succeeded in obtaining an ex parte interim

order in his favour without disclosing the entire facts and circumstances of the case and the details of previous cases filed by him before this Court and the orders passed therein, the order dated 17.4.2014 is liable to be recalled.

Per contra, Sri Sikandar B. Kochar, learned counsel for the applicant vehemently submitted that the prayer made by the applicant in this application is founded upon allegations which have no connection with the earlier proceedings initiated before this Court by the applicant and the opposite party no. 2 and the orders passed by this Court therein and even if the litigative history between the parties was disclosed by the applicant, the same would not have made any difference to the merit of the present case. He next submitted that there is cross version of the incident also which was registered as Case Crime No. 2675 of 2012, under Sections-307, 452, 427, 504, 506, 380, 436 and 392 IPC at P. S.-Kotwali, sub-district-Sadar, district-Bareilly against the informant in the present case and several other persons.

Learned counsel for the applicant also submitted that initially after registration of Case Crime No. 2568 of 2012 against the applicant and his two sons in pursuance of the first information report lodged by the opposite party no. 2, the matter was investigated by the S. S. I. Brahmanand of P. S.-Kotwali, district-Bareilly. The investigation was later transferred to Prashant Kumar who is hand in glove with the opposite party no. 2. The aforesaid Prashant Kumar made some interpolations in the parcha prepared by S. I. Brahmanand, the earlier I. O. Strangely, the investigation of the cross case was also entrusted to him and who without making proper investigation submitted final report in the cross case against which the protest petition filed by the applicant is still pending. He next submitted that in view of the settled legal position on the issue that the cross cases should be decided together, in case the session trial in which the applicant is an accused is decided separately, the same will result in failure of justice. He also submitted that the applicant has disclosed each and every material fact necessary to enable this Court to decide whether the applicant is entitled to the prayer made by him in this application or not. There being no suppression of any material fact by the applicant, this recall application deserves to be rejected.

After having considered the submissions made by learned counsel for the parties and perused the material on record, I find that there is no dispute about the fact that a cross version of the incident which has been registered as Case Crime No. 2675 of 2012, under Sections-307, 452, 427, 504, 506, 380, 436 and 392 IPC, P. S.-Kotwali, sub-district-Sadar, district-Bareilly in which final report has been submitted and against which protest petition has been filed by the applicant is pending. There is no quarrel about the settled legal position that where there are cross cases, the same should be decided together. It is equally true that prior to moving this application, the applicant had approached this Court twice for being enlarged on bail by means of Criminal Misc. Bail Application Nos. 364 of 2013 and 17956 of 2013. He had further invoked the inherent jurisdiction of this Court by means of filing Criminal Misc. Application (Under Section 482 Cr. P. C.) Nos. 16535 of 2013, 3811 and 6775 of 2014. The aforesaid cases were disposed of by this Court with directions.

Thus, in view of the above, it transpires that the applicant has failed to disclose in this application the details of the cases filed by him before this Court earlier and the orders passed therein and although in the strict sense it cannot be said that had the aforesaid facts been disclosed in this application, this Court would not have passed any interim order in favour of the applicant but nevertheless the Court cannot ignore the fact that the applicant had failed to disclose in this application the details of the earlier cases filed by him before this Court and orders passed by this Court therein which have now been brought to the notice of this Court by the opposite party by moving the present recall application.

For the aforesaid reasons, this recall application is allowed. The order dated 17.4.2014 passed by this Court in this case is hereby recalled.

List this application before the appropriate Court on 19.1.2015.”

32. Mr. Sikandar B. Kochar, learned counsel for accused-applicant invited the attention of the Court to the 3rd paragraph at internal page no.3 of the order dated 23.12.2014 (which has been highlighted by me) to submit that Hon'ble Court has been pleased to observe that cross version of the incident has been registered as Case Crime No. 2675 of 2012 under

Sections 307, 452, 427, 504, 506, 380, 436 and 392 I.P.C. P.S.-Kotwali, District Bareilly.

33. On the basis of aforesaid recital contained in order dated 23.12.2014, it is urged by Mr. Sikandar B. Kochar, learned counsel for accused-applicant that this Court, vide order dated 23.12.2014 had already opined that the two cases between the parties are cross cases. As such order dated 15.12.2016, whereby this Court held that the two cases are cross-cases on the basis of concession conceded by learned A.G.A. cannot be faulted with. Furthermore, in view of order dated 23.12.2014 referred to above, there is no room before this Court to sit in appeal over that order or direction or to proceed with the matter in compliance of earlier interim order dated 03.08.2018 passed in Criminal Misc. Application U/S 482 Cr.P.C. No.25681 of 2018 (Nitin Jaiswal Vs. State of U.P. and another). It may be mentioned here that aforesaid Criminal Misc. Application has subsequently been dismissed as not pressed vide order 02.08.2019 passed by this Court.

34. Then reliance was placed upon order dated 16.7.2013 passed by Additional Sessions Judge, Court No. 1, Bareilly, in S.T. No. 123 of 2013 (State Vs. Nirmal Singh Garewal and others) under Sections 452, 307 I.P.C. P.S. Kotwali Bareilly, District-Bareilly, arising out of Case Crime No. 2568 of 2012 under Sections 452, 307 I.P.C., P.S. Kotwali Bareilly, District-Bareilly, whereby objection raised by one of the parties that Case Crime No. 2658 of 2012 and Case Crime No. 2657 of 2012 arise out of same incident and therefore the record of cross-case i.e Case Crime No. 2657 of 2012 may be summoned and further P.W. 4, Prashant Kumar, Sub Inspector, who had investigated both the cases may be cross-examined to ascertain the aforesaid issue. The Additional Sessions Judge, Court No. 1, Bareilly, vide order dated 16.07.2013 directed that the record of Case Crime No. 2675 of 2012 may be summoned. This order dated 16.7.2013 was challenged by Mr. Nitin Jaiswal by means of Criminal Misc. Application No. 23954 of 2013 (Nitin Jaiswal Vs. State of U.P. and

others). Aforesaid Criminal Misc. Application ultimately came to be dismissed at that stage of proceedings, vide order dated 16.10.2014. For ready reference order dated 16.10.2014 is reproduced herein-below:

“ Heard learned counsel for the applicant and learned A. G. A. for the State as well as Sri Sikandar B. Kochar, learned counsel for the opposite party No. 2.

The applicant by means of this application under Section 482 Cr. P. C. has invoked the inherent jurisdiction of this Court with the prayer to quash the order dated 16.7.2013 passed by the Additional Sessions Judge, Court No. 1, Bareilly in Sessions Trial No. 123 of 2013 by which he has allowed the application 68-Kha moved on behalf of the accused before him with a prayer for summoning the Case Diary of cross case No. 2675 of 2012, P. S.-Kotwali, district-Bareilly and the photostat copies of the other related documents from the Court of C. J. M., Bareilly and S. I. S., Bareilly as witness, has been allowed.

After having heard the submissions made by learned counsel for the parties and perused the impugned order as well as the other materials brought on record, I do not find any reason to interfere with the impugned order at this stage.

Accordingly, this application is dismissed at this stage.”

35. On the aforesaid factual premise, submission urged by learned counsel for original applicant is that recall application filed by opposite party No. 2 is thus barred by section 362 Cr. P. C., as in the garb of recall this Court cannot review order dated 12.12.2016.

36. Mr. Sikandar B. Kochar learned counsel for the applicant has relied upon the following judgements to extend legal support to his submissions:

A. Smt. Suraj Devi Vs. Pyare Lal, 1981 SCC (Cri) 188.

B. Mohd. Zakir Vs. Sabana and others 2018 (15) SCC 316

C. Atul Shukla Vs. The State of Madhya Pradesh and another 2019 (6) SCJ 246.

D. Shivpoojan Upadhyay and another Vs. State of U.P. and another 2019 (3) ALJ 407

37. On the basis of submissions urged by counsel for parties, following questions arise for determination in this recall application:

I. Whether Complaint Case No.1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal and others) under Sections 307, 436, 392, 380, 504 and 506 I.P.C., P.S. Kotwali Bareilly, District-Bareilly, arising out of Case Crime No. 2675 of 2012, under Sections 307, 452, 427, 504, 506, 380, 426 and 392 I.P.C., P.S. Kotwali Bareilly, District-Bareilly and S.T. No. 123 of 2013 (State Vs. Nirmal Singh Garewal and others) under Sections 452 and 307 I.P.C. P.S. Kotwali Bareilly, District-Bareilly, arising out of Case Crime No. 2568 of 2012 under Sections 452, 307 I.P.C. P.S. Kotwali Bareilly, District-Bareilly are cross-cases.

II. Whether the ex-parte order dated 15.12.2016 passed by this Court in exercise of its jurisdiction under Section 482 Cr.P.C. has caused serious prejudice to opposite party no.2, Nitin Jaiswal and can be recalled at the behest of opposite party no.2, who admittedly was not heard at the time of passing of order dated 15.12.2016.

III. Whether the bar of Section 362 Cr.P.C. will come into play regarding recall of ex-parte order dated 15.12.2016.

IV. Whether in view of the orders dated 29.08.2017, 31.01.2018 and 15.12.2016 passed by Apex Court, this Court has jurisdiction to entertain the recall application filed by opposite party no.2, Nitin Jaiswal.

38. Mr. Anoop Trivedi, learned Senior Counsel appearing on behalf of opposite party no.2 has tried to persuade the Court that Complaint Case No.1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal and others) under Sections 307, 436, 392, 380, 504 and 506 I.P.C., P.S. Kotwali Bareilly, District-Bareilly, arising out of Case Crime No. 2675 of 2012 under Sections 307, 452, 427, 504, 506, 380, 426 and 392 I.P.C., P.S. Kotwali Bareilly, District-Bareilly and S.T. No. 123 of 2013 (State Vs. Nirmal Singh Garewal and others) under Sections 452 and 307 I.P.C. P.S.

Kotwali Bareilly, District-Bareilly, arising out of Case Crime No. 2568 of 2012 under Sections 452, 307 I.P.C. P.S. Kotwali Bareilly, District-Bareilly are not cross-cases. He further submits that in case a parallel is drawn between the two F.I.Rs. or the Two Case Crime numbers, following distinctions are clearly evident. The F.I.R. dated 25.11.2012 registered as Case Crime No. 2675 of 2012 under sections 307, 452, 427, 504, 506, 380, 426, 392 IPC, lodged by Nirmal Singh Garewal is in respect of an incident, which took place on 21.10.2012 at 3 a.m. and the place of occurrence has been shown as 126A, Civil Lines, situate in Southern direction and at a distance of 3 Kms. from Police Station Kotwali Sadar, District Bareilly. However, F.I.R. dated 21.10.2012 registered as Case Crime No. 2568 of 2012 under sections 452, 307 IPC contains a recital that the incident took place on 21.10. 2012 at 6 a.m. at 126 Civil Lines, situate at a distance of 2 km. and in the Southern direction from Police Station Kotwali Sadar, District Bareilly.

39. Mr. Sikandar B. Kochar, learned counsel for applicant on the other hand submits that this question as to whether complaint case and Sessions Trial are cross-cases or not is no more open to consideration and the same stands concluded by the observations made by Investigating Officer as well as the observations made by courts below and also by this Court. Detailing his argument, he submits that the Investigating Officer while submitting the final report dated 19.12.2012 in Case Crime No. 2675 of 2012 under Sections 307, 452, 427, 504, 506, 380, 426 and 392 I.P.C., PS-Kotwali Bareilly, District-Bareilly, has opined that Case Crime No. 2675 of 2012 and Case Crime No. 2568 of 2012 appear to be in the same sequence of events.

40. Then attention of the Court was invited to order dated 13.07.2017 passed by Sessions Judge, Bareilly, allowing the transfer application filed by Nirmal Singh Garewal and directing the Additional Chief Judicial Magistrate, Court no.2, Bareilly to transfer Complaint Case No. 1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal) under Sections 307, 452,

427, 504, 506, 380, 426 and 392 I.P.C., PS-Kotwali Bareilly, District-Bareilly, arising out of Case Crime No. 2675 of 2012, under Sections 307, 452, 427, 504, 506, 380, 426 and 392 I.P.C., PS-Kotwali Bareilly, District-Bareilly to the Court of Additional Sessions Judge, Bareilly on the ground that Complaint Case No. 1716 of 2016 is cross-version of S.T. No. 123 of 2013.

41. Reference was also made to order dated 17.04.2017 passed by His Lordship Hon'ble Mr. Justice B. K. Narayana in Criminal Misc. Recall Application No. 172452 of 2014 in Criminal Misc. Application U/S 482 Cr.P.C. No. 11932 of 2014 (Nirmal Singh Garewal Vs. State of U.P. and another) wherein the following recital is contained:

“After having considered the submissions made by learned counsel for the parties and perused the material on record, I find that there is no dispute about the fact that a cross version of the incident which has been registered as Case Crime No. 2675 of 2012, under Sections-307, 452, 427, 504, 506, 380, 436 and 392 IPC, P. S.-Kotwali, sub-district-Sadar, district-Bareilly in which final report has been submitted and against which protest petition has been filed by the applicant is pending. There is no quarrel about the settled legal position that where there are cross cases, the same should be decided together. It is equally true that prior to moving this application, the applicant had approached this Court twice for being enlarged on bail by means of Criminal Misc. Bail Application Nos. 364 of 2013 and 17956 of 2013. He had further invoked the inherent jurisdiction of this Court by means of filing Criminal Misc. Application (Under Section 482 Cr. P. C.) Nos. 16535 of 2013, 3811 and 6775 of 2014. The aforesaid cases were disposed of by this Court with directions”

42. On the strength of the aforesaid recital, it is contended by Mr. Sikandar B. Kochar learned counsel for applicant that this Court, vide order dated 23.12.2014 has already opined that the two cases between parties are cross-cases and therefore, there is no room before this Court to sit in appeal over order dated 23.12.2014.

43. Attention of the Court was further invited to order dated 16.07.2013 passed by Additional Sessions Judge, Court No.1, Bareilly, in S.T. 123 of

2013, whereby objection raised by one of the parties that Case Crime No. 2568 of 2012 and Case Crime No. 2657 of 2012, arise out of the same incident and therefore, record of cross-case i.e. Case Crime No. 2657 of 2012 may be summoned and further P.W.-4 Prashant Kumar, Sub-Inspector who had investigated both the cases may be cross-examined to ascertain the aforesaid issue was allowed. This order dated 16.07.2013 was challenged by Nitin Jaiswal by means of Criminal Misc. Application No. 23954 of 2013 (Nitin Jaiswal Vs. State of U.P. and others), which came to be dismissed, vide order dated 16.10.2016. Therefore, it is now not open to judge whether the two cases are cross-cases or not.

44. Contradicting the submissions urged by Mr. Sikandar B. Kochar, learned counsel for applicant, Mr. Anoop Trivedi, learned Senior Counsel appearing for opposite party no.2 has submitted that when the two FIRs. giving rise to Case Crime No. 2657 of 2012 and 2658 of 2012 are examined together, it is explicit that they relate to different incidents which have taken place at different points of time and at different places. Case Crime No. 2657 of 2012 has come into existence pursuant to the F.I.R. dated 25.11.2012, wherein the date and time of occurrence has been mentioned as 21.10.2012 at 3 a.m. and the place of occurrence has been shown as 126A, Civil Lines, situate in Southern direction and at a distance of 3 Kms. from Police Station Kotwali Sadar, District Bareilly. Similarly Case Crime No. 2568 of 2012 has come into existence pursuant to the F.I.R. dated 21.10.2012 wherein the date and time of occurrence has been mentioned as 21.10. 2012 at 6 a.m. and the place of occurrence has been shown to be as 126 Civil Lines, situate at a distance of 2 Kms. and in the Southern direction from Police Station Kotwali Sadar, District Bareilly. He thus contends that in view of the aforesaid facts explicit on the record, the opinion of Investigating Officer, who had investigated Case Crime Nos. 2657 of 2012 and 2568 of 2012 are cross-cases as they arise out of same sequence of events, cannot be relied upon to conclude that the two cases are cross-cases

45. In continuation of his submissions, learned Senior Counsel further submits that reliance placed upon by counsel for applicant on the order dated 13.07.2017 passed by Sessions Judge, Bareilly allowing Criminal Misc. Case/Transfer Application No. 113 of 2017 (Nirmal Singh Garewal Vs. Nitin Jaiswal and six others), is wholly misconceived. The order dated 13.07.2017 was passed by the Sessions Judge as the order dated 15.12.2016 passed by this Court against which the present recall application has been filed was still in operation. Secondly, vide order dated 15.12.2016, the Additional Sessions Judge, Bareilly, was directed to re-examine the matter in the light of observations made in the order dated 15.12.2016 itself. Furthermore, as the concerned Magistrate failed to commit Complaint Case No. 1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal and others) to the Court of Sessions by exercising powers under Section 323 Cr.P.C., then Sessions Judge by exercising powers under Sections 408(1) Cr.P.C. transferred the complaint case to the Court of Sessions. However, he further points out that Sessions Judge, Bareilly, vide order dated 13.07.2017 only transferred Complaint Case No.1716 of 2013 (Nirmal Singh Garewal Vs. Nitin Jaiswal and others) under Sections 307, 436, 392, 380, 504 and 506 I.P.C., P.S. Kotwali Bareilly, District-Bareilly and did not connect the same with S.T. No. 123 of 2013 (State Vs. Nirmal Singh Garewal and others) under Sections 452 and 307 I.P.C., P.S. Kotwali Bareilly, District-Bareilly being cross-cases. On the aforesaid premise, it is thus urged that order dated 13.07.2017 passed by Sessions Judge, Bareilly, does not decide the issue whether Case Crime No. 2675 of 2012 and Case Crime No. 2568 of 2012 are cross-cases or not. As the order dated 15.12.2016 passed by this Court observing therein that the Complaint Case No. 1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal and others) under Sections 307, 436,392,380,504,506 I.P.C. P.S.-Kotwali Bareilly, District-Bareilly, arising out of Case Crime No. 2675 of 2012, under Sections 307, 436, 392, 380, 504, 506 I.P.C. P.S.-Kotwali Bareilly, District-Bareilly and S.T. 123 of 2013 (State Vs. Nirmal

Singh Garewal and others) under Sections 452 and 307 I.P.C., P.S. Kotwali Bareilly, District-Bareilly, arising out of Case Crime No. 2568 of 2012 under Sections 452 and 307 I.P.C., P.S. Kotwali Bareilly, District-Bareilly are cross-cases, the transfer application was allowed by the Sessions Judge, Bareilly. The submission urged is that Sessions Judge, Bareilly, while passing the order dated 13.07.2017 has not adjudicated upon the issue as to whether the two cases referred to above are cross-cases or not, but has followed the order dated 15.12.2016 passed by this Court and allowed the transfer application.

46. It is then contended that observations made by His Lordship Hon'ble Mr. Justice B. K. Narayana in order dated 17.04.2014 are of no relevance as the same were made at the time of deciding Criminal Misc. Recall Application filed by applicant no.2 herein Nitin Jaiswal, seeking recall of interim order dated 17.04.2014. Criminal Misc. Application No. 11932 of 2014, wherein recall application No. 172452 of 2014 was filed for recall of interim order dated 17.04.2014 has itself been dismissed as not pressed, vide order dated 02.08.2019. On the aforesaid facts, learned Senior Counsel submits that it is well settled that any observation made at the time of deciding interlocutory application will merge with the final order and secondly, if the petition is ultimately dismissed, the same shall amount that no interim order was passed. As such, no benefit can be derived from the observations contained in order dated 02.08.2019.

47. In addition to the aforesaid submissions, learned Senior Counsel appearing for opposite party no.2 further submits that vide order dated 16.07.2013 passed by Additional Sessions Judge, Court No.1, Bareilly, in S.T. 123 of 2013 (State Vs. Nirmal Singh Garewal and others) under Sections 452 and 307 I.P.C., P.S. Kotwali Bareilly, District-Bareilly, summoned record of Complaint Case No. 1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal and others) under Sections 307, 436, 392, 380, 504 and 506 I.P.C., P.S. Kotwali Bareilly, District-Bareilly, arising out of Case Crime No. 2675 of 2012 under Sections 307, 452, 427, 504, 506,

380, 426 and 392 I.P.C., P.S. Kotwali Bareilly, District-Bareilly and also the Investigating Officer, namely P.W.-4, Prashant Kumar Sub-Inspector, who had investigated both the Case Crime Nos. to ascertain whether Case Crime No. 2568 of 2012 and 2657 of 2012 are cross-cases or not. The order dated 16.07.2017 does not decide the issue as to whether the aforesaid two cases are cross-cases or not but only a step was taken by Court below to adjudicate this controversy. Therefore, the dismissal of Criminal Misc. Application No. 23954 of 2013 (Nitin Jaiswal Vs. State of U.P. and another) which was filed challenging the order dated 16.07.2013 will not amount to res-judicata. Secondly, the order dated 16.10.2016 was passed at that stage of proceedings. Learned Senior Counsel further submits that up to this stage, no order has been passed by any of the Courts below adjudicating that the two cases are cross-cases. Consequently, it is urged that Complaint Case No. 1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal and others) under Sections 307, 436, 392, 380, 504, 506 I.P.C. P.S.-Kotwali Bareilly, District-Bareilly, arising out of Case Crime No. 2675 of 2012 under Sections 307, 436, 392, 380, 504, 506 I.P.C. P.S.-Kotwali Bareilly, District-Bareilly and S.T. 123 of 2013 (State Vs. Nirmal Singh Garewal and others) under Sections 452 and 307 I.P.C., P.S. Kotwali Bareilly, District-Bareilly, arising out of Case Crime No. 2568 of 2012, under Sections 452 and 307 I.P.C., P.S. Kotwali Bareilly, District-Bareilly, are not cross-cases, but relate to different incidents which occurred at different places and at different points of time. Consequently, the concession granted by the learned A.G.A. on 15.12.2016 before His Lordship Hon'ble Mr. Justice R.D. Khare is contrary to the record.

48. I have considered the rival submissions raised by counsel for the parties. From what has been noted herein-above, it is established that up till date, no adjudication has been made by any of the Courts below that Case Crime No. 2675 of 2012 and Case Crime No. 2658 of 2012 are cross cases. Whatever orders have been passed by Courts below are either

in furtherance of exercise to adjudicate the said issue or it has been passed in compliance of order dated 15.12.2016, passed by this Court, whereby on the basis of concession given by learned A.G.A. , it has been held that the two cases are cross-cases. The High Court has independently not examined the issue in any proceeding. The observation contained in the order dated 23.12.2014 passed by Hon'ble Mr. Justice B. K. Narayana in Criminal Misc. Recall Application No. 172452 of 2014 in Criminal Misc. Application U/S 482 Cr.P.C. No. 11932 of 2014 (Nirmal Singh Garewal Vs. State of U.P. and another) that the two cases are cross-cases cannot be taken as a concluded fact. It is well established that any observation made during the pendency of the proceedings will ultimately merge with the final order. It is also equally true that when a petition is dismissed it means as if no interim order was passed. However, irrespective of the aforesaid Criminal Misc. Application No. 11932 of 2014 has itself been dismissed as not pressed. Consequently, the effect of the same is that no final adjudication was made by His Lordship, Hon'ble Mr. Justice B. K. Narayana. As such, question No.1 is answered in negative that two case crime numbers, as stated above, are not cross cases, but as submitted by learned Senior Counsel appearing for opposite party No. 2 that they relate to different incidents which occurred at different places and at different points of time.

49. Question nos. 2 and 3 are inter-related and inter linked, therefore, decided together.

50. Mr. Anoop Trivedi, learned Senior Counsel appearing for opposite party No.2 has strenuously urged that Criminal Misc. Application No. 25681 of 2018 was filed on 13.12.2016 and was disposed of finally on 15.12.2016. Admittedly, the complainant Nitin Jaiswal was impleaded as opposite party No.2 in the aforesaid criminal misc. application, but no notice was issued to him. Furthermore, without affording any opportunity of hearing to the opposite party No.2, order dated 15.12.2016 was passed. As a corollary to the aforesaid, it is also urged by learned Senior Counsel

that order dated 15.12.2016 passed by this Court has caused serious prejudice to the opposite party No. 2 as in spite of fact that two cases i.e. Complaint Case No. 1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal and others) under Sections 307, 436, 392, 380, 504 and 506 I.P.C., P.S. Kotwali Bareilly, District-Bareilly, arising out of Case Crime No. 2675 of 2012, under Sections 307, 452, 427, 504, 506, 380, 426 and 392 I.P.C., P.S. Kotwali Bareilly, District-Bareilly and Sessions Trial No.123 of 2013 (State Vs. Nirmal Singh Garewal and others) under Sections 452 and 307 I.P.C. P.S. Kotwali Bareilly, District-Bareilly, arising out of Case Crime No. 2568 of 2012 under Sections 452, 307 I.P.C. P.S. Kotwali Bareilly, District-Bareilly are not cross cases, they have been directed to be decided together. S.T. No. 123 of 2013 (State Vs. Nirmal Singh Garewal and Others) is at an advanced stage inasmuch as evidence has been recorded and trial is at the stage of defence evidence as provided under Section 313 Cr.P.C.

51. It is also urged that the accused somehow or the other want to throttle the proceedings of Sessions Trial. Detailing his arguments, learned Senior Counsel submits that in furtherance of aforesaid objective, the accused had raised an objection by filing application (Paper No. 68 Ka) before the Court below that Case Crime No. 2658 of 2012 and Case Crime No. 2657 of 2012 arise out of same incident and therefore the record of cross-case i.e. Case Crime No. 2657 of 2012 may be summoned and further P.W.-4, Prashant Kumar, Sub-Inspector, who had investigated both the cases may be cross-examined to ascertain the aforesaid issue. The said objection was allowed, vide order dated 16.07.2013. Order dated 16.07.2013 came to be challenged by Nitin Jaiswal, the opposite party no.2 herein by filing Criminal Misc. Application No. 23954 of 2013 (Nitin Jaiswal Vs. State of U.P. and another) ultimately came to be dismissed, vide order dated 16.10.2014. As the accused could not derive any benefit from order dated 16.07.2013, they thereafter filed an application in terms of Section 309 Cr.P.C. (Paper No. 309 Kha) which

was rejected by Court below vide order dated 02.12.2016.

52. Mr. Sikandar B. Kochar learned counsel for applicant vehemently contends that in view of the bar contained in Section 362 Cr.P.C. order dated 15.12.2016 passed by this Court cannot be recalled.

53. Mr. Anoop Trivedi, learned Senior Counsel has tried to impress upon the Court that irrespective of the bar contained in Section 362 Cr.P.C. this Court has power to recall an order passed ex-parte at the behest of a person who is a party to the proceedings, but was not heard at the time of passing of the order sought to be recalled.

54. Reliance is placed upon the judgement of the Apex Court in the case of **Vishnu Agarwal Vs. State of U.P. and another** reported in **2011 (14) SCC 813** to contend that an ex-parte order can be recalled and in such a situation, bar of Section 362 Cr.P.C. does not come into play. Reference was made to paragraphs 2, 3, 4, 5, 6 and 7, which are reproduced herein-below:

“2.It appears that the aforesaid Criminal Revision was listed in the High Court on 2.9.2003. No one appeared on behalf of the Revisionist, though the Counsels for respondents appeared. In these circumstances, the judgment was passed. Subsequently, an application was moved for recall of the Order dated 2.9.2003 alleging that the case was shown in the computer list and not in the main list of the High Court, and hence, the learned Counsel for the Revisionist had not noted the case and hence he did not appear.

3. It often happens that sometimes a case is not noted by the Counsel or his clerk in the cause list, and hence, the Counsel does not appear. This is a human mistake and can happen to anyone. Hence, the High Court recalled the order dated 2.9.2003 and directed the case to be listed for fresh hearing. The aforesaid order recalling the order dated 2.9.2003 has been challenged before us in this appeal.

5.Learned Counsel for the appellant Mr. Manoj Swarup submitted that in view of the aforesaid decision, the High Court erred in law in recalling the Order dated 2.9.2003. We regret we cannot agree.

6. In our opinion, Section 362 cannot be considered in a rigid and over technical manner to defeat the ends of justice. As Brahaspati has observed :

"Kevalam Shastram Ashritya Na Kartavyo Vinirnayah Yuktiheeney Vichare tu Dharmahaani Prajayate"

which means:

"The Court should not give its decision based only on the letter of

the law. For if the decision is wholly unreasonable, injustice will follow."

7. Apart from the above, we are of the opinion that the application filed by the respondent was an application for recall of the Order dated 2.9.2003 and not for review. In Asit Kumar Vs. State of West Bengal and Ors. 2009(1) SCR 469, this Court made a distinction between recall and review which is as under:-

"There is a distinction between a review petition and a recall petition. While in a review petition, the Court considers on merits whether there is an error apparent on the face of the record, in a recall petition the Court does not go into the merits but simply recalls an order which was passed without giving an opportunity of hearing to an affected party. We are treating this petition under Article 32 as a recall petition because the order passed in the decision in All Bengal Licensees Association Vs. Raghavendra Singh & Ors. [2007(11) SCC 374] cancelling certain licences was passed without giving opportunity of hearing to the persons who had been granted licences."

55. On the strength of the aforesaid observations made by Apex Court as noted above it is urged that the application filed by opposite party no.2 which is registered as Criminal Misc. Recall Application No. 4345 of 2017 is not a review application but an application for recall of order dated 15.12.2016 passed by this Court ex-parte against opposite party no.2, which has caused serious prejudice to opposite party no.2. As such the order dated 15.12.2016 is liable to be recalled.

56. Reference was then made to a single judge judgement of this Court in Jawahar Lal @ Jawahar Lal Jalaj Vs. State of U.P. reported in 2015 (91) ACC 128, wherein a learned Single Judge has considered the question regarding recall of a final order and the bar of Section 362 Cr.P.C. Reference was made to paragraphs 6, 10, 13, 14, 15, 16, 17, 27, 28, 30, 31, 32, 33, 34, which are reproduced herein-under

6. The main question for consideration is that whether a petition under section 482 Cr.P.C., which has been dismissed for want of prosecution can be restored to its original number or not and whether the prohibition as provided by Section 362 Cr.P.C. will apply or not?

10. Learned counsel for the petitioner has emphasized the word "secure the ends of justice".

13. In Asit Kumar Kar vs. State of West Bengal and others; (2009) 1 SCC (Cri) 851, Hon'ble the Supreme Court has held as under :

"There is a distinction between a petition under Article 32, a review petition and a recall petition. While in a review petition the Court considers on merits where there is an error apparent on the face of the record, in a recall petition the Court does not go into the merits but simply recalls an order which was passed without giving an opportunity of hearing to an affected party.

We are treating this petition under Article 32 as a recall petition because the order passed in the decision in All Bengal Licensees Association v. Raghabendra Singh & Ors. [2007 (11) SCC 374] cancelling certain licences was passed without giving opportunity of hearing to the persons who had been granted licences.

14. In these circumstances, we recall the directions in paragraph 40 of the aforesaid judgment. However, if anybody has a grievance against the grant of licences or in the policy of the State Government, he will be at liberty to challenge it in appropriate proceedings before the appropriate Court. The writ petitions are disposed of with these directions."

In Ram Naresh Yadav and others vs. State of Bihar; 1987 CRI.L.J. 1856 & AIR 1987 SCC 1500, Hon'ble the Apex Court has held as under :

"It is an admitted position that neither the appellants nor counsel for the appellants in support of the appeal challenging the order of conviction and sentence, were heard. It is no doubt true that if counsel do not appear when criminal appeals are called out it would hamper the working of the court and create a serious problem for the court. And if this happens often the working of the court would become well nigh impossible. We are fully conscious of this dimension of the matter but in criminal matters the convicts must be heard before their matters are decided on merits. The court can dismiss the appeal for non-prosecution and enforce discipline or refer the matter to the Bar Council with this end in view. But the matter can be disposed of on merits only after hearing the appellant or his counsel. The court might as well appoint a counsel at State cost to argue on behalf of the appellants. Since the order of conviction and sentence in the present matter has been confirmed without hearing either the appellants or counsel for the appellants, the order must be set aside and the matter must be sent back to the High Court for passing an appropriate order in accordance with law after hearing the appellants or their counsel and on their failure to engage counsel, after hearing counsel appointed by the Court to argue on their behalf. As the matter is being remanded to the High Court, no orders can be passed on the bail application. The appellants, if so advised, may approach the High Court for bail"

15. In Rafiq and another vs. Munshi Lal and another; AIR 1981 SC 1400, Hon'ble the Apex Court has held as under :

"The disturbing feature of the case is that under our present adversary legal system where the parties generally appear through their advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the court's procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the appeal, the

personal appearance of the party is not only not required but hardly useful. Therefore, the party having done everything in his power to effectively participate in the proceedings can rest assured that he has neither to go to the High Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watchdog of the advocate that the latter appears in the matter when it is listed. It is no part of his job. Mr. A.K. Sanghi stated that a practice has grown up in the High Court of Allahabad amongst the lawyers that they remain absent when they do not like a particular Bench. Maybe he is better informed on this matter. Ignorance in this behalf is our bliss. Even if we do not put our seal of imprimatur on the alleged practice by dismissing this matter which may discourage such a tendency, would it not bring justice delivery system into disrepute. What is the fault of the party who having done everything in his power and expected of him would suffer because of the default of his advocate. If we reject this appeal, as Mr. A.K. Sanghi invited us to do, the only one who would suffer would not be the lawyer who did not appear but the party whose interest he represented. The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission, or misdemeanour of his agent. The answer obviously is in the negative. Maybe that the learned advocate absented himself deliberately or intentionally. We have no material for ascertaining that aspect of the matter. We say nothing more on that aspect of the matter. However, we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted. Therefore, we allow this appeal, set aside the order of the High Court both dismissing the appeal and refusing to recall that order. We direct that the appeal be restored to its original number in the High Court and be disposed of according to law. If there is a stay of dispossession it will continue till the disposal of the matter by the High Court. There remains the question as to who shall pay the costs of the respondent here. As we feel that the party is not responsible because he has done whatever was possible and was in his power to do, the costs amounting to Rs.200/- should be recovered from the advocate who absented himself. The right to execute that order is reserved with the party represented by Mr. A.K.Sanghi."

16. *In Raghuvera and others vs. State of U.P.; 1990 CRI.L.J. 2735 (All.), this Hon'ble Court has held as under :*

"It is no doubt true that Section 362 Cr. P.C. debars the court from altering or reviewing any final order or judgment given by a court except to correct the clerical or arithmetical error. But the question arises whether an order dismissing an application for revision for default of the counsel as not pressed can be termed as a judgment or final order? The term "Judgment" has not been defined in the Criminal Procedure Code but a judgment means the expression of the opinion of the Court arrived at after due consideration of the entire material on record, including the arguments, if any, advanced at the Bar. A final order or judgment can only be passed in a criminal court when the court applies its mind to the merit of the case. In case the order is passed in a criminal proceeding and the application for revision is dismissed for default as not pressed, the said order cannot be taken as either final order or a judgment. Thus Section 362 Cr. P.C. is no bar to review or alter the order dated 14th March 1990. The order in question was passed without going into the merit of the case and is without jurisdiction and as such it has to be set aside."

17. In *K. G. Keralakumaran Nair vs. State of Kerala and other*; 1995 CRI. L. J. 2319, the Kerala High Court has held as under:

"That leads us to the further question whether an appeal or other criminal proceeding dismissed by this Court can be restored to file. The contention is that this Court has no power by virtue of Section 362 of the Code which reads:

"Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error."

The Section relates only to judgment or final order disposing of a case. What is a judgment or a final order is not seen defined in the Code But the word 'judgment' is understood to mean an order in a trial terminating in either conviction or acquittal of the accused. It has also been held that judgment means the expression of opinion of the Court arrived at after due consideration of the evidence and all the arguments. Understood in this light, every order under the provisions of the Code cannot be considered to be a judgment within the meaning of Section 353 or coming under the scope of Section 362, of the Code. In short, there must be an investigation of the merits on evidence and after hearing arguments in order to constitute a judgment. In the case of an appeal, such judgment has to be one rendered on merits after hearing counsel for appellant or the appellant, as the case may be, and Public Prosecutor or counsel appearing for respondent.

15. *Whether an order dismissing an appeal for default amounts to a judgment or a final order coming within the scope of Section 362 of the Code is the next aspect that requires consideration. The Calcutta High Court in the decision in Bibhuty Mohun Roy v. Dasimoni Dassi (1909) 10 Cri LJ 287, held that in India a Court cannot review or alter its own judgment in a criminal case, but it has jurisdiction to hear and determine a criminal case which has not been heard and determined on the merits. It was further held that where the Court discharged a rule because no one appeared, it has power to re-open it.*

16. In *Sahadeo v. Jagannath*, AIR 1950 Nagpur 77: (1950 (51) Cri LJ 662), the appeal was dismissed for non-filing of a copy of the judgment. It was held that the order rejecting the appeal cannot be held to be an order amounting to a judgment within the meaning of Section 369 of the Code of 1898 and there was no bar to the consideration of the appeal on its merits.

17. *The question whether a criminal Court has inherent power to revive a complaint in a warrant case which was dismissed under Section 259 of the Code of 1898 for the absence of the complainant on the date of commencement of the preliminary enquiry came up for consideration in W.T. Singh v. C.A. Singh, AIR 1961 Manipur 34 : (1961 (2) Cri LJ 352). While holding that such dismissal of the complaint or discharge of the accused will not amount to an acquittal within the meaning of Section 403, of the Code, it was observed that such an order of dismissal, is not a judgment within Section 366, and therefore Section 369, would not apply. It is also observed that the absence of any provision on a particular matter in the Code does not mean that the Court has no such power and the Court may act on the principle that every procedure should be understood as permissible till it is shown to be prohibited by*

law.

18. The Andhra Pradesh High Court has gone to , the extent of holding that there should be no objection to the maintainability of a second petition for revision when the first one had failed not on the merits but by default. In *Satyanarayana v. Narayanaswami* AIR 1961 Andh. Pra. 18 (1961) (2) Cri LJ 37, it was held that there is no question of the High Court becoming *functus officio* by reason of an order of dismissal for default passed by it on a petition by a private party, who has really no right but a mere concession in the matter of moving the High Court in revision.

19. The Mysore High Court had occasion to consider whether a revision application dismissed for default can be restored in the decision in *Madiiah v. State of Mysore*, AIR 1963 Mysore 191 : (1963(2) Cri LJ 23). That was a case of a dismissal of a revision by the High Court. It was held that subject , to the provisions contained in the Code, a judgment , delivered or an order passed on merits is final after it is duly signed by Court. The inherent power of a High Court cannot be exercised in matters specifically covered by the provisions of the Code. Where the Code is silent about the power of the High Court in respect of any, matter arising before it, it can pass suitable orders in exercise of its inherent powers to give effect to any order passed under the Code or to prevent the abuse of the process of any Court or to secure the ends of justice. It was held that this power can also be exercised to reconsider orders of dismissal of an appeal or application passed without jurisdiction or in default of appearance, where reconsideration is necessary to secure the ends of justice.

20. The Bombay High Court in the decision in *Deepak v. State of Maharashtra* 1985 Cri LJ 23, observed that the High Court in exercise of its inherent powers can review or revise its judgment if such judgment is pronounced without giving an opportunity of being heard to a party who is entitled to a hearing and that party is not at fault, the reason being that a party cannot suffer for the mistake of the Court. In that case, the hearing was adjourned to 13th February but the adjourned date was inadvertently marked as 8th February on which date the petitioner and his counsel were absent. The High Court on going through the record passed the order dismissing the petition. It was held that since the petitioner was entitled to a hearing, it could be said that the Court acted without jurisdiction and in violation of the principles of natural justice and in the circumstances the review petition must be allowed.

21. A Division Bench of this Court in *Padmachandran v. Radhakrishnan* (1984 Ker LT 416), was considering the question whether the inherent powers of this Court under Section 482, can be exercised to restore a revision dismissed for default. In that case, the revision was decided in the absence of the counsel. Request was made for re-hearing the revision. The Division Bench held that the earlier order dismissing the revision was really a disposal for default, counsel for petitioner being absent. For the purpose of securing the ends of justice it was found necessary that the Criminal Revision should be heard afresh,

22. The question whether dismissal of a Criminal Revision petition as not pressed amounts to a final order coming within the scope of Section 362, of the Code arose for consideration before the Allahabad High Court in *Raghuvira v. State of U. P.* (1990) 3 Crimes 225 : (1990 Cri LJ 2735). It was held that a final order or judgment can only be passed by a

criminal Court when the Court applies its mind to the merits of the case. In case the order is passed in a criminal proceeding and the application for revision is dismissed for default as not pressed, the said order cannot be taken as either final order or judgment. It was held that Section 362, of the Code is no bar to review or alter the order of dismissal.

23. The same view was expressed by the Karnataka High Court in Ibrahimsab v. Faridabi (1986) 2 Kant LJ 65. It was held that the expression "final order disposing of the case" means a considered order on merits and not an order of dismissal for default and the provision contained in Section 362, does not come in the way of the Court recalling such order and restoring the revision dismissed for default. \ The decision in Chandran's case ((1989) 2 Ker LJ 845) (supra) did not also consider the scope of the inherent power of this Court under Section 482, of the Code and power of this Court to dismiss an appeal or any other criminal proceeding in exercise of that power or the power of restoration. Having considered those matters in detail in the light of the pronouncements of the various High Courts. I am of the considered view that this Court has all the inherent powers to make any order to prevent the abuse of the process of Court or for the ends of justice or to enforce discipline by invoking the powers under Section 482, of the Code, Section 386 of the Code notwithstanding. The provision contained in Section 386 cannot therefore have any application to the exclusion of those inherent powers. Viewed from this angle and in the light of the principle laid down in Ram Naresh Yadav's case (1987 Cri LJ 1856) (SC). I hold that this Court has power to dismiss an appeal or any other criminal proceeding for default and this Court has also the power to restore such proceeding on sufficient grounds being shown for non-appearance. But the right of dismissal and the power of restoration can be exercised only by this Court, and that too in exercise of the powers under Section 482 of the Code, and not by any of the Courts subordinate to this Court since those courts have no inherent powers envisaged under Section 482 of the Code.

The point formulated is answered thus:-

- i. A Criminal Appeal shall be disposed of only after perusing the record and hearing the appellant or his pleader, if he appears and the Public Prosecutor, if he appears.*
- ii. A criminal appeal can be decided on merits, only after hearing the appellant or his counsel.*
- iii. The High Court has powers under Section 482 of the Code of Criminal Procedure to dismiss an appeal or revision or any other criminal proceeding for default or non-prosecution.*
- iv. The High Court has also inherent power to restore any matter dismissed for default or non-prosecution on sufficient reason being shown.*
- v. The power of dismissal for default and the power of restoration inhere only in the High Court and cannot be exercised by the Courts subordinate to the High Court since they do not possess the inherent powers under Section 482 of the Code.*

27. In the present case, the petition has been dismissed for want of prosecution, although opportunity of hearing was given but that opportunity of hearing could not be availed due to sudden illness of the

counsel. The inherent power under section 482 Cr.P.C. can be exercised to give effect to any order under Cr.P.C. or to prevent the abuse of the process of any court or otherwise to secure the ends of justice. Certainly, if the application has been dismissed for default, that cannot be termed as 'judgement'.

28. Accordingly, the bar as provided by section 362 Cr. P.C. shall not be applicable. This court has power to dismiss in default any application or writ petition and at the same time has also power to restore such proceedings on sufficient grounds being shown for non-appearance provided it appears to the court that default was not wilful and it was accidental. There are instances, where either legal advice is given or due to shrewd character of the litigant mala fide efforts are adopted with a view to delay the proceedings of the case, such tactics are also adopted to get the case dismissed in default and then to move application for restoration and thus, lingering on the proceedings. Certainly, such practice must be carved out and should not be permitted to continue.

30. Therefore, I am of the view that if any petition has been dismissed in default and the application for recall is made, then it will not come within the meaning of words 'alter' or 'review' as expressed in Section 362 of the Code. Accordingly, such orders may be recalled or set aside provided the intention of the parties is bonafide i.e. party who has moved the application for recall or restoration is not unnecessarily lingering on the proceedings mala fide or that interim order or stay order, if any, is not being misused.

31. Accordingly, the application for restoration or recall of the order is maintainable and the prohibition of Section 362 Cr.P.C. do not apply in the petitions, which have been dismissed in default without discussing the merits of the case because it do not come within the prohibition of 'alter' or 'review' of judgment, which has entirely a different meaning.

32. In the present case, the petition was dismissed for want of prosecution because the counsel for the petitioner could not appear due to sudden illness for which the learned counsel for the CBI also has raised no objection.

33. Accordingly, the application for recall is allowed.

34. The order dated 29.04.2015 is recalled. The petition is restored to its original number and status.”

57. On the strength of aforesaid observations, it is urged that recall application filed by opposite party no.2 seeking recall of ex-parte order dated 15.12.2016 is liable to be recalled.

58. Then attention of the Court was invited to the judgement of Apex Court in ***State of Punjab Vs. Devendar Pal Singh Bhullar and others*** reported in ***2011 (14) SCC 770***. Reliance was placed upon paragraphs 2, 44, 46 and 47 which are reproduced herein-below:

“2. The Appeals herein raise peculiar substantial questions of law as to whether the High Court can pass an order on an application entertained

after final disposal of the criminal appeal or even suo motu particularly, in view of the provisions of Section 362 of the Code of Criminal Procedure, 1973 (hereinafter called Cr.P.C.) and as to whether in exercise of its inherent jurisdiction under Section 482 Cr.P.C. the High Court can ask a particular investigating agency to investigate a case following a particular procedure through an exceptionally unusual method which is not in consonance with the statutory provisions of Cr.P.C.

44. There is no power of review with the Criminal Court after judgment has been rendered. The High Court can alter or review its judgment before it is signed. When an order is passed, it cannot be reviewed. Section 362 Cr.P.C. is based on an acknowledged principle of law that once a matter is finally disposed of by a Court, the said Court in the absence of a specific statutory provision becomes functus officio and is disentitled to entertain a fresh prayer for any relief unless the former order of final disposal is set aside by a Court of competent jurisdiction in a manner prescribed by law. The Court becomes functus officio the moment the order for disposing of a case is signed. Such an order cannot be altered except to the extent of correcting a clerical or arithmetical error. There is also no provision for modification of the judgment. (See: Hari Singh Mann v. Harbhajan Singh Bajwa & Ors., AIR 2001 SC 43; and Chhanni v. State of U.P., AIR 2006 SC 3051).

46. If a judgment has been pronounced without jurisdiction or in violation of principles of natural justice or where the order has been pronounced without giving an opportunity of being heard to a party affected by it or where an order was obtained by abuse of the process of court which would really amount to its being without jurisdiction, inherent powers can be exercised to recall such order for the reason that in such an eventuality the order becomes a nullity and the provisions of Section 362 Cr.P.C. would not operate. In such eventuality, the judgment is manifestly contrary to the audi alteram partem rule of natural justice. The power of recall is different from the power of altering/reviewing the judgment. However, the party seeking recall/alteration has to establish that it was not at fault. (Vide: Chitawan & Ors. v. Mahboob Ilahi, 1970 Cr.L.J. 378; Deepak Thanwardas Balwani v. State of Maharashtra & Anr., 1985 Cr.L.J. 23; Habu v. State of Rajasthan, AIR 1987 Raj. 83 (F.B.); Swarth Mahto & Anr. v. Dharmdeo Narain Singh, AIR 1972 SC 1300; Makkapati Nagaswara Sastri v. S.S. Satyanarayan, AIR 1981 SC 1156; Asit Kumar Kar v. State of West Bengal & Ors., (2009) 2 SCC 703; and Vishnu Agarwal v. State of U.P. & Anr., AIR 2011 SC 1232).

47. This Court by virtue of Article 137 of the Constitution has been invested with an express power to review any judgment in Criminal Law and while no such power has been conferred on the High Court, inherent power of the court cannot be exercised for doing that which is specifically prohibited by the Code itself. (Vide: State Represented by D.S.P., S.B.C.I.D., Chennai v. K.V. Rajendran & Ors., AIR 2009 SC 46.)”

59. Then reliance was placed upon judgement in **Makkapati Nagaswara Sastri Vs. S.S. Satyanarayan** reported in 1981 (1) SCC 62, wherein revision was decided by High Court without hearing

counsel for respondent. The judgement is a short one and accordingly the whole of it is reproduced herein under:

“This appeal is directed against an order dated March 20, 1973 of the High Court of Andhra Pradesh whereby it accepted a reference made by the Additional Sessions Judge, West Godavari at Elura under Section 435 read with Section 438 of the Code of Criminal Procedure with the recommendation that the order of Additional First Class Magistrate, Elura in Crl MP No. 163 of 1971 refusing to give direction to the respondent to hand over all the records, accounts, properties, cash etc. of Sahakara Parapathi Sangham, Pragadavaram, to the petitioner, be set aside and revised. It appears from the impugned order that no notice of the date of hearing was issued to the respondent or his counsel. A note appears to have been added to the impugned order later which reads as follows:

“It is true that the case has been disposed of without hearing the counsel for the respondent as he could not appear at the time of the hearing because his name was not printed in the cause list. But this is a revision case where the respondent is not entitled to be heard as of right. Having regard to the facts of the case, I do not think any review of the order already passed is necessary.”

2.This view taken by the High Court is manifestly contrary to the audi alteram partem rule of natural justice which was applicable to the proceedings before the High Court. On this short ground we think that the order of the High Court does not deserve to be maintained. Accordingly, we set aside that order and send the case back to the High Court with the direction that it should dispose of Crl R. No. 411 of 1972 within two months from the receipt of a copy of this order, after hearing both the parties.

3.The appeal is disposed of in terms of the above order.”

60. Mr. Anoop Trivedi, learned Senior Counsel, submits that in the present case also, the application under section 482 Cr.P.C. filed by accused-applicant, Jaspreet Singh Garewal has been allowed ex-parte without giving any notice or opportunity of hearing to opposite party No.2. Consequently, recall application filed by opposite party No.2 is liable to be allowed so that the matter is heard and decided after affording opportunity of hearing to opposite party No.2, which shall be in compliance of principles of natural justice. Consequently ex-parte order dated 15.12.2016 passed by this Court is liable to be recalled.

61. Attention of the Court was then invited to the Full Bench decision of Rajasthan High Court in **Habu Vs. State of Rajasthan** reported in AIR

1987 RAJ 83. Referring to paragraphs 1, 38, 39 and 45, it is urged that the power of recall is different from power of altering or reviewing the judgement. In the present case, the opposite party no.2 has filed a recall application seeking recall of order dated 15.12.2016 on the ground that the said order has been passed without affording any notice or opportunity of hearing to opposite party No.2, and order dated 15.12.2016 has caused serious prejudice to opposite party No.2. For ready reference, paragraphs 1, 38, 39 and 45 of full Bench decision are reproduced herein below:-

“1. This larger Bench has been constituted by the orders of the Chief Justice, dt. July 3, 1986, to answer a question referred to larger Bench by our brother Hon'ble G. K. Sharma, J. vide his order of reference, dated May 28, 1986 wherein he has framed the following question :

"Whether the judgment given in absence of the appellant or his counsel but the case decided on merits, can be re-called by the Court in its inherent powers under Section 482, Cr.P.C."

38. There are two views available on the point. According to one view Section 362 Cr. P.C. has been held to be mandatory and puts complete bar and it has been therefore, held that Section 482 Cr. P.C. can also not be invoked for the purposes of reviewing or altering the judgment. The other view is that re-calling is different than reviewing and altering and if the Court is of the opinion that gross injustice has been done, then Section 482 Cr. P.C. should be invoked to re-call the judgment and re-hear the case. In fact the earlier view has impliedly been done away with by their Lordships of the Supreme Court in Sankatha Singh's case (AIR 1962 SC 1208) (supra). Their Lordships have held that the appellate Court had no power to review or restore an appeal which has been disposed of under Sections 424 and 369 Cr. P.C. (old). Similar was the view taken in State of Orissa v. Ram Chandra, (AIR 1979 SC 87) (supra). Sankatha Singh's case has been referred to in Sooraj Devi's case (AIR 1981 SC 736) (supra) wherein also their Lordships have held

that inherent powers cannot be invoked when there is a complete bar. Scope of Section 482 Cr. P.C. was then considered by their Lordships in Manohar Nathu Sao Samarth v. Marot Rao, (AIR 1979 SC 1084) (supra). Thus on one side as mentioned above the principles which have been laid down by their Lordships of the Supreme Court can be summarized as under :--

- 1. That the powers to deal with the case must flow from the statute,*
- 2. That the powers given under Section 362 Cr. P.C. (S. 369 Cr. P.C. old) given to the Court for reviewing or altering is limited only for correcting an arithmetical or clerical error and specifically prohibits Courts from touching the judgment by taking away the powers altering or reviewing the judgment or the final order and as such principle of functus officio has been accepted.*
- 3. That the prohibition contained in Section 362 Cr. P.C. (Section 369 Cr. P.C. Old) is not only restricted to the trial Court but also extends to appellate Court or the revisional Court.*
- 4. That the inherent powers of the Court cannot be invoked where there is an express prohibition and in other words Section 482 Cr. P.C. cannot be invoked.*

39. As against this the analogical deduction which comes out from another set of cases is--

- (i) Right of the accused to be heard is his valuable right which cannot be taken away by any provision of law,*
- (ii) If the accused has not been given an opportunity of being heard or is not provided with the counsel when not duly represented it will be violative of principles of natural justice as well as Article 21 of the Constitution,*
- (iii) That to provide defence counsel in case the accused is not in a position to engage is fundamental duty of the State and has*

throughout been recognized and now incorporated in Section 304 Cr. P.C. and in Article 39 A of the Constitution,

(iv) That bar of review or alter is different than the power of recall,

(v) That inherent powers given under Section 482 Cr. P.C. (Section 561-A Cr. P.C. Old) are wide enough to cover any type of cases if three conditions mentioned therein so warrant, namely--

(a) for the purpose of giving effect to any order passed under the Code of Criminal Procedure;

(b) for the purposes of preventing the abuse of the process of any Court; and

(c) for securing the ends of justice.

(vi) The principle of audi alteram partem shall be violated if right of hearing is taken away,

(vii) That when the judgment is re-called it is a complete obliteration/abrogation of the earlier judgment and the Appeal or the ' Revision, as the case may be, has to be heard and decided afresh,

(viii) That a Court subordinate to High Court cannot exercise the inherent powers and the Code restricts it to the High Court alone.

(ix) That no fixed parameters can be fixed and hard and fast rule also cannot be laid down and Court in appropriate cases where it is specified that one of the three conditions of Section 482 Cr. P.C. are attracted should interfere.

45. Their Lordships of the Supreme Court in a case of Bhagwant Singh v. Commr. of Police, AIR 1985 SC 1285 even while giving interpretation to Section 173(2)(ii) Cr. P.C. have laid great emphasis on the right of hearing and held as under :

"in a case where the Magistrate to whom a report is forwarded under Sub-section (2) of Section 173 decides not to take cognizance of the offence and to drop the

proceeding or takes the view that there is no sufficient ground for proceeding against some of the persons mentioned in the First Information Report, the Magistrate must give notice to the informant and provide him an opportunity to be heard at the time of consideration of the report."

What we intend to emphasize is that right of hearing is very important right of which no litigant should be deprived. Thus on the consideration of all the cases cited and on the two cases quoted by learned single Judge, we answer the reference as under :

(i) That the power of re-call is different than the power of altering or reviewing the judgment.

(ii) That powers under Section 482 Cr. P.C. can be and should be exercised by this Court for re-calling the judgment in case the hearing is not given to the accused and the case falls within one of the three conditions laid down under Section 482 Cr. P.C."

62. Then reference was made to the Full Bench decision of this Court in the case of **Rajnarayan and others Vs. The State of U.P.** reported in **A.I.R. 1959 ALL 315**, in support of proposition that High Court in exercise of its powers under section 482 Cr.P.C. can revoke, review, recall or alter its own decision and rehear the same. The Full Bench is in reference to the provisions of old Cr.P.C. and therefore, the same is not of much help to the counsel for opposite party No.2.

63. On the other hand Mr. Sikandar B. Kochar, learned counsel appearing for applicants has relied upon the judgement of Apex Court in **Smt. Suraj Devi Vs. Pyare Lal, 1981 SCC (Cri) 188**, wherein Apex Court has held that High Court cannot review an order passed by it on the criminal side by exercising its inherent powers under section 482 Cr.P.C. because of the bar contained under section 362 Cr.P.C. Following has been observed in paragraphs 4, 5 and 6, which are reproduced herein under:

“4. The sole question before us is whether the High Court was right in refusing to entertain Criminal Miscellaneous Application No. 5127 of 1978 on the ground that it had no power to review its order dated September 1, 1970. Section 362 of the Code of Criminal Procedure declares: “Save as otherwise provided by this Code or by any other law for the time being in force, no court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error” It is apparent that what the appellant seeks by the application is not the correction of a clerical or arithmetical error. What she desires is a declaration that the High Court order dated September 1, 1970 does not affect her rights in the house property and that the direction to restore possession to Pyare Lal is confined to that portion only of the house property respecting which the offence of trespass was committed so that she is not evicted from the portion in her possession. The appellant, in fact, asks for an adjudication that the right to possession alleged by her remains unaffected by the order dated September 1, 1970. Pyare Lal disputes that the order is not binding on her and that she is entitled to the right in the property claimed by her. Having considered the matter, we are not satisfied that the controversy can be brought within the description “clerical or arithmetical error”. A clerical or arithmetical error is an error occasioned by an accidental slip or omission of the court. It represents that which the court never intended to say. It is an error apparent on the face of the record and does not depend for its discovery on argument or disputation. An arithmetical error is a mistake of calculation, and a clerical error is a mistake in writing or typing. Master Construction Co. (P) Ltd. v. State of Orissa [AIR 1966 SC 1047 : (1966) 3 SCR 99 : (1966) 17 STC 360].

5. The appellant points out that he invoked the inherent power of the High Court saved by Section 482 of the Code and that notwithstanding the prohibition imposed by Section 362 the High Court had power to grant relief. Now it is well settled that the inherent power of the court cannot be exercised for doing that which is specifically prohibited by the Code (Sankatha Singh v. State of U.P. [AIR 1962 SC 1208 : 1962 Supp 2 SCR 817 : (1962) 2 Cri LJ 288]). It is true that the prohibition in Section 362 against the court altering or reviewing its judgment is subject to what is “otherwise provided by this Court or by any other law for the time being in force”. Those words, however, refer to those provisions only where the court has been expressly authorised by the Code or other law to alter or review its judgment. The inherent power of the court is not contemplated by the saving provision contained in Section 362 and, therefore, the attempt to invoke that power can be of no avail.

6. The High Court, in our opinion, is right in declining to entertain the application. The appeal must be dismissed. But we may observe that anything said by the High Court in the criminal proceeding against Kailash Chandra Jain should not be allowed to influence the judgment of the court in the civil suits mentioned above or in any proceeding arising therefrom.”

64. Reference was then made to judgement of Apex Court in **Mohd. Zakir Vs. Sabana and others 2018 (15) SCC 316**, for proposition

that High Court cannot correct an order on merits by virtue of bar contained in section 362 Cr.P.C. Reference is made to paragraph 3 of the judgement, which is as under:

“3. The High Court should not have exercised the power under Section 362 CrPC for a correction on merits. However patently erroneous the earlier order be, it can only be corrected in the process known to law and not under Section 362 CrPC. The whole purpose of Section 362 CrPC is only to correct a clerical or arithmetical error. What the High Court sought to do in the impugned order is not to correct a clerical or arithmetical error; it sought to rehear the matter on merits, since, according to the learned Judge, the earlier order was patently erroneous. That is impermissible under law. Accordingly, we set aside the impugned order dated 28-4-2017.”

65. Then reliance was placed upon judgement of Apex Court in **Atul Shukla Vs. The State of Madhya Pradesh and another 2019 (6) SCJ 246**, wherein correctness of order passed by High Court reviewing its earlier order dated 20.7.2018, was examined. The Apex Court dealt with said issue in following terms:

“A petition under Section 482 of the Code of Criminal Procedure 1973 was filed by the second respondent for quashing of the FIR. In the meantime, charges are framed on 24 April 2017. On 20 July 2018, the High Court dismissed the petition under Section 482 in the following terms:-

“Considering the circumstances, this petition under Section 482 of Cr.P.C. has no merit. The petitioner may challenge the framing of charge under appropriate provisions.

With the above observation, this petition is dismissed.”

After the above order, the second respondent filed another petition under Section 482 in which the following relief was sought:

It is therefore, prayed that this Hon'ble Court may kindly review, recall and modify the order dated 20.07.2018 in the interest of justice.”

It is on the second petition that the High Court passed its impugned order dated 20 August 2018 allowing the petition and

recalling its earlier order dated 20 July 2018.

The submission which has been urged on behalf of the appellant is that the High Court could not have entertained the subsequent petition under Section 482 for review or, as the case may be, for modification of its earlier order having regard to the specific bar contained in Section 362 of the Cr.P.C. Section 362 provides as follows:

“Section 362: Court not to alter judgement. Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgement or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error.....”

66. Lastly reliance was placed upon a judgement delivered by a single Judge of this Court in **Shiv Poojan Upadhyay and another Vs. State of U.P. and another 2019 (3) ALJ 407**. In the above case, a recall application was filed by applicant for recall of order dated 4.8.2018 on the ground that he was not heard. The learned Single Judge referred to the judgements in the case of **Vishnu Agarwal vs. State of U.P. and Ors, 2011 (14) SCC 813**; **Asit Kumar Kar Vs. State of West Bengal, 2009 (2) SCC 703**; **Popular Muthiah Vs. State, 2006 (7) SCC 296** and in **Ajay Singh and another Vs. State of Chhattisgarh and another, AIR 2017 SC 310**; **Hari Prakash Vs. State of U.P., 2014 (84) ACC 45**; **Mohammad Zakir Vs. Shaband and Ors, 2018 (3) JIC 17**; **Suraj Devi Vs. Pyare Lal and Ors; 1981 (1) SCC 500**; **Sankata Singh Vs. state of U.P. , AIR 1962 SC 1208**; **State through Special Cell, New Delhi vs. Navjot Sandhu @ Afshan Guru & Ors, 2003 (6) SCC 641**, and concluded that by virtue of section 362 Cr.P.C., it is not possible to recall the order dated 4.8.2018, merely on the ground that counsel was not present at the time of hearing.

67. Deriving support from aforesaid judgements, Mr. Sikandar B. Kochar, learned counsel for applicant submits that order dated 15.12.2016, passed

by this Court is an order deciding the application under section 482 Cr.P.C. on merits. Irrespective of the fact that no notice was issued to opposite party No.2 and also that opposite party No.2 was not heard before passing order dated 15.12.2016, the said order cannot be recalled at the instance of opposite party No.2 as that would amount to review of earlier order dated 15.12.2016. Since there is a specific bar contained in section 362 Cr.P.C. prohibiting review of an order the recall application filed by opposite party No.2 is liable to be rejected.

68. I have perused the judgements relied upon by counsel for parties. It is an undisputed fact that present criminal misc. application was filed on 13.12.2015 in Registry of this Court. The application came up for admission on 15.12.2016 and this Court allowed the application on same day i.e. 15.12.2016. The opposite party No.2 was not represented by any counsel nor notices were issued to opposite party No.2 before finally deciding the application. As such, order dated 15.12.2016 is ex-parte against opposite party No.2. Rule of *audi alterem partem* requires that opportunity of hearing should be afforded before an order is passed on judicial side. The aforesaid view has also been reiterated by Apex Court in the case of **Makkapati Nagaswara Sastri** (Supra). The order dated 2.12.2016 impugned in the application was in favour of opposite party No.2 and therefore, the said order could not have been set aside without hearing opposite party No.2. Consequently, prayer for recall made by opposite party No.2 for recall of order dated 15.12.2016 on aforesaid grounds is perfectly just and legal. The Apex Court in case of **Vishnu Agarwal** (Supra) and judgement of learned Single Judge in **Jawahar Lal** (Supra) have reiterated that there is difference between recall and review. By seeking recall of order dated 15.12.2016, opposite party No.2 is not seeking review of order dated 15.12.2016 and therefore bar contained in section 362 Cr.P.C. will not come in way. Consequently, I am of the considered opinion that order dated 15.12.2016, is liable to be recalled at the behest of opposite party No.2, who admittedly was not

afforded any notice or opportunity of hearing before order dated 15.12.2016 was passed.

69. Now I come to the last question involved in this recall application i.e. whether in view of orders dated 29.8.2017, 31.1.2018 and 15.12.2016, passed by Apex Court, this Court has jurisdiction to entertain recall application filed by opposite party No.2 seeking recall of earlier order dated 15.12.2016.

70. During pendency of S.T. No. 113 of 2017 (Nirmal Singh Garewal Vs. Nitin Jaiswal and six others) under Sections 452 and 307 I.P.C. P.S. Kotwali Bareilly, District-Bareilly, arising out of Case Crime No. 2568 of 2012, under Sections 452, 307 I.P.C. P.S. Kotwali Bareilly, District-Bareilly, Misc. Case/Transfer Application No. 113 of 2017 (Nirmal Singh Garewal Vs. Nitin Jaiswal and six others) was filed seeking transfer of Complaint Case No. 1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal and others) under Sections 307, 436, 392, 380, 504 and 506 I.P.C., P.S. Kotwali Bareilly, District-Bareilly, arising out of Case Crime No. 2675 of 2012 under Sections 307, 452, 427, 504, 506, 380, 426 and 392 I.P.C., P.S. Kotwali Bareilly, District-Bareilly to the Court of Additional Sessions Judge, Court No.1, Bareilly. The aforesaid transfer application was filed on the ground that Complaint Case No. 1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal and others) and S.T. No. 113 of 2017 (Nirmal Singh Garewal Vs. Nitin Jaiswal and six others) are cross-cases and therefore Complaint Case No. 1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal) under Sections 456, 427, 143 I.P.C., arising out of Case Crime No. 2675 of 2012, under Sections 307, 452, 427, 504, 506, 380, 426 and 392 I.P.C. P.S.-Kotwali Bareilly, District-Bareilly, be transferred to the Court of 1st Additional Sessions Judge, Bareilly. It is pertinent to mention here that when the aforesaid transfer application was filed, order dated 15.12.2016, passed by this Court in Criminal Misc. Application No. 38644 of 2016 (Jaspreet Singh Garewal Vs. State of U.P.

and another) was already operative. This Court, vide order dated 15.12.2016, set aside order dated 02.12.2016 passed by Sessions Judge, Court No.1, Bareilly, whereby application filed under Sections 309 Cr.P.C. was rejected and directed the Additional Sessions Judge, Court No.1, Bareilly, to reconsider the matter as above mentioned cases are cross-cases. Admittedly, no decision was taken by the Magistrate concerned before whom Complaint Case No. 1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal and others) under Sections 307, 436, 392, 380, 504 and 506 I.P.C., P.S. Kotwali Bareilly, District-Bareilly, arising out of Case Crime No. 2675 of 2012 under Sections 307, 452, 427, 504, 506, 380, 426 and 392 I.P.C., P.S. Kotwali Bareilly, District-Bareilly, was pending to transfer the same to the court of Sessions being cross-cases. The Magistrate did not exercise his powers in terms of section 323 Cr.P.C. The High Court, vide order dated 15.12.2016 had remanded the matter to Additional Sessions Judge, Court No.1, Bareilly, to decide the matter afresh. Section 408 (1) Cr.P.C. provides that power of transfer can be exercised only by Sessions Judge. It is in the aforesaid circumstances that transfer application was filed and was allowed vide order dated 13.7.2017. The Sessions Judge, Bareilly, only transferred Complaint Case to the Court of Additional Sessions Judge, but did not consolidate the two cases. Order dated 13.7.2017 was challenged before this Court by way of Criminal Misc. Application U/s 482 No. 22262 of 2017 (Nitin Jaiswal Vs. State of U.P. and another) which was came to be dismissed, vide order dated 29.8.2017. This order has been quoted in Paragraph 27 of this judgement. This order dated 29.8.2017 was challenged before Apex Court by way of Special Leave Petition to Appeal (Crl.) No. 8152 of 2017 and was decided finally vide order dated 6.11.2017. The same is reproduced herein-under:-

“In the peculiar facts of this case, we are not inclined to entertain the present petition as the order of consolidation of two cases is substantially correct. However, we leave the question open as to whether the

Additional Sessions Judge had the power to order consolidation of the cases under Section 408 of the Cr.P.C., even when we find that the Additional Sessions Judge did not have the power to do so.

We are also conscious of the fact that insofar as the case filed by the petitioner is concerned, it has already reached the advanced stage of final arguments. In these circumstances, we would impress the Trial Court to have expeditious trial of the case which is filed by the respondent, possibly within one year.

The Special Leave Petition is disposed of.

Pending applications(s), if any, stands disposed of accordingly.”

71. Subsequently, against order dated 29.8.2017, a review petition was filed, which came to be dismissed vide order dated 31.1.2018. Order dated 31.01.2018 is reproduced herein-under:-

“ The instant review petition is filed against the order dated 06.11.2017 whereby the aforementioned special leave petition was disposed of.

We have carefully gone through the review petition and the connected papers. We find no error much less apparent in the order impugned. The review petition is, accordingly, dismissed.”

72. Against interim order dated 3.8.2018, passed in Criminal Misc. Application No. 25681 of 2018 (Nitin Jaiswal Vs. State of U.P. and another), Special Leave to Appeal (Criminal) No. 16536 of 2019 (Nirmal Singh Garewal Vs. State of U.P. and another) was filed, which was decided finally, vide order dated 10.5.2019. It is pertinent to mention here that at the time of consideration of S.L.P No. 16536 of 2019 (Nirmal Singh Garewal Vs. State of U.P. and another), reference was also made to order dated 6.11.2017, passed by Apex Court. For ready reference, it may be mentioned that order dated 10.05.2019 has already been quoted in paragraph 12 of this judgement.

73. On the aforesaid factual premise, Mr. Sikandar B. Kochar, learned

counsel for applicant submits that once order dated 13.7.2017, passed by Sessions Judge, Bareilly, transferring Complaint Case No. 1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal and others) under Sections 307, 436, 392, 380, 504 and 506 I.P.C., P.S. Kotwali Bareilly, District-Bareilly, arising out of Case Crime No. 2675 of 2012 under Sections 307, 452, 427, 504, 506, 380, 426 and 392 I.P.C., P.S. Kotwali Bareilly, District-Bareilly, to the Court of Additional Sessions Judge, Court No.1, Bareilly, where S.T. No. 113 of 2017 (Nirmal Singh Garewal Vs. Nitin Jaiswal and six others) under Sections 452 and 307 I.P.C. P.S. Kotwali Bareilly, District-Bareilly, arising out of Case Crime No. 2568 of 2012 under Sections 452, 307 I.P.C. P.S. Kotwali Bareilly, District-Bareilly, was pending, has been upheld upto Apex Court, this Court cannot adjudicate the said issue.

74. In reply it is submitted by Mr. Anoop Trivedi, learned Senior Counsel that this Court while deciding Bail Application No. 17956 of 2013 (Nirmal Singh Garewal Vs. State of U.P) vide order dated 25.7.2013, directed trial Court to expeditiously decide the S.T. No. 123 of 2013 (State Vs. Nirmal Singh Garewal and others), under Sections 452 and 307 I.P.C., P.S.-Kotwali Bareilly, District-Bareilly, arising out of Case Crime No. 2568 of 2012, under sections 452, 307 IPC, P.S. Kotwali, District Bareilly.

75. It is then submitted that as no progress was being made in aforesaid Sessions Trial as proceedings were being prolonged by filing applications by accused, three criminal misc. applications under section 482 Cr.P.C. came to be filed before this Court. Application U/s 482 No. 3811 of 2014 (Nirmal Singh Garewal Vs. State of U.P. and Another) was filed challenging the order dated 18.1.2014, whereby trial court summoned the witnesses and documents other than those mentioned in the charge sheet; Application U/s 482 No. 6775 of 2014 (Nirmal Singh Garewal Vs. State of U.P. and Another) was filed challenging order dated 18.1.2014, whereby Court below declined prayer made by accused for furnishing

copies of statements of witnesses to them. Application U/s 482 No. 6095 of 2014 (Nitin Jaiswal Vs. State of U.P. and Another) was filed by complainant for expeditious disposal of case. All the above mentioned criminal misc. applications came to be decided vide order dated 9.4.2014. Criminal Misc. Application No. 3811 of 2014 (Nirmal Singh Garewal Vs. State of U.P. and Another) and Criminal Misc. Application No. 6775 of 2014 (Nirmal Singh Garewal Vs. State of U.P. and Another) were dismissed, whereas Criminal Misc. Application No. 6095 of 2014 (Nitin Jaiswal Vs. State of U.P. and Another) was disposed of with a direction to proceed with trial expeditiously irrespective of pendency of any application or petition before this Court except where specific order of stay has been passed.

76. Then reference was made to the order dated 23.7.2015 as corrected, vide order dated 7.8.2015 passed by this Court in Criminal Misc. Application No. 20143 of 2015, whereby directions were issued to conclude the trial within a period of two months. The orders dated 23.07.2015 and 07.08.2015 have been quoted in paragraph 4 of present judgement.

77. Lastly, reference was made to last fourth paragraph of order dated 24.10.2016, passed in Criminal Misc. Application No. 27370 of 2016 (Nitin Jaiswal Vs. State of U.P. and Others) and Criminal Misc. Application No. 27511 of 2016 (Taranpreet Garewal @ Dimpal Vs. State of U.P. and Another). Criminal Misc. Application No. 27370 of 2016 (Nitin Jaiswal Vs. State of U.P. and Others) was allowed with further direction to trial Court to proceed with trial on day to day basis and conclude same, within two months from date of production of certified copy of order. Criminal Misc. Application No. 27511 of 2016 (Taranpreet Garewal @ Dimpal Vs. State of U.P. and Another) was dismissed. The order dated 24.10.2016 is already quoted above in paragraph 13 of this judgement. He, therefore, submits that in view of facts as noted herein

above and also findings recorded in the order dated 2.12.2016, passed by Additional Sessions Judge, Court No. 1, Bareilly, rejecting the application under section 309 Cr.P.C. filed by accused, it is explicit that the trial is at an advanced stage. Evidence has been recorded and now only the accused have to give their defence testimony as provided under Section 313 Cr.P.C. The order dated 15.12.2016 runs counter to the orders referred to above. However, it may be noticed that Sessions Judge, Bareilly transferred Complaint Case No. 1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal) under Sections 456, 427, 143 I.P.C., arising out of Case Crime No.2675 of 2012 under Sections 307, 452, 427, 504, 506, 380, 426 and 392 I.P.C. P.S.-Kotwali Bareilly, District-Bareilly to the Court of 1st Additional Sessions Judge, Bareilly, but did not consolidate the two being cross-cases as is explicit from the recital contained in the order 06.11.2017 passed by the Apex Court. There is nothing on record to show that the two cases were consolidated to be tried together by Sessions Judge, Bareilly while exercising his power under Section 408 Cr.P.C.

78. Both the counsels have referred to judgement of Apex Court in ***Khoday Distillers Ltd. (Now known as Khoday India Limited and others) Vs. Sri Mahadeshwara Sahakara Sakkare Karkhane Ltd. Kollegal (Under Liquidation) Represented by the Liquidator*** reported in ***2019 (4) SCC 376***, in support of their respective contentions as to whether order dated 15.12.2016 can or cannot be recalled in view of subsequent orders passed by Apex Court. Reliance is placed upon paragraph 27, which is as under:-

27) From a cumulative reading of the various judgments, we sum up the legal position as under:

(a) The conclusions rendered by the three Judge Bench of this Court in Kunhayammed and summed up in paragraph 44 are affirmed and reiterated.

(b) We reiterate the conclusions relevant for these cases as under:

"(iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the

doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(v) If the order refusing leave to appeal is a speaking order, i.e., gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting the special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.

(vi) Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.

(vii) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before the Supreme Court the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Rule 1 of Order 47 CPC.”

(c) Once we hold that law laid down in Kunhayammed is to be followed, it will not make any difference whether the review petition was filed before the filing of special leave petition or was filed after the dismissal of special leave petition. Such a situation is covered in para 37 of Kunhayammed case.

79. The case in hand is covered by conclusion no.4 contained in Paragraph 27 of the judgement. Consequently, the principle of merger will not apply. As such, I am of the view that there is no legal impediment in recalling the order dated 15.12.2016.

78. There is an another aspect of the matter. This Court, vide order dated 23.07.2015, quoted in paragraph 4 of this judgement had directed that trial should be concluded within a period of six months preferably on day to day basis. Subsequent to the order dated 23.07.2015 accused filed an application under Section 311 Cr.P.C. which came to be rejected vide order dated 27.08.2016. At this stage Criminal Misc. Application U/S482 Cr.P.C. No. 27370 of 2016 (Nitin Jaiswal Vs. State of U.P. and another) for issuing appropriate direction to the trial court to conclude the trial of Sessions Trial No. 123 of 2013 (State of U.P. Vs. Nirmal Singh Garewal and others) and Criminal Misc. Application No. 27511 of 2016 (Taran Preet Garewal @ Dimpal Vs. State of U.P. and another) came to be filed before this Court. The same was decided vide order dated 24.10.2016. Reference may be made to the last four paragraphs of order dated 24.10.2016, which reads as under:

“It is clear from the material on record that the accused persons including bailed out accused Nirmal Singh Garewal, an advocate are committing abuse of process of court by moving one frivolous application or the other and approaching this Court every now and then by filing one frivolous application or the other under Section 482 Cr.P.C. or under Section 397/401 Cr.P.C. or even transfer application. In the circumstances, it is necessary to observe that the bailed out accused Nirmal Singh Garewal, who is also an Advocate, with co-accused persons, his sons, is making misuse of his professional degree. The conduct of accused persons indicates that they have no respect for the Courts as well as orders passed by Court. The law relied on behalf of opposite party Sri Nirmal Singh Garewal has no application to the facts of the case.

In view of the facts and circumstances brought before this Court through application No.27370 of 2016 and in view of the earlier orders dated 25.07.2013, 09.04.2014, 23.07.2015 and 07.08.2015 of this Court directing expeditious disposal of the trial in time bound period, the application No.27370 of 2016 is liable to be

allowed with further direction to trial court for expeditious disposal of the trial by proceeding from day to day and if possible within two months from the date of submission of copy of this order before this Court without granting any unnecessary adjournment to the accused-persons.

However, if the trial Court finds that the opposite party Nirmal Singh Grewal or his sons the co-accused persons are continuing to follow the same delaying tactics by moving frivolous applications, the same shall be disposed of expeditiously in accordance with law by appropriate orders, including order for imposition of special costs on accused-persons if so required. If the trial is not concluded within a period of 2 months due to misconduct of accused persons, it will be deemed that opposite party Nirmal Singh Grewal is making misuse of liberty of bail and on being approached, this Court shall be compelled to curtail the liberty so granted and cancel the bail granted to him vide order dated 25.07.2013.

Accordingly, application No.27370 of 2016 is allowed with the directions to the trial court for expeditious disposal of trial within two months from the date of production of copy of order before it and application No.27511 of 2016 is dismissed with costs.

81. After order dated 24.10.2016 was passed, the accused filed an application under Section 309 Cr.P.C. dated 29.11.2016 before Additional Sessions Judge, Court No.1, Bareilly, in S.T. No. 123 of 2013 (State of U.P. Vs. Nirmal Singh Garewal and others) under Sections 452 and 307 I.P.C. P.S. Kotwali Bareilly, District-Bareilly, for transfer of Complaint Case No. 1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal and others) under Sections 307, 436, 392, 380, 504 and 506 I.P.C., P.S. Kotwali Bareilly, District-Bareilly, pending in the Court of Judicial Magistrate Ist, Bareilly and the same be tried alongwith above mentioned Sessions Trial.

82. This application under Section 309 Cr.P.C. came to be rejected by 1st Additional Sessions Judge, Court No.1, Bareilly, vide order dated

02.12.2016 against which Criminal Misc. Application U/S 482 Cr.P.C No. 38644 of 2016 was filed, in which order dated 15.12.2016 was passed.

83. From perusal of record of Criminal Misc. Application No. 38644 of 2016, the Court finds that there is no reference of the orders dated 25.07.2013, 09.04.2014 and 07.08.2015 passed by this Court nor copies of same have been appended alongwith the present application. The application under Section 309 Cr.P.C. has been filed much after aforesaid orders have been passed.

84. For the facts as noted herein above and also the reasons recorded, the present recall application is liable to succeed. Accordingly, the same is allowed. Order dated 15.12.2016 passed by this Court is hereby recalled. The application shall now stand restored. The same shall be listed for hearing on merits.

Order Date :- 19.09.2019

YK.