

respondent no. 2 that the present petition is completely frivolous and an abuse of process of law and therefore is liable to be dismissed with cost.

10. Sri Anand Sagar Dubey, learned AGA-I who appeared on behalf of State submitted his written submission but the entire averments and facts along with relied upon judgments are the same one which he submitted in Petition under Article 227 no. 13987 of 2024 since petition no. 13987 of 2024 (connected) and 15602 of 2024 (present) were clubbed with each other and heard together and as such in both the petitions the stand of the learned AGA was the same.

Observations and Conclusion

11. After hearing the rival submissions extended by learned counsel for the parties, it is crystal clear that one hand petitioner is challenging extension of bail in favour of respondent no. 2 and in the connected petition petitioner was supporting direction contained in order which impugned the present petition, meaning thereby petitioner is seeking bail cancellation through the instant petition but at the same time intended to restore direction passed by learned Additional Sessions Judge-II/Special Judge, SC/ST Act, Gautam Buddha Nagar which is available in the impugned order through which the direction was issued to re-investigate the matter for ascertaining role of respondent no. 3.

12. As per the procedure, bail cancellation application can only be preferred under Section 439(2) Cr.P.C. but in the instant matter cancellation of bail has been sought through challenging order through which bail has been extended in favour of respondent no. 2. It is a trite law that while seeking bail, it is only the bail cancellation order which is not amenable for putting into challenge before higher court. The

grant of bail is not an order which has been adjudicated on the basis of pleadings exchanged but it is extension and grant for ensuring personal liberty ensured as per procedure on the basis of certain conditions and as such the prayer made through the instant petition is not maintainable wherein certain part has been prayed to be restore and consideration of grant of anticipatory bail has been sought to be set aside.

13. The procedure has not mandated for seeking cancellation of bail through preferring petition under Article 227 of the Constitution of India and the prayer made in the instant petition for seeking quashing the order dated 17.05.2024 only to the extent insofar as it considers the non-bailable offences against the respondent no. 2 as bailable and granted anticipatory bail to the respondent no. 2 cannot be considered since the same is directly seeking cancellation of the bail as extended in favour of respondent no. 2.

14. In view of the aforementioned facts and circumstances, and in the light of the discussions made above and by giving highest regard to the judgments rendered by Hon'ble Apex Court and the judgment passed by this Court, relying upon the verdict of Hon'ble Apex Court, the instant petition stands *dismissed* accordingly.

(2025) 2 ILRA 102
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.02.2025

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Application U/S 482 No. 1287 of 2025

Anil Kumar Srivastava **...Applicant**
Versus
C.B.I./S.C.B. Lko. & Ors. **...Opposite Parties**

Counsel for the Applicant:

Ambrish Kumar Pandey

Counsel for the Opposite Parties:

Anurag Kumar Singh, G.A.

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 161 - Evidence Act, 1872 - Section 33 - Bharatiya Sakshya Adhiniyam, 2023- Sections 27 & 33 of the Evidence Act, 1872, relates to the relevancy of certain evidence for proving, in a subsequent proceeding or at a later stage of the same proceeding, the truth of facts stated therein. Evidence given by a witness in a judicial proceeding becomes relevant for such purposes when the witness is dead or unavailable. However, a statement recorded by an Investigating Officer under Section 161 CrPC does not fall within the ambit of Section 33 of the Evidence Act, 1872, nor does it satisfy the requirements under Section 27 of the Bharatiya Sakshya Adhiniyam, 2023. Hence, such statements cannot be read into evidence for proving the truth of facts in subsequent judicial proceedings. (Para 5, 6)

B. Bharatiya Nagarik Suraksha Sanhita, 2023- Section 528 - Code of Criminal Procedure, 1973, S. 482 - *Inherent powers of the High Court to make such orders as may be necessary to give effect to any order under the Sanhita, to prevent abuse of the process of any Court, or to otherwise secure the ends of justice.* There are two parts: (i) exercise of inherent powers *ex debito justitiae* to prevent abuse of process and ensure substantial justice, and (ii) giving effect to the provisions of the Code when no specific remedy exists. The inherent jurisdiction of the Court is of wide and plenary amplitude under Section 528 of BNSS. (Para 11)

C. Lapse on part of counsel – It is a trite law that a litigant should not suffer for the lapses or inadvertent mistakes of their counsel. Once a party engages a lawyer, confidence is reposed in the lawyer to

safeguard their interest. If due diligence is shown by the counsel but technical or procedural lapse occurs inadvertently, the party ought not to be penalised. In the present case, the applicant had earlier filed an application dated 18.07.2024 u/s 33 of the Indian Evidence Act, 1872 seeking to rely on the statement of Late Vijay Bahadur Singh, the Investigating Officer (CBCID), recorded under Section 161 CrPC in previous proceedings. However, Section 33 does not permit such statements, recorded under Section 161 CrPC, to be treated as relevant in subsequent judicial proceedings. Application was defective. Applicant sought liberty to move a fresh application u/s 33 with an appropriate prayer. *Held* : The Court held that parties should not be prejudiced due to their counsel's lapses. If inherent powers under Section 528 BNSS are not exercised, grave injustice would be caused, rendering the applicant remedy-less, which is impermissible under the constitutional scheme. Accordingly, liberty was granted to the applicant to move a fresh application under Section 33 of the Evidence Act, 1872. The trial court was directed to consider the same in accordance with law. (Paras 14, 15, 18)

Held: Application Allowed. (E-5)

List of Cases cited:

Ashok Kumar Vs New India Assurance Co. Ltd., (2024) 1 SCC 357

(Delivered by Hon'ble Shree Prakash Singh, J.)

1. Heard learned counsel for the applicant, Mr Anurag Kumar Singh, counsel for C.B.I, Mr. Nirmal Kumar Pandey and Mr. Sushil Kumar Pandey, counsels for the State.

2. Under challenge is the order dated 03.08.2024 passed in Case No. 01A/2009, RC 4 (S)/2007, Under Section

120B r/w- 420, 467, 468 & 471 I.P.C., C.B.I./S.C.B. Lucknow, Pending In The Special Judicial Magistrate Pollution/C.B.I., Lucknow, C.B.I. Versus - Anil Kumar Srivastava and Order Dated 05.11.2024 in Criminal Revision bearing No. 558/2024, Anil Kumar Srivastava Versus C.B.I.

3. The factual matrix of the case is that the first information report was lodged on 06.06.2007 under section 120-B, 420, 467, 468 and 471 of IPC against Rajendra Kumar @ Tinku and two unknown persons on the basis of letter no. 4616 dated 30.05.2007, by the then Registrar of High Court of Judicature at Allahabad, Lucknow Bench, whereafter, the matter was investigated by the C.B.I. and the chargesheet was filed on 26.12.2008 while, recording the statement of the witnesses and all concerned. The chargesheet was filed against Brijesh Kumar Verma and Anil Kumar Srivastava, the present applicant and subsequently, the chargesheet was challenged by the present applicant before this Court and an interim order was granted in his favour while staying the criminal proceedings against him, whereas, the trial proceeded against Brijesh Kumar Verma and he was convicted. Later on, a 482 petition was decided and the matter was relegated back to the trial court concerned to proceed with the trial. During course of trial an application under section 33 of The Evidence Act, 1872 (hereinafter referred to as 'Act 1872') was moved by the applicant before the trial court, while making a prayer that the statement of Vijay Bahadur Singh (the then CBCID official) under section 161 of Cr.P.C. is relevant for proving in the subsequent judicial proceedings and therefore, his prayer may be allowed and his statement may be considered as an evidence so as a proof.

4. After hearing the applicant and the C.B.I., the learned trial court decided the application on 03.08.2024 and it is held that the statement taken under section 161 of Cr.P.C. by the Investigating Officer do not come under the purview of section 33 of The Evidence Act.

5. Section 33 of the Evidence Act is reproduced hereinunder:-

"Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated. Evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:

Provided-

that the proceeding was between the same parties or their representatives in interest;

that the adverse party in the first proceeding had the right and opportunity to cross-examine;

that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation. A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section."

6. The aforesaid provisions speaks about the relevancy of an evidence of a

witness in a judicial proceeding, for the purpose of proving in the subsequent proceedings. The provisions is very obvious that the statement given in a judicial proceedings is relevant for proving the certain evidences to the truth of facts. The statement which is recorded by the Investigating Officer under section 161 of Cr.P.C. do not cover the field of the provisions as there are two elements, first, evidence given by a witness in the judicial proceedings and secondly, 'before any person authorized by law' and admittedly, the application dated 18.07.2024 submitted before the trial court, is evident that it was prayed therein that the statement under section 161 of Cr.P.C. dated 14.07.2008 given by the then official of CBCID namely, late Vijay Bahadur Singh be read while invoking the provisions under section 33 of The Evidence Act. The relevant extract of the application is reproduced hereinunder:-

"अतः न्यायालय श्रीमानजी से प्रार्थना है कि महत्वपूर्ण बयान जो साक्षी स्व० श्री विजय बहादुर सिंह पुत्र स्व० श्री हरनाम सिंह द्वारा सी.बी.आई. को मुकदमा उपरोक्त में दिनांक 14.07.2008 को बयान अंतर्गत धारा 161 दं.प्र.सं. के रूप में कराया गया था, सी. बी. आई. द्वारा न्यायालय के समक्ष पेशित, रिपोर्ट दिनांकित 29.05.2022 के अनुसार उपरोक्त साक्षी की मृत्यु दिनांक 09.06.2018 को हो चुकी है जिससे साक्षी स्व०. श्री विजय बहादुर सिंह पुत्र स्व०. श्री हरनाम सिंह का बयान अंतर्गत धारा 164 नहीं हो सका, को प्रार्थी/अभियुक्त के सफाई साक्षी- 2 के रूप में पढ़ा जाना अत्यन्त महत्वपूर्ण एवं न्याय हित में आवश्यक है एवं सफाई साक्षी- 2 के रूप में पढ़ा जाय ।"

7. Overtly, the aforesaid prayer is for considering the statement taken under section 161 of Cr.P.C. as relevant in the subsequent trial of co-accused/applicant and that is not a statement taken under the judicial proceeding and thus, prima facie, the finding recorded by the learned trial court is correct.

8. At this stage, the learned counsel for the applicant submits that on the ill advise, the applicant had moved the application with wrong prayer and if the applicant is not given the liberty to move fresh application, the irreparable loss and legal injury□ would be caused to him. He further submitted that in fact the statement of late Vijay Bahadur Singh was recorded under the judicial proceeding and in fact that is required to be considered by the learned trial court while invoking the jurisdiction under section 33 of the ' Act 1872' thus, submission is that to meet the ends of interest of justice, the applicant may be given liberty to move a fresh application in-consonance with the provisions of section 33 of Act 1872 and the trial court may be directed to consider the same within stipulated period of time as may be fixed by this Court.

9. On the other hand Sri Anurag Kumar Singh, learned counsel appearing for C.B.I. has opposed the prayer made by counsel for the applicant for setting aside the orders dated 03.08.2024 and 05.11.2024 passed on an application under section 33 of Act 1872, moved by the applicant before the trial court subsequently, a revision before the revisional court. He submits that there is no incorrectness in the findings recorded by the trial court and the application dated 18.07.2024 has been rightly rejected, as the statement recorded under section 161 of Cr.P.C by an

Investigating Officer cannot be taken into consideration so far as the mandate of provisions of section 33 is concerned, thus, submission is that the instant application is liable to be dismissed.

10. Having heard learned counsels for the parties and after perusal of material placed on record, it transpires that the impugned order is challenged while invoking the jurisdiction under section 528 of B.N.S.S. (old section 482 of Cr.P.C.), the provisions are quoted hereinunder verbatim:-

"Saving of inherent powers of High Court.

Nothing in this Sanhita shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Sanhita, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

11. From perusal of the aforesaid provision, it reveals that there are two parts, 'one is that the inherent powers to act ex debito justitiae to do real and substantial justice where, there is abuse of process of law and secondly, to secure the ends of justice. The inherent power is also stretched to the extent to give effect to the provisions of the code. Time and again, the law is settled that the inherent powers under section 482 of Cr.P.C. (Now 528 of B.N.S.S.) have to be exercised sparingly, carefully and with great caution and only in the event when such exercise is justified by the tests laid down in the provision itself. Further the inherent powers of the Court can also be exercised when there is no remedy provided in the Code of Criminal Procedure (Now B.N.S.S.) for redressal of the grievance. It is the fact that the provisions earlier envisaged under

section 482 of Cr.P.C. is given verbatim under section 528 of BNSS.

12. So far as the case in hand is concerned, an anomaly is brought to the knowledge of this Court that an application was placed by counsel for the applicant before the trial court with a prayer that the statement of late Vijay Bahadur Singh, Investigating Officer of CBCID, under section 161 of Cr.P.C. be allowed to be read for proving the case whereas, section 33 of the Act 1872 do not permit such statement to be read.

13. When this Court examines the impugned order dated 03.08.2024, it reveals that the learned trial court has considered the application in a right perspective, while adhering the provisions of section 33 of the Act 1872. In this background of the matter, now the applicant has no remedy except apart to approach this Court invoking the jurisdiction under section 528 B.N.S.S. (old section 482 of Cr.P.C.). Prima facie, the application dated 18.07.2024 placed by counsel of the applicant seems to be erroneous as the very purpose of filing the aforesaid application was for compliance of the mandates of section 33 of the Act 1872 and it is a fact that the statement of late Vijay Bahadur Singh, the Investigating Officer, CBCID was earlier recorded by the trial court in the judicial proceedings and that would be relevant and in fact the application dated 18.07.2024 seems to be drafted inadvertently with the prayer to get that statement under section 161 of Cr.P.C. be considered by the learned trial court in the subsequent judicial proceedings of the applicant as to prove the case and therefore, the application is faulty.

14. It is a trite law that the contesting parties should not be left to suffer for lapses on the part of their

counsels. It is noticeable in the background of our society, that generally the party appears through their advocates and they, after briefing them, pay the fees and solely trust upon the advocates to do rest of the things. Such parties are the villagers and belongs to the rural area and it is not expected from them that may have knowledge of the court's procedure. Once such party/person engaged the lawyer then he put himself in a confidence that the lawyer will look after his interest, but there is other side of the coin that if a lawyer works with due diligence, but some sorts of his inadvertence, he commits some fault, then that cannot be termed the fault committed by the party and therefore, such person should not be held liable for the faults/lapses on the part of their counsels. This aspect of the matter has currently been reiterated by the Hon'ble Apex Court in case of **Ashok Kumar v. New India Assurance Co. Ltd. Reported in 2024 1 SCC 357.**

15. This Court is also aware of the wide and plentitude power given under sections 528 of B.N.S.S. (Old section 482 of Cr.P.C.) and at the same time, the limitation thereof. In the instant case, prima facie, there seems to be some lapse on the part of the counsel of the applicant, might be inadvertent, though apparent from the facts and circumstances of the case and if this Court would not invoked the inherent powers, this would cause grave injustice to the applicant and would be left remedy-less, which is impermissible under the scheme of constitution of India.

16. Consequently, the relief sought by the applicant vide the present applicaiton seems to be genuine and therefore, the order dated 03.08.2024

passed by the learned trial court is hereby kept in abeyance.

17. Further the applicant had also approached the learned revisional court and the revisional court has passed the order dated 05.11.2024 in Criminal Revision bearing No. 558/2024, while affirming the order dated 03.08.2024 and therefore, the same is also kept in abeyance.

18. In view of the above-said, the applicant is given liberty to move a fresh application under the strict purview of section 33 of Act 1872, with the right texture and prayer, within a period of 30 days and if such, application is moved by the applicant, the same shall be decided by the trial court, within further period of thirty days, after giving opportunity to all concerned.

19. Accordingly, the application is hereby **allowed.**

(2025) 2 ILRA 107
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.02.2025

BEFORE

THE HON'BLE SAMIT GOPAL, J.

Application U/S 482 No. 2818 of 2020
 With
 Application U/S 482 No. 18261 of 2022
 With
 Application U/S 482 No. 36143 of 2022
 With
 Application U/S 482 No. 4446 of 2020

Surendra Kumar & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants: