APPELLATE JURISDICTION
CRIMINAL- SIDE
DATED: ALLAHABAD 12.07.2013

BEFORE
THE HON'BLE VINOD PRASAD, J.
THE HON'BLE ANJANI KUMAR MISHRA, J.

Contempt Appeal No. 4 of 2013

Tarun Kumar Agrawal ...Petitioner
Versus
The Executive Engineer ...Respondents

Counsel for the Petitioner:
Sri Gautam, Sri Ashish Singh

Counsel for the Respondents:
.....

Contempt of Court Act, 1971-Section 19-
Contempt Appeal-against order of issue notices to maintain status quo on spot-held-not maintainable-in absence of punishment order.

Held: Para-14 & 15
14. As already observed by us, the order impugned does not award any punishment to the appellant and is therefore clearly covered by condition I aforementioned. Besides, the direction issued in the order under appeal is not one which would bring it within the ambit of condition IV above.

15. In view of the preceding discussions and also considering the fact that no order of punishment has been passed by the impugned order, we have no reservations in holding that the instant Contempt Appeal is not maintainable.

(Delivered by Hon'ble Anjani Kumar Mishra, J)

1. This Contempt Appeal under Section 19 of the Contempt of the Courts Act has been filed against the order dated 06.05.2013.

2. The facts relevant for the instant appeal are as follows:

Plot number F-15 (40), Shastri Nagar, Meerut was allotted to one P.S. Mahesh by the U.P. Avas Evan Vikas Praishad. The original allottee applied for and obtained sanction of map no:229 dated 28.04.2012 from the U.P. Avas Evam Vikas Parishad, Meerut for raising a residential house over the aforesaid plot. On an inspection, it was discovered that the constructions on the spot were not being raised in accordance with the sanctioned plan. A show cause notice was therefore issued on 28.07.2012 to the recorded owner to show cause why the unauthorised constructions be not demolished. Since none appeared on the date fixed in pursuance of the notice aforesaid, an order for the demolition of the unauthorised constructions was passed by the Competent Authority on 8.8.2012.

4. After the order of the demolition was passed, two representations were made by the appellant. The first on 14.08.2012 wherein it was admitted that the constructions being raised on the spot were at variance with the sanctioned plan while by the second representation dated 28.05.2012 it was intimated that the appellant had purchased the plot in question from the original allottee, P.S. Mahesh.

5. The appellant challenged the demolition order by means of a Writ Petition No. 5391 of 2012, wherein a Division Bench on 10.10.2012, passed an order directing the parties to maintain status quo as regards the constructions in question.

6. The Executive Engineer, U.P. Avas Evam Vikas Parishad, Meerut filed

a Contempt Application (Civil) No. 1456 of 2013 alleging therein that the order of status quo was being violated by the appellant and he was continuing with the constructions. Photographs of the constructions made in defiance of the order of status quo, snapped in November, 2012 were annexed along with the contempt application. It was further stated that a notice dated 13.12.2012 was issued to the appellant, calling upon him to stop the construction work being carried out in defiance of the interim order dated 10.10.2012. In response to this notice, Tarun Kumar Agrawal submitted a reply that he was only getting the finishing work done, that no work was being done as far as the disputed construction was concerned and that he had not been restrained from continuing the work in the rest of the house apart from the disputed constructions.

7. The Contempt application aforesaid was entertained and notices were issued to the opposite party in the contempt petition (appellant herein) by this Court fixing, 06.05.2013.

8. On the date fixed, a counter affidavit filed by Sri Tarun Kumar Agarwal was taken on record and the order impugned was passed.

9. We have heard Sri Gautam, learned counsel for the appellant and have perused the record.

10. The stamp reporter has reported that the instant appeal is not maintainable.

11. A perusal of the order impugned shows that it grants time to the counsel for filing a rejoinder affidavit in response to the counter affidavit filed by the contemnor and further directions contained in the said order have been issued only to ensure compliance of the order of status quo passed by the writ court on 10.10.2012. No order of punishment has been passed.

12. We have also perused the counter affidavit filed by the appellant in the contempt petition as also the affidavit in support of the stay application in this appeal wherein the appellant has admitted that construction work was being carried out by him. However, the entire thrust of the averments is to justify the construction work being carried out. The object of invoking the appellate jurisdiction appears to be to obtain some order or observation, interpreting the order, contempt whereof is alleged, which would absolve the appellant of the contempt notice even before the contempt Court has applied its mind to the decide the matter finally. This, to our mind, is impermissible.

13. Section 19 of the Contempt of Courts Act, invoked by the appellant reads as follows:

"19. Appeals- (1) An appeal shall lie as of right from any order or decision of High Court in the exercise of its jurisdiction to punish for contempt ?....

The Apex Court considering the import of the aforesaid provision of law in the case of Midnapore Peoples' Co-operative Bank Ltd. Versus Chunnilal Nanda reported in (2006) 5 SCC 399 has held in paragraph 11 of the said judgment as follows:

"11. The position emerging from these decisions, in regard to appeals against orders in contempt proceedings may be summarized thus:

I. An appeal under section 19 is maintainable only against an order of

decision of the High Court passed in exercise of its jurisdiction to punish for contempt, that is, an order imposing punishment for contempt.

II. , Neither an order declining to initiate proceedings for contempt, nor an order in initiating proceedings for contempt nor an order dropping the proceedings for contempt nor an order acquitting or exonerating the contemnor, is appealable under section 19 of the CC Act. In special circumstances, they may be open to challenge under Article 136 of the Constitution.

III. In a proceeding for contempt, the High Court can decide whether any contempt of court has been committed, and if so, what should be the punishment and matters incidental thereto. In such a proceeding, it is not appropriate to adjudicate or decide any issue relating to the merits of the dispute between the parties.

IV. Any direction issued or decision made by the High Court on the merits of a dispute between the parties, will not be in the exercise of "jurisdiction to punish for contempt") and, therefore, not appealable under section 19 of the CC Act. The only exception is where such direction or decision is incidental to, or inextricably connected with the order punishing for contempt, in which event the appeal under section 19 of the Act, can also encompass the incidental or inextricably connected directions.

V. If the High Court, for whatsoever reason, decides an issue or makes any direction, relating to the merits of the dispute between the parties, in the contempt proceedings, the aggrieved person is not without remedy. Such an order is open to challenge in an intra-court appeal (if the order was of a Single Judge and there is a provision for an intra-court appeal), or by seeing special leave to appeal under Article 136 of the Constitution of India (in other cases)."

14. As already observed by us, the order impugned does not award any punishment to the appellant and is therefore clearly covered by condition I aforementioned. Besides, the direction issued in the order under appeal is not one which would bring it within the ambit of condition IV above.

15. In view of the preceding discussions and also considering the fact that no order of punishment has been passed by the impugned order, we have no reservations in holding that the instant Contempt Appeal is not maintainable.

16. The contempt appeal is therefore dismissed as not maintainable.

HIGH COURT OF JUDICATURE AT ALLAHABAD
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.07.2013

BEFORE
THE HON'BLE SIBGHAT ULLAH KHAN, J.

Civil Revision 77 of 2007

Sudhakar Verma ...Petitioner
Versus
Mahendra Kumar and Ors ...Respondents

Counsel for the Petitioner:
Sri Avdhesh Kumar, Sri Ankur Sinha

Counsel for the Respondents:
Sri Sushil Awasthi

C.P.C.-Section 115- Civil Revision-against order for return of plaint due to

want of jurisdiction of civil Court at Lakhimpur Khiri-suit for permanent injunction on dissolution of partnership firm to run Brick Kein at Pilibhit-in partnership deed jurisdiction given to civil court Lakhimpur-held- if plaint allegation, confined upto movable property by virtue of amended plaint-impugned order shall go if related to immovable property order impugned shall be perfect.

Held: Para-14

Accordingly, it is directed that plaintiff applicant within two months from today shall file an application seeking amendment in the plaint clarifying as to whether relief claimed is in respect of movable property alone or in respect of immovable property also. If through amendment in the plaint plaintiff clarifies that the relief is only in respect of movable property and accounting then suit shall be treated to be maintainable at Lakhimpur Khiri and shall be decided on merit. However, if through amendment it is clarified that relief is claimed in respect of immovable property also then impugned order shall stand and plaint shall be returned (after allowing the amendment) to be filed before the competent court at Pilibhit. If within two months, amendment application is not filed, then impugned order shall stand.

Case Law discussed:

AIR 2004 SC 2432; AIR 2007 SC 2656; AIR 2007 SC 1636; AIR 2004 SC 2154

(Delivered by Hon'ble Sibghat Ullah Khan,J.)

1. At the time of arguments, no one appeared on behalf of respondents even though the case was taken up in the revised list, hence only the arguments of learned counsel for applicant were heard.

2. This is plaintiff's revision under Section 115, C.P.C. directed against order dated 07.03.2007 passed by Civil Judge (S.D.), Lakhimpur Khiri in Regular Suit No.266 of 2005, Sudhakar Ram Vs. Mahendra Kumar and others. Through the impugned order, preliminary issue relating to jurisdiction (whether civil court at Lakhimpur or at Pilibhit has got jurisdiction to try the suit) was decided against the plaintiff holding that civil court at Pilibhit had got jurisdiction. Ultimately, through the impugned order the plaint was directed to be returned for filing before appropriate court.

3. According to the plaint allegations, plaintiff started a business in partnership with defendants of brick kiln at Pilibhit. The relief claimed was for permanent prohibitory injunction seeking to restrain the defendants from dissipating the property of firm M/s Krishna Brick Field and for accounting. Partnership agreement was executed on 01.10.2002 at Lakhimpur Khiri and office of the firm for the purposes of trade tax was got registered at Lakhimpur Khiri. In para-3 of the plaint, it was stated that plaintiff and defendants established the brick kiln by the name of M/s Krishna Brick Field at plot No.23, area 0.75 hectare situate at Pota Kala, District Pilibhit.

4. In the partnership agreement, it was mentioned that all the disputes would be subject to the jurisdiction of court at Lakhimpur Khiri. The court below in the impugned order held that the relevant clause in the partnership deed did not contain the word only, hence suit could not be filed at Lakhimpur Khiri as the property was situate at Pilibhit. The relevant clause is quoted below:

"That all the disputes are subject to Lakhimpur Khiri jurisdiction."

5. Admittedly, the defendants reside at Pilibhit.

6. The question of jurisdiction of civil court is dealt with under Sections 15 to 20, C.P.C. Under Section 28, Contract Act, it is provided that agreement in restraint of legal proceedings is void. The courts have interpreted Section 28, Contract Act to mean that if for a suit more than one civil court situate at more than one place may have jurisdiction, then parties may by consent oust the jurisdiction of one or more of such courts and confine the jurisdiction to only one of such courts. The Supreme Court in **Hanil Era Textiles Ltd. v. Puromatic Filters (P) Ltd. AIR 2004 SC 2432** has held that the clause in the agreement confining jurisdiction to one of such several courts, which may have jurisdiction to try the suit is binding upon the parties even if it is not qualified by words like "alone, only or exclusive'.

7. The relevant clause of the partnership agreement confining jurisdiction to the courts at Lakhimpur Khiri is not relevant for deciding the present controversy. Such types of clauses can always be invoked by defendants. There is absolutely no occasion for the plaintiff to take advantage of such clause. Through such clauses if cause of action arises at several places then court at particular place may be chosen to have exclusive jurisdiction to try the suit. However if cause of action arises at different places then even otherwise plaintiff has got full right to file the suit at any of such places (Section 17, C.P.C.)

8. Accordingly, what is relevant to be seen is as to whether irrespective of the relevant clause in the partnership deed (supra) civil court at Lakhimpur Khiri has got jurisdiction to try the suit or not, whether exclusively or along with the Civil Court at Philibhit. Sections 16 to 20, C.P.C. broadly divide the suits between two parts. The first part consists of suit in respect of immovable property or movable property actually under distraint or attachment and the other division is of other suits. Sections 16 & 17, C.P.C. deal with the suits in respect of immovable properties or movable properties under attachment. By virtue of Sections 16-17, suits for recovery, partition, foreclosure, sale or redemption in the case of a mortgage or of charge upon immovable property, or for the determination of any other right or interest in the immovable property, or for compensation for wrong to immovable property and for recovery of movable property actually under attachment may be instituted only in the court within local limits, of whose jurisdiction the property is situate. However, by virtue of Sections 19 & 20, suit for compensation for wrong done to the person or to movable property (Section 19) or other suits (Section 20) may be filed either at the place where cause of action arises or where defendant resides or carries on business or personally works for gain at the option of the plaintiff.

9. Accordingly, if the suit is in respect of immovable property or any interest therein then no other court except the court where property is situate will have jurisdiction to try the suit otherwise the suit may also be filed at the place where defendant resides or works for gain.

10. The relief claimed in the suit is in respect of property of the firm. The property may be movable as well as immovable. Relief claimed is for accounting also. As the office of the firm is at Lakhimpur Khiri

hence it can very well be said that defendant works for gain there. Accordingly, suit for accounting and in respect of movable property of the firm is quite maintainable at Lakhimpur Khiri.

11. However, the suit in respect of immovable property of the firm is not at all maintainable at Lakhimpur Khiri. At this juncture, reference may be made to the Supreme Court authority reported in **Sandeep Polymers Private Limited V/S Bajaj Auto Limited, AIR 2007 SC 2656.** The said case related to damages for breach of contract without claiming any right or interest in immovable property. There also registered office of defendant was situate at a place different from the place where suit was filed. Supreme Court held that the suit would be maintainable only in respect of that relief which was based upon a cause of action arising at the place where the suit was filed. In the end the plaintiff was permitted to amend the plaint and to seek the relief with respect to purchase orders at Pune (suit had been filed at Nagpur) at Pune.

12. As far as proviso to Section 16, C.P.C. is concerned, it is not applicable to the facts of the case. Under the said proviso a suit to obtain relief respecting for wrong to immovable property can be instituted where defendant resides or works for gain where the relief sought can be entirely obtained through his personal obedience. In the instant case, there is no possibility that relief can be obtained through personal obedience of the defendants' respecting immovable property. In this regard, reference may be made to **AIR 2007 SC 1636.**

13. Learned counsel for plaintiff applicant has cited the Supreme Court authority reported in **New Moga Transport Corporation Of India vs. United India Insurance Co. Ltd., AIR 2004 SC 2154** holding that "Where two courts or more have under the C.P.C. jurisdiction to try a suit or proceedings agreement between the parties that the dispute between them shall be tried in any one of such courts is not contrary to public policy and in no way contravenes Section 28 of the Contract Act. (Para-14)"

14. Accordingly, it is directed that plaintiff applicant within two months from today shall file an application seeking amendment in the plaint clarifying as to whether relief claimed is in respect of movable property alone or in respect of immovable property also. If through amendment in the plaint plaintiff clarifies that the relief is only in respect of movable property and accounting then suit shall be treated to be maintainable at Lakhimpur Khiri and shall be decided on merit. However, if through amendment it is clarified that relief is claimed in respect of immovable property also then impugned order shall stand and plaint shall be returned (after allowing the amendment) to be filed before the competent court at Pilibhit. If within two months, amendment application is not filed, then impugned order shall stand.

15. Revision is disposed of accordingly.

APPELLATE JURISDICTION
CRIMINAL- SIDE
DATED: ALLAHABAD 22.07.2013

BEFORE
THE HON'BLE DHARNIDHAR JHA, J.
THE HON'BLE PANKAJ NAQVI, J.

Criminal Misc. Application Defective u/s 372 Cr.P.C. (Leave to appeal) No. 83 of 2013

Nanhey Singh @ Dinesh Singh..Petitioner
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri Ashutosh

Counsel for the Respondents:
A.G.A.

Code of Criminal Procedure-Section 372-
Appeal against acquittal-appeal by stranger-neither informant nor appeared as witness-merely on ground the investigation officer not examined-none of witness could identify the criminals-none of witness tern hostile-apart from merit delay of 2400 days-even though no limitation for filing appeal u/s 372 provided-but limitation of 60 days prescribed for appeal under section 378-adopted-accordingly-appeal dismissed with cost of rs. 10,000/- recoverable as fine under procedure of Cr.P.C.

Held: Para-5
We refer to Article 114 of the Limitation Act, which refers to Section 417 (2) of the Cr P C, that, the Cr P C of 1988 and that is equivalent to present Section 378 Cr P C. In that case the period is prescribed as 90 days, but the provisions under Section 372 Cr P C being a new one, which was brought out by virtue of Amending Act No. 5 of 2009 and on consideration of the very Article 114 of the Limitation Act, we find that it speaks of an appeal from an order of acquittal and thereafter, makes categorization of different appeals under different headings. We have to assume that the Legislature at the time of the framing Article 114 of the Limitation Act in absence of the previous proviso to Section 372 Cr P C, had nothing before it to mention that particular provision as one of such occasions on which the law of limitation shall be considered for computing the period of limitation. But, the provision speaks of appeals against acquittal and we are of the opinion that a period of 90 days should be applicable also to appeals under Section 372 proviso Cr P C.

Case Law discussed:
1983 AIR 826; AIR 1993 SC 892;

(Delivered by Hon'ble Dharnidhar Jha, J.)

1. We have heard Sri Ashutosh, Advocate appearing on behalf of the appellant Nanhey Singh @ Dinesh Singh, challenging the correctness of judgment of acquittal dated 11.10.2006, passed by learned Additional Sessions Judge, Court No. 3, Bijnor in Sessions Trials No. 356 of 2005 & 160 of 2006, by which respondents Kuldip Singh and Nagendra Pal were acquitted of offence under Section 302 IPC, who is neither the informant of the case nor was examined as a witness. He has made a statement in his affidavit that he was the cousin brother of the deceased Jabbar Singh, who was the son of informant Babu Ram, examined as PW-2 in the court below.

2. The "party interested" or "a victim" could have a locus standi of preferring an appeal and we for that reason, while referring to the provisions of Section 372 Cr P C, recall the judgment of the Supreme Court in B**aghwant Singh v. Commissioner of Police, Delhi, reported in 1983 AIR 826 as also Janta Dal v. H S Chowdhary and others,** reported in AIR 1993 SC 892. There is no doubt in our mind that the appellant is a busy-bee, he is an inter-meddler, who has pecked his nose unnecessarily to waste the court's time. This is one aspect of the case as regards the locus standi of a person to prefer an appeal under Section 372 Cr P C.

3. The other aspect which deters us from applying our jurisdiction under

Section 372 Cr P C, is the Law of Limitation, which has intervened by virtue of 2400 reported days of delay in filing the present appeal. Section 372 Cr P C does not provide for any period in which the appeal under that particular provision should be filed, though the other provision under Section 378 Cr P C, which speaks of filing of an appeal against acquittal in three different categories of cases does so. The first category could be of such cases, which have been investigated into by Delhi Special Police Establishment Act, i.e., by the Central Bureau of Investigation, the other category of cases are those which could have been investigated into by the State Police through its investigating wing and the third category of cases would be of those appeals, which could be arising out of judgments of acquittal based on trials, the prosecution in which had been lodged by virtue of filing a complaint petition as defined under Section 2(d) of the Cr P C, i.e., by the complainant. In case, a complaint has been filed by a public servant, the period of limitation, set down by Section 378 (5) Cr P C, is of 6 months, whereas in other cases the appeal has to be preferred and filed within 60 days.

4. We have already noted that provisions of Section 378 Cr P C is related to special categories of cases on account of very categorization made by that provision. Thus, we have no hesitation in saying that the provision of limitations, which are prescribed by Section 378 Cr P C, could not be attracted to an appeal, which could have been filed under Section 372 Cr P C by virtue of the Proviso, which was added by the legislature through the Amending Act No. 5 of 2009. Then, the simple question could be as to how could the courts be ascertaining as to what should be the limitation within which an appeal should be preferred by any person, who is entitled by virtue of proviso to Section 372 Cr P C to bring an appeal before any appellate court. In our opinion, the provision of Section 378 Cr P C, as we have already noted, is special in nature, which is attracted only in cases of appeals, which are likely to be preferred or which have been filed in three different categories of cases, which we have already indicated, may be a case different from that which is spoken of by Section 378 as in that case even if the right of appeal has been created in favour of the complainant, he has to exercise that right within a particular period by virtue of Section 378 (5) Cr P C, which situation is not postulated by proviso to Section 372 Cr P C, as such, in our opinion, the general provisions of the Limitation Act have to be consulted for ascertaining the period, which could be attracted for filing an appeal under Section 372 proviso Cr P C.

5. We refer to Article 114 of the Limitation Act, which refers to Section 417 (2) of the Cr P C, that, the Cr P C of 1988 and that is equivalent to present Section 378 Cr P C. In that case the period is prescribed as 90 days, but the provisions under Section 372 Cr P C being a new one, which was brought out by virtue of Amending Act No. 5 of 2009 and on consideration of the very Article 114 of the Limitation Act, we find that it speaks of an appeal from an order of acquittal and thereafter, makes categorization of different appeals under different headings. We have to assume that the Legislature at the time of the framing Article 114 of the Limitation Act

in absence of the previous proviso to Section 372 Cr P C, had nothing before it to mention that particular provision as one of such occasions on which the law of limitation shall be considered for computing the period of limitation. But, the provision speaks of appeals against acquittal and we are of the opinion that a period of 90 days should be applicable also to appeals under Section 372 proviso Cr P C.

6. The delay is of 2400 days. We have already noted that the appellant, who has filed the petition under Section 5 of the Limitation Act, is a rank outsider, who does not have any locus standi to file the appeal. This is one circumstance and disability by which the appeal could not be maintained.

7. In spite of the above, we have considered the merit of the case.

8. The case related to the murder of Jabbar Singh, the son of PW-2 Babu Ram. The informant was not an eye witness, as appears from the story put down by him in the written report as he very categorically stated that he was informed about the incident telephonically by PW-4 Manpal. The story was that while taking his meals with PW-1 Hitesh, and PW-4 Manpal, the deceased was shot at and killed by the respondents in the dhaba, owned by PW-5. Neither PW-1, who was said to be an eye witness nor PW-4, who was another eye witness, supported the prosecution story, rather they stated that they were not taking their meals in the hotel owned by PW-5 and had not seen the murder of Jabbar Singh being committed in the said hotel. The hotel owner PW-5 Adesh Kumar also came to state that the murder, though, had been committed in his hotel, but he could not identify the criminals and as regards the two respondents, he was very categorical that the two had not committed the crime. We have already noted that Babu Ram, was not an eye witness. In view of the above evidence, there was no possibility for any court to have come to a conclusion that anyone could be said to have committed the offence.

9. Learned counsel appearing for the appellant was submitting to us that only because the Investigating Officer had not been examined, there was a good ground for him to file the present appeal.

10. We regret to note if there was no evidence about the complicity of any of the accused indicating that they could have committed the offence and if the witnesses were turning hostile by failing even to identify the accused persons, it would have been an exercise in futility that the Investigation Officer should have been summoned. Mere non-examination of the Investigating Officer does not appear giving rise to any cause for anyone to question the judgment of acquittal in the light of the evidence, we have just noticed.

11. The judgment, passed by the learned trial Judge was the only result which could have been obtained under the facts and circumstances of the case. The appeal appears not only devoid of merit, but a frivolous exercise, which has consumed the precious time of the court and, as such, we impose a cost of Rs.10,000/- to be realized from the appellant Nanhey Singh @ Dinesh Singh, s/o Late Chotey Lal, r/o Village Harthala, near Jatowala Mandir, police station Civil Lines, District Moradabad, by procedure

as set down for realization of fine under the Cr P C.

12. The appeal fails and is dismissed at the admission stage itself.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 15.07.2013

BEFORE
THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.

Review Petition Defective No. 96 of 2009

District Basic Education Officer ...Petitioner
Versus
Chandra Kant Tripathi & Ors...Respondents

Counsel for the Petitioner:
Sri Jyotinjay Verma

Counsel for the Respondents:
Sri K.M. Shukla, Sri P.K. Khare

Constitution of India, Art. 226- Review Application-petition decided with direction of reinstatement and salary-based upon concealment of material facts and fraud-review held-maintainable.

Held: Para-18
I have no hesitation to hold that this Court was persuaded to pass the order dated 6.2.2009 by suppression and concealment of material facts as noted above. Though the order dated 6.2.2009 is innocuously worded and in fact it is a conditional order, however, for the reason that the said order is causing miscarriage of justice on account of the fact that the departmental authorities have already held the initial appointment of respondent no.1 to be forged, in my considered view, the order dated 6.2.2009 deserves to be reviewed, albeit without giving any finding as to the genuineness of the appointment of respondent no. 1.

Case Law discussed:
[2004 (22) LCD 115]

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

1. Heard Shri Jyotinjay Verma, learned counsel for review applicant and Shri K.M. Shukla and Shri P.K. Khare, learned counsel appearing for respondent no. 1.

2. By means of the instant review petition, the final judgment and order dated 06.02.2009 passed by this Court has been sought to be reviewed on the ground inter alia that the order dated 6.2.2009 passed by this Court has resulted in miscarriage of justice for the reason that this Court was persuaded to pass the order on account of suppression and concealment of material facts by the respondent no. 1.

3. Opposing the plea taken by learned counsel appearing for review applicant, Shri P.K. Khare, learned counsel for respondent no. 1 has vehemently submitted that the order under review dated 6.2.2009 is an innocuous order and the same does not suffer from any legal infirmity so as to call for its review. He has further stated that the order under review is a conditional order, according to which, the respondents in the writ petition were directed to allow joining of the petitioner therein and to pay him salary only in case the petitioner was reinstated. He has further stated that in case according to the review applicant, respondent no. 1 was not reinstated then the order dated 6.2.2009 ought to have been interpreted by the review applicant accordingly. He further states that the order, being conditional in nature, does

not suffer from any error apparent on the face of record and hence the review petition is misconceived.

4. Shri Khare has further stated that on one hand in compliance of order dated 6.2.2009, the respondent no. 1 has not only been allowed his joining but is also being paid his salary as well and on the other hand, the same order is being assailed by the review applicant by filing the instant petition, which according to him, is not legally permissible.

5. I have considered the rival arguments advanced by learned counsels for respective parties.

6. Admittedly, the writ petition filed by respondent no.1 (Chandra Kant Tripathi) bearing Writ Petition No. 918 (SS) of 2008 in which the order under review dated 6.2.2009 has been passed was finally disposed of on the date when it was presented for the first time before the Court. The order dated 6.2.2009 was passed after hearing the learned Standing Counsel appearing for the State authorities and also learned counsel appearing for the Basic Shiksha Adhikari, who is the applicant in the instant review petition.

7. The order dated 6.2.2009 is based on the grievance raised by respondent no. 1 to the effect that since he was reinstated by the order dated 7.11.2007 as such, he is entitled to be permitted his joining and further to be paid the salary. The Court while passing the order dated 6.2.2009 only observed that if the respondent no. 1 has been reinstated by the order of Basic Shiksha Adhikari then there cannot be said to be any authority under which he can be restrained from functioning as teacher in the institution in question and further that there cannot be any legal provision or legal authority under which the petitioner can be denied his continuance and salary as teacher unless any subsequent order has been passed against him. Based on the aforesaid observations, the Court only directed the respondents of the writ petition to allow the joining of the petitioner therein and to pay him salary only if the petitioner was reinstated. The operative portion of the aforesaid order dated 06.02.2009 is as follows:-

"In view of the fact, it is directed that if the petitioner has been reinstated, he shall be allowed to join on his post within a period of fifteen days from the date a certified copy of this order is produced before the authority concerned and will also be entitled for salary if permissible under the law."

8. True, from a perusal of the order dated 6.2.2009 passed by this Court while finally disposing of Writ Petition No. 918 (SS) of 2009, it cannot be said that the said order suffers from any apparent infirmity. However, this case has very disturbing facts, which are being narrated here in after. These facts make it evident that while passing the order dated 6.2.2009, this Court was persuaded to pass the said order by concealment of material facts by the petitioner in the writ petition.

9. It is alleged by learned counsel appearing for the review applicant that the respondent no. 1 was allegedly appointed in the year 1991 on compassionate ground. However, he was placed under suspension on the ground that he claimed his appointment on compassionate ground

on the basis of a forged document i.e. his very appointment letter. In this regard, he has drawn attention of the Court towards the letter dated 21.7.2005, written by the then Basic Shiksha Adhikari (who has since retired) to the Assistant Director of Education (Basic) Faizabad Division, Faizabad stating therein that though alleged appointment order issued in favour of respondent no. 1 is dated 20.8.1991, which is allegedly issued under his signature whereas he had joined on his posting only on 12.9.1991. The then Basic Shiksha Adhikari has categorically stated in the said letter that the alleged order of appointment of the respondent no.1dated 20.8.1991 is completely forged and fabricated.

10. It has further been stated by the learned counsel appearing for review applicant that an inquiry was conducted and by means of order dated 30.6.2005 reinstatement of the respondent no. 1 ordered earlier was cancelled. He has further stated that in the said inquiry, it was found that the appointment order of the respondent no.1, allegedly issued on 20.8.1991 appointing him on compassionate ground, was a forged document. It has also been brought to the notice of the Court that challenging the aforesaid order dated 30.6.2005, the respondent no.1 had earlier filed a Writ Petition bearing No. 532 (SS) of 2005 wherein no interim order was passed by the Court and on the date of disposal of Writ Petition No. 918 (SS) of 2009, the said writ petition i.e. Writ Petition No. 532 (SS) of 2005 was pending. It has also been pointed out by learned counsel that the factum of pendency of Writ Petition No. 532 (SS) of 2005 was not disclosed by the respondent no.1 while filing Writ Petition No. 918 (SS) of 2009. He further stated that if such an averment was made in Writ Petition No. 918 (SS) of 2009 bringing to the notice of the Court the factum of pendency of Writ Petition No. 532 (SS) of 2005, the Court would not have been persuaded to pass the order under review dated 6.2.2009.

11. It has also been brought to the notice of the Court and the said fact has not been controverted by learned counsel appearing for respondent no.1 that in respect of alleged forgery committed by respondent no.1 in obtaining forged appointment of compassionate ground as Assistant Teacher, First Information Report was lodged in the year 2005 and after investigation in the said criminal case a charge sheet was also submitted before the court concerned. It has also been stated that non-bailable warrants by the court concerned have been issued against him. Learned counsel for review applicant states that the factum of lodging of F.I.R., filing of charge sheet and pendency of the criminal case in respect of very initial appointment of petitioner ought to have been brought to the notice of the Court by respondent no.1 while filing Writ Petition No. 918 (SS) of 2009 and by not bringing these facts to the notice of the Court, the respondent no.1 is, in fact, guilty of misrepresentation and concealment of relevant facts. He further states that on account of the aforesaid misrepresentation, the Court appears to have been persuaded to pass the order dated 6.2.2009.

12. Shri Verma has further argued that as far as the earlier Writ Petition No. 532 (SS) of 2005 is concerned, the same was got dismissed as withdrawn on 19.2.2006 i.e. subsequent to the final disposal of Writ Petition No. 918 (SS) of

2009 by means of the order dated 6.2.2009, which is under review. He has also stated that no notice of the application seeking withdrawal of Writ Petition No. 532 (SS) of 2005 was ever given to the learned counsel appearing for Basic Shiksha Adhikari in the said case.

13. In the background of the aforesaid facts, especially the misrepresentation and concealment of relevant facts and material made by respondent no.1, it can safely be observed that order under review may not apparently appear to suffer from any infirmity for the reason that it is apparently very innocuously worded but it has ultimately resulted in miscarriage of justice, as such, the instant review petition deserves to be allowed.

14. As regards the submission made by Shri P.K. Khare, regarding the maintainability of the review petition, regard may be had to the judgment of the Division Bench of this Court in the case of **Vijay Pratap Singh Vs. Union of India and seven others reported in [2004 (22) LCD 115]** wherein it has categorically been held that the orders obtained by concealment of fact deserves to be set aside and further that the order of the Court should not be prejudicial in any manner and if the Court finds that the order was passed under a mistake or in a situation where it would not have exercised the jurisdiction, but forits erroneous assumption, which in fact did not exist, it can rectify the error. In other words, if an order has been passed by mistake or by suppression of material facts and further if the order is causing miscarriage of justice, it can be reviewed.

15. Paragraph no. 8 of the aforesaid judgment in the case of **Vijay Pratap Singh (supra**) is relevant to be quoted here which runs as under:-

"8. It appears to be a settled legal position that orders obtained by concealment of facts, deserves to be set aside. In this connection, reference may be made to Welcom Hotel & others V. State of Andhra Pradesh & others (1983) 4 SCC page 575, the Chancellor & another v. Dr. Vijaynanda Kar & others, (1994) 1 SCC, 169, wherein it has clearly been held that suppression of material facts disentitles the petitioner to any relief at the hands of the Court. The Apex Court has also ruled in S.Nagraj & others v. State of Karnataka & others, (1993) Supp. (4) SCC 595 that the order of the court should not be prejudicial to any one and if the court finds that the order was passed under a mistake and it would not have exercised the jurisdiction but for the erroneous assumption which in fact did not exit, it an rectify the error. In other words, if an order has been passed either by mistake or by suppression of material facts and if the order is causing miscarriage of justice, it has to be reviewed. Similar was the view of this Court in Dr. Sushma Misra, Vs. U.P. Higher Education Service Commission, (1982) 2 UPLBEC 1502. it was said that if an order was passed on misapprehension of facts, then there was no rule which prevented it from reviewing the same."

16. It does not require any discussion to observe that forgery vitiates all judicial acts and since in the instant case, the very initial appointment of respondent no.1 is allegedly based on forged and fabricated appointment order, hence, respondent no.1 was not entitled to

any kind of relief howsoever innocuously worded the order under review may be. The submission of learned counsel appearing for the respondent No.1 that the order dated 6.2.2009, which is under review in the instant review petition is a very innocuous order and further it is a conditional order and hence instead of filing the review petition, it was incumbent on the part of review applicant to have appropriately interpreted the said order does not impress the Court.

17. As noticed above, the allegation of the review applicant is that the very initial appointment order of respondent no.1 appointing him as Assistant Teacher on compassionate ground is forged. Further noticeable feature in this case is that on an inquiry, the department has found the order dated 21.6.2004, on the strength of which the respondent no.1 had claimed his reinstatement, has also been found to be forged. This report is embodied in the order dated 30.6.2005. The said order dated 30.6.2005 was challenged by respondent no.1 by way of filing Writ Petition No. 532 (SS) of 2005. Further, while filing the subsequent Writ Petition No. 918 (SS) of 2009 even the factum of pendency of the earlier writ petition was deliberately suppressed by the respondent no.1. Another material suppression, which is apparent in the instant case, which the respondent no.1 indulged into, is that while filing Writ Petition No. 918 (SS) of 2009, pendency of criminal case in respect of allegations of forgery in the appointment order dated 20.8.1991 was not disclosed. It is also noteworthy that the order dated 7.11.2007 is also being termed to be a forged document allegedly fabricated by respondent no.1.

18. From a close scrutiny and analysis of the aforesaid facts and circumstances of the case as also the competing arguments raised by learned counsels appearing for the parties, I have no hesitation to hold that this Court was persuaded to pass the order dated 6.2.2009 by suppression and concealment of material facts as noted above. Though the order dated 6.2.2009 is innocuously worded and in fact it is a conditional order, however, for the reason that the said order is causing miscarriage of justice on account of the fact that the departmental authorities have already held the initial appointment of respondent no.1 to be forged, in my considered view, the order dated 6.2.2009 deserves to be reviewed, albeit without giving any finding as to thegenuineness of the appointment of respondent no. 1.

19. In view of the discussions made and reasons given above, in the result, the instant review petition is allowed and the order dated 6.2.2009 is hereby set aside. It is expected that pleadings in the Writ Petition No. 918 (SS) of 2009 shall be completed within the shortest possible span of time and the same shall be decided expeditiously.

20. There shall be no order as to costs.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.07.2013

BEFORE
THE HON'BLE DHARNIDHAR JHA, J.
THE HON'BLE PANKAJ NAQVI, J.

Criminal Misc.Application (Leave toAppeal) No. 105 of 2013(u/s 372)

Madan Pal Sharma ...Petitioner
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri H.C. Mishra, Sri V. Singh

Counsel for the Respondents:
A.G.A.

Code of Criminal Procedure-Section 372-
Appeal against acquittal-offence under section 498-A, 304-B, 302/34 I.P.C.-readwith 3/4 D.P. Act-Trail Court recorded finding of fact about no demand of dowry-living peacefully continues three years in-in-laws house-goes to established regarding no demand of dowry-merely because defence failed to explain about burn injury-can not be basis for interference with trail court finding-appeal dismissed.

Held: Para-8
We have already noted that some of the facts which have been alleged by the prosecution were not established. There was no demand of dowry initially at the time of marriage and the court below has rightly noted that there was no evidence to establish that there was any further demand while the deceased was residing in her matrimonial house. The further story that she was expelled from her matrimonial house on account of not bringing the desired dowry was falsified by the fact that she had remained in her matrimonial house peacefully for three continuous years. Merely because the defence did not offer any explanation as to how the deceased has incurred the burn injuries, was of his consequence. The non - establishment of the ingredients of the offence itself had entitled the accused to an acquittal.

Case Law discussed:
AIR 1962 SC 605; AIR 1977 SC 170

(Delivered by Hon'ble Dharnidhar Jha, J.)

1. We have heard Sri Veer Singh, learned counsel for the appellant on admission of appeal under Section 372 I.P.C. The appeal is directed against judgment of acquittal dated 23.2.2013 passed by the learned Additional Sessions Judge, Court No. 2 Muzaffarnagar in Sesstions Trial No. 172 of 2006.

2. Some of the admitted facts were that the deceased Ravita was married to respondent Amit Kumar as per Hindu rites and rituals on 7th March, 2002 and that she was residing in her matrimonial house on 13.5.2005. It is also not disputed that she was burnt and the burn injuries were to the extent of 95% and she died of those injuries.

3. What was alleged and what was disputed was that just after the marriage, not being satisfied with the quantum of dowry given by the father of the deceased, the in-laws of the deceased placed additional demand of Rs. 25,000/- in cash and a scooter. It was stated that the lady had been beaten up and expelled from the matrimonial house one year prior to the occurrence and was told to be allowed to return only when she had brought the demanded cash and the scooter. The informant stated that there was some patch up between the parties and Rs. 10,000/- in cash was given to the accused which facilitated the lady to return to her matrimonial house but the lady continued to be assaulted and beaten up daily and lastly, on 13.5.2005 at about 11:00 a.m. he learnt from some unknown persons that the lady had been burnt by her in-laws and husband.

4. The informant, examined as P.W. 1, claimed having rushed to the house of the accused and found that she had been admitted into the hospital. When he wanted to meet the deceased the doctors forbade him to do so.

5. During the course of the trial P.W.1, father of the deceased admitted that at the time of the marriage there had not been any demand of dowry and the marriage was dowryless.The father of the groom was unhappy on the poor hospitality extended to the baratis but that particular

evidence does not indicate that there was any further annoyance and acrimony between the parties and the prosecution case that the deceased had been turned out after one year of the marriage from her matrimonial house appears hypothetical and as of no consequence as the prosecution evidence itself indicated that the lady remained at her matrimonial house continuously for three years and there was no complaint of any ill treatment and torture.

6. Learned counsel appearing for the appellant was critical of the judgment by submitting that once the death was under circumstances not natural and within seven years of marriage the defence had to discharge its burden under Section 113 B by showing as to how the deceased happened to have those burn injuries.

7. We on scrutiny of the arguments wish to note that even in a case of statutory burden created on defence as may be in cases of Section 304 B I.P.C. or cases of misappropriation or embezzlement of properties where the burden is caused on the accused to indicate the discharge of entrustment of the property, the primal onus is on the prosecution of establishing the constitution of the offence which was allegedly committed by the accused by admissible and acceptable evidence this onus never shifts. Once the prosecution has discharged its primary onus of establishing the offence which was allegedly committed by the accused, then only there would be some burden on the accused which could be required to be discharged. But, again there is difference between the discharge of the onus by the prosecution and showing the probabilities of the defence version by referring to the facts admitted by the witnesses or those brought on record by the cross-examination the prosecution witnesses. Yet another principle of criminal jurisprudence which is applicable to all cases is that if there are four ingredients creating the offence and the prosecution had established all the four ingredients by acceptable evidence and the defence has set up any plea which is constituted by yet another five sets of facts which the defence attempted to establish by leading evidence, the Court has to adopt an approach that if the defence has failed in establishing the four ingredients of its defence case completely and fully but if it had probablised the truth of the fifth factual ingredient, then a doubt is created by such probability of one fact of the defence version whereby the foundation of the prosecution case is shaken and the accused gets acquitted. We want to refer in the above context some of the cases of Supreme Court rendered in K.M. Nanawati Vs. State of Maharashtra reported in AIR 1962 SC 605 and Rabindra Kumar Dey Vs. State of Orissa reported in AIR 1977 SC 170.

8. We have already noted that some of the facts which have been alleged by the prosecution were not established. There was no demand of dowry initially at the time of marriage and the court below has rightly noted that there was no evidence to establish that there was any further demand while the deceased was residing in her matrimonial house. The further story that she was expelled from her matrimonial house on account of not bringing the desired dowry was falsified by the fact that she had remained in her matrimonial house peacefully for three continuous years. Merely because the defence did not offer any explanation as

to how the deceased has incurred the burn injuries, was of his consequence. The non - establishment of the ingredients of the offence itself had entitled the accused to an acquittal.

9. In view of our findings just noted, we find that the appeal against acquittal filed by the appellant is meritless and the same is dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.05.2013

BEFORE
THE HON'BLE SAEED-UZ-ZAMAN SIDDIQI, J.

Second Appeal No. 117 of 2013

Badri Vishal and Ors. ...Petitioners
Versus
Raj Narain ...Respondent

Counsel for the Petitioners:
Sri Ashok Shukla, Sri Shishir Tewari

Counsel for the Respondent:
Sri Raj Narain

Hindu minority and guardianship Act 1956-Section8(2) and (4)- Suit for cancellation of sale deed-at behest of minor-dismissed by Trail Court-decreed by Lower Appellate Court-with specific finding-transfer made even by mother of minor-without prior permission held-illegal-can not be disturbed under second appeal-no substantial question of law involve.

Held: Para-11
A detailed hearing and perusal of the judgment and orders of both the Courts below made it abundantly clear that no substantial question of law is involved in this appeal. Even appreciation of evidence by the two Courts below has not been assailed before this Court. Since the question involved in the instant second appeal has already been decided by the Hon'ble Apex court as well as this Court in three cases, I do not find it fit and expedient to refer this matter to a larger Bench of this Court as provided under Chapter V of Rules of the Court, 1952.

Case Law discussed:
[1982 (1) RR 122]; 1978 AWC 13; 2011 (2) AWC 1641; AIR 1991 SC 1256; 1987 AWC 109; AIR 1962 SC 1314; (2005) 7 SCC 60; AIR 1947 PC 19; (2011) 1 SCC 673; Civil Appeal No. 1374 of 2008.

(Delivered by Hon'ble Saeed-Uz-Zaman Siddiqi, J.)

1. Heard learned counsel for the appellants and perused the records.

2. The instant appeal has been preferred against the judgment and decree dated 22.12.2010, passed by learned Additional Civil Judge (J.D.), Court No.21, Barabanki, in Regular Suit No.134 of 1996, by which the plaintiffs suit for cancellation of sale deed was dismissed with costs but Civil Appeal No.5 of 2011 preferred by the defendant has been allowed and judgment and decree passed by the learned Trial Court has been set aside and the suit for cancellation of sale deed has been decreed with costs by learned First Appellate Court who has discussed the entire evidence and law laid down by the Hon'ble Apex Court as well as this Court in detail.

3. Simple dispute in this case is that the plaintiff was the recorded tenure holder of disputed agricultural plots. Since he was minor, his mother was natural guardian who sold it to the defendants without obtaining any permission from the learned District Judge as required under Section 8 of Hindu Minority and Guardianship Act, 1956. It is

admitted case between the parties that while executing the sale deed plaintiff's mother did not obtain any permission from the District Judge. The plaintiff after attaining majority, filed suit for cancellation which has already been decreed by the learned First Appellate Court. The law has been settled by the Hon'ble Apex Court in **Amirtham Kudumbah v. Sarnam Kudumban, AIR 1991 SC 1256** and **Vishambar and others v. Laxminarayana (Dead) by L.Rs. and another, 2001 (44) ALR 569**, which have been relied upon by this court in a catena of judgments. The law is also clear on the point. Section 8 of Hindu Minority and Guardianship Act, 1956 deals with power of natural guardian. Sub Section (2) of which prohibits a guardian not to transfer any part of immovable property of the minor without previous permission of the Court. The legislature has put a rider on the Courts itself by incorporating Sub Section (4) which says that no Court shall grant permission to the natural guardian to transfer except in the case of necessity or for an evident advantage to the minor. These words denote that if the property has been transferred without permission of the District Judge for the benefit of minor, he may not challenge it after attaining the age of majority and, as such, such transfer has been made voidable at the instance of the minor or by any person claiming under him. Sub Section (4) deals with proceedings of application for obtaining permission of the Court in the same fashion as are provided under Section 29 of Guardian and Wards Act, 1890.

4. Learned counsel for appellants relied upon the law laid down by this Court in **Smt. Sursati Devi v. The Joint Director of Consolidation, Basti and others [1982 (1) RR 122]**, wherein following observations have been made:-

"In view of aforesaid, one has to make strict interpretation of Entries 5 and 6 of List III so as to enable those to operate fully in their respective legislative fields. While Entry 5 covers a very wide field in matters of 'marriage an divorce; infants and minors, adoption, wills, intestacy and succession; joint family and partition all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law, Entry 6 of List III covers the legislative filed on the topics; 'Transfer of property other than agricultural land; registration of deeds of documents.' There appears to be good reason for the authors of the Constitution to exclude agricultural land from the ambit of legislative field on the topic 'transfer of property' enumerated in Entry 6 of List III because such matter has been enumerated in Entry 18 of List II and the State Legislature has been given exclusive jurisdiction to make laws about transfer and alienation of agricultural land. A harmonious construction is to be made so as to give full effect to Entry 18 of List I. The exclusion of 'agricultural land' from the ambit of Entry 6 clearly makes out that the Parliament has got no jurisdiction to legislate on the matter regarding transfer and alienation agricultural land because of specific exception provided in Entry 6 of List III in respect of such land.

There is a presumption that the legislature does not intend to exceed its jurisdiction and that the general words in a Statute are to be construed with reference to the powers of the legislature which enacts it. If Parliament enacts law on the subject enumerated in List II or the State Legislature enacts laws on the subject enumerated in the List I, the law

so enacted would be ultra vires to that extent are liable to be struck down being enacted beyond the legislative competence envisaged in the Constitution.

In this view of the matter, the provision of Section 8 of the H.M. & G. Act have got to be construed as to bring the said provision within the legislative competence of the central legislature. Since the Parliament could not make laws regulating transfer of agricultural land, it would be apt to construe the said provision to be not applicable to agricultural land so as to bring the said provision within its legislative competence."

5. It has been further held by this court in the above said case that the words 'immovable property' has not been defined in Section 4 of the H.M. & G. Act nor under Section 4 of the G. & W. Act. But, this Court in **Murari Lal v. DDC and Others, 1978 AWC 13** has held as under:-

".....relying on the authority reported in Mohd. Sohrab Khan & Ors. v. Deputy Director of Consolidation, 1970 AWR 78 in which it was held that transfer of share of a minor in agricultural land by a guardian is prohibited. It is also further held in this authority that there is no provision in U.P. Zamindari Abolition and Land Reforms Act dealing with the subject with which Sec. 11 of Hindu Minority and Guardianship Act of 1956 deals. That provision would, therefore, prevail and on this basis the revision was allowed."

6. Not only this in a recent case of **Hari Mohan v. Additional District Judge and Ors. 2011 (2) AWC 1641** same view has been reiterated. In **Amrithan Kudumbah v. Sarnam Kudumban, AIR 1991 SC 1256**, the Hon'ble Apex Court has relied upon a number of decisions and held as under:-

"The rationale of these decisions is that the right to impeach a sale effected by the guardian is a personal right vested in the minor and it is not transferable inter vivos. The expression "person claiming under him", according to this line of reasoning must, therefore, be understood as a legal representative and not as assignee."

In the above mentioned case it was further held:-

"The transfer made by the father during his son's minority was voidable at the instance of his son who was the real owner, and any person purchasing such property from the natural guardian obtained only a defeasible title. The minor retained a right in the property to defeat existing adverse claims, and such right is an assignable right. We are in complete agreement with what has been stated on the point of Palaniappa Goundan v. Nallappa Goundan and Ors. MANU/TN/0264/1951 : AIR 1951 Mad 817 and in P.Kamaraju v. C Gunnayya and Ors. MANU/TN/0068/1923 : AIR 1924 Mad. 322. We do not agree with the contrary view expressed on the point in Jhaverbhai Hathibhai Patel v. Kabhai Bechar Patel and Ors. MANU/MH/0102/1932 : AIR 1933 Bom. 42 : Mon Mohan Battacharjee and Ors. v. Bidhu Bhusan Dutta and Ots. MANU/WB/0259/1938 : AIR 1939 Cal.460 : MANU/WB/0259/1938 : AIR 1939 Cal460 and Palani Goundan and Anr. v. Vanjiakkal and Anr.

MANU/TN/0395/1955 : 1956 ILR Mad. 1062."

7. In an earlier decision in the case of **Banshi and others v. The D.D.C. Kanpur Camp at Orai (Jalaun), 1987 AWC 109,** this court has held as under:-

"As regards the third submission that the provisions of Section 8 of the Hindu Minority and Guardianship Act 1956 were not retrospective and sale-deed was dated 20.6.1956 and the Hindu Minority and Guardianship Act came into force on 27.8.1956. No doubt that the sale-deed was executed prior to 27th August, 1956 when the Hindu Minority and Guardianship Act came into force and the same was retrospective in its operation. But before the enforcement of this Act in such matters where the property of minor was sought to be alienated of compromised Order Thirty two (32) Rule 7 CPC was applicable. Even though provisions of the Code of Civil Procedure do not apply in terms to consolidation proceedings but its spirit or substances has to be made applicable to secure the ends of justice. In respect of the land of the minor if any transfer or compromise was sought to be made, the permission of the District Judge must have been obtained. In the present case the permission of the District Judge was not obtained. The sale-deed in question, cannot, accordingly be said to have been legally executed. This submission is equally devoid of substance."

8. In view of the authorities as mentioned above, it is quite clear that under Section 4 (b) of Hindu Minority & Guardianship Act, 1956, guardian of minor means a person having the care of the person of a minor or of his property or of both his person and property. Under Section 5 (b) of this Act the Act has overriding effect of any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act.

9. In view of these provisions texual Hindu law which is the general law is no more in force and Hindu Minority & Guardianship Act, 1956 is a special law which has got an overriding effect over any other law. In this aspect of the matter, a study of U.P. Zamindari Abolition and Land Reforms Act shows that there is no such provision in the entire Act which deals with the powers of natural guardian. Since the Act is silent on the point of rights of minor and powers of natural guardian is special law i.e. Hindu Minority & Guardianship Act, 1956 and Section 4 of Guardian and Wards Act shall prevail and prior permission must have been obtained of the learned District Judge under Section 8 of the Act.

10. In view of this matter I respectfully disagree with the law laid down by a Single Judge of this Court in Smt. Sursati Devi's case (supra) and I conquer with the law laid down by the Hon'ble Apex Court as well as various authorities as mentioned above and in view of law laid down by this Court in Banshi's case (supra), Hari Mohan's case (supra) and Murari Lal's case (supra). Particularly, because the State legislature while enacting U.P. Z.A. & L.R. Act has purposely omitted to deal with properties held by a minor keeping in view of the fact that such matters have already been dealt with by the Parliament in Hindu Minority and Guardianship Act and under Guardian and Wards Act.

11. A detailed hearing and perusal of the judgment and orders of both the Courts below made it abundantly clear that no substantial question of law is involved in this appeal. Even appreciation of evidence by the two Courts below has not been assailed before this Court. Since the question involved in the instant second appeal has already been decided by the Hon'ble Apex court as well as this Court in three cases, I do not find it fit and expedient to refer this matter to a larger Bench of this Court as provided under Chapter V of Rules of the Court, 1952.

In **Sir Chunnilal V. Mehta & & Sons Ltd. Vs. Century Spinning and Manufacturing Co. Ltd**., reported in **A.I.R. 1962 S.C., 1314,** the Hon'ble Apex Court for the purposes of determining the issue has held :

"The proper test for determining whether a question of law raises in the case is substantial, would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties."

13. Further in **Rajeshwari Vs. Puran Indoria, reported in (2005) 7 S.C.C., 60**, it was held :

"The Court, for the reasons to be recorded, may also entertain a second appeal even on any other substantial question of law, not formulated by it, if the Court is satisfied that the case involves such a question. Therefore, the existence of a substantial question of law is a sine-quanon for the exercise of jurisdiction under the provisions of Section 100 C.P.C. The second appeal does not lie on the ground of erroneous findings of facts based on appreciation of the relevant evidence."

14. In **Smt. Bibhabati Devi Vs. Ramendra Narayan Roy & Ors., reported in A.I.R. 1947 PC 19,** it has been held :

"the Privy Council has provided the guidelines as in what cases the second appeal can be entertained, explaining the provisions existing prior to the amendment of 1976, observing .... that miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happen not in the proper sense of the word a judicial procedure at all. That the violation of some principles of law or procedure must be such erroneous proposition of law that if that proposition to be corrected, the finding cannot stand, or it may be the neglect of some principle of law or procedure, whose application will have the same effect. The question whether there is evidence on which the Courts could arrive at their finding, is such a question of law."

15. In **Vijay Kumar Talwar Vs. Commissioner of Income Tax, New Delhi, reported in (2011) 1 S.C.C. 673**, it has been held :

"a point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be 'substantial' a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law

'involving in the case' there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. It will, therefore, depend on the facts and circumstances of each case, whether a question of law is a substantial one or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis."

16. In the case of **Union of India Vs. Ibrahim & Another in Civil Appeal No.1374 of 2008, decided on July 17, 2012,** the Hon'ble Apex Court has held :

"There may be exception circumstances where the High Court is compelled to interfere, notwithstanding the limitation imposed by the wording of Section 100 CPC. It may be necessary to do so for the reason that after all the purpose of the establishment of courts of justice is to render justice between the parties, though the High Court is bound to act with circumspection while exercising such jurisdiction. In second appeal the court frames the substantial question of law at the time of admission of the appeal and the Court is required to answer all the said questions unless the appeal is finally decided on one or two of those questions or the court comes to the conclusion that the question(s) framed could not be the substantial question(s) of law. There is no prohibition in law to frame the additional substantial question of law if the need so arises at the time of the final hearing of the appeal."

17. In view of the law as discussed above, the second appeal is dismissed.

APPELLATE JURISDICTION
CIVIL- SIDE
DATED: ALLAHABAD 23.07.2013

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

First Appeal No. 129 of 1988

D.M. Jaunpur & Ors. ...Petitioners
Versus
Majid and Ors. ...Respondents

Counsel for the Petitioner:
S.C., Sri S.C. Srivastava

Counsel for the Respondents:
Sri A.K. Sinha, Sri K.P. Agarwal
Sri R.S. Pandey, Sri Rajesh Kesarwani

Land Acquisition Act-Section 18-Reference against-award made by S.L.O.-reference court enhanced amount of compensation relying upon photocopy of sale deed-never proved-enhancement patently illegal-S.L.O. is not a court-simply giving offer-inadequacy of compensation can be proved only by evidence-order passed by reference court not sustainable-quashed.

Held: Para-11
The impugned judgment and order of the reference court does not point out any error of law in the award of the SLAO or as to how the compensation awarded is on the lower side. The reference court has simply based its award on the sale deed of Devi Prasad. The said sale deed was never produced in evidence before it. Thus, without adducing any evidence to prove that the compensation offered is inadequate or that it should be on higher side, the reference court manifestly erred in law in awarding compensation on the basis of the sale deed of Devi Prasad which was not part of the record.

Case Law discussed:
AIR 1988 SC 1652

(Delivered by Hon'ble Pankaj Mithal, J.)

1. Heard learned Standing counsel appearing for appellants no. 1 and 2. and Sri S.C. Srivastava, learned counsel appeared for appellant no. 3.

2. No one has appeared for the respondents despite case being called out twice.

3. The notification dated 11.5.1979 under Section 4 of the Land Acquisition Act was issued to acquire the land in question which involved plot no. 276 and 442 having area of 0.42 acres situate in Village-Muradganj, Pargana-Haveli, District-Jaunpur.

4. The SLAO made an award under Section 11 on 29.5.1982. The SLAO for the entire area of 14.625 acres of land awarded a total of Rs. 2,97,507.53. On reference being preferred by the claimant respondent under Section 18 of the Act the III Additional District Judge by the impugned judgment and order dated 11th November 1987 has directed for payment of compensation as per the sale deed of Devi Prasad which has been referred to at item no. 15 in the award of the SLAO and for payment of statutory benefits admissible under the Act.

5. Aggrieved by the aforesaid award of the Additional District Judge, this appeal under Section 54 of the Act has been preferred by the Collector/District Magistrate and the Special Land Acquisition Officer (in short SLAO). Later, U.P. Power Transmission Corporation was impleaded as appellant no. 3 as the land was acquired for its benefit.

6. The impugned judgment, order and award reveals that it has been passed on the basis of the sale deed by which Devi Prasad had purchased 6 decimal of land for a sum of Rs. 7,251/-. The date of the sale deed and other details are not mentioned in the impugned judgment. The reference court has not even cared to calculate the market rate as per the above sale deed and has directed for payment of compensation on its basis.

7. I have gone through the paper book and the entire record of the reference court.The said sale deed is not part of the evidence.

8. It has long been settled by the Supreme Court in **Chimman Lal Hargovinddas Vs. Special Land Acquisition Officer AIR 1988 SC 1652** that the award of the SLAO is simply an offer and is not to be treated as a judgment of the trial court. The material relied upon by the SLAO while making the award can not be utilized by the reference court unless it is produced in evidence and is proved in accordance with law. In other words, the reference is like an original proceeding wherein market value of the acquired land is required to be determined on the basis of the evidence/material produced before the Court. The claimant is in a position of a plaintiff and the burden is upon him to show that the offer made by the SLAO is inadequate and that he is entitle to higher compensation.

9. Once the burden to establish that the award of the SLAO is incorrect and that the compensation offered to him ought to be higher, it is the duty of the claimant to adduce relevant evidence to prove the market value at which he is entitle to receive compensation.

10. It has repeatedly been held by the Supreme Court that the best evidence

for determining the market value of any property is the exemplar sale deeds in respect the very property and if no suitable sale deed proximate in time to the acquisition of the land is available, then the Court may fall back upon the exemplar sale deed of the land adjacent to the acquired land or of the nearby villages.

11. The impugned judgment and order of the reference court does not point out any error of law in the award of the SLAO or as to how the compensation awarded is on the lower side. The reference court has simply based its award on the sale deed of Devi Prasad. The said sale deed was never produced in evidence before it. Thus, without adducing any evidence to prove that the compensation offered is inadequate or that it should be on higher side, the reference court manifestly erred in law in awarding compensation on the basis of the sale deed of Devi Prasad which was not part of the record.

12. The reference court has not assigned any other reason and has not followed any other evidence in awarding compensation according to the aforesaid sale deed.

13. It may be important to note that even photostat copies of sale deed are ordinarily inadmissible in evidence and can not form the basis for enhancement of compensation. Therefore, the complete absence of the sale deed from the record is fatal and the reference court fell in grave error in referring to it and basing its judgment upon it.

14. In view of the aforesaid facts and circumstances, the impugned, judgment order and award dated 11th November 1987 passed by the III Additional District Judge, Jaunpur in Land Acquisition Case No. 167 of 1985 (Majid and another Vs. Collector, Jaunpur and another) is set aside.

15. Appeal is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 29.07.2013

BEFORE
THE HON'BLE SAAED-UZ-ZAMAN SIDDIQI, J.

Rent Control No. 135 of 2010

Ram Autar & Ors. ...Petitioners
Versus
Additional Distt. Judge & Ors....Respondents

Counsel for the Petitioners:
Sri Nishant Srivastava, Sri Aftab Alam

Counsel for the Respondents:
C.S.C.

U.P. Act No. 13 of 1972-Section 21(i)- Release application of land lord-rejected by both courts below-on ground-legal heir of land lord are govt. servant-posted out of city-where as even after death of tenant-his wife and children residing-held-approach of both the courts below wholly perverse.

Held: Para-6
Their need to the disputed premises cannot be denied by mere posting outside the home town. Learned Prescribed Authority has not discussed or reached to the conclusions as to when each applicant could attain the age of superannuation and rejected the personal requirement on the ground of assessment as "near future'. It is not the requirement of law that the landlords have to permanently live in the disputed premises.

Case Law discussed:
[(2012) 2 SCC 155]; [2007 (5) SCC 660]; [2000(1) SCR 77]; [(1998) 2 SCC 1]; [(1979) 1 SCC]; [(1980)1SCC290].

(Delivered by Hon'ble Saeed-Uz-Zaman Siddiqi, J.)

1. By means of this writ petition, the petitioners have prayed for writ in the nature of certiorari quashing the order dated 05.07.2010 passed by Additional District Judge, Court No. 9, Faizabad in Misc. Case No. 01 of 2003 and judgment and order dated 05.12.2002 passed by Prescribed Authority/Civil Judge (Junior Division), Faizabad by which the petitioners' release application was rejected.

2. I have heard learned counsel for the petitioners as none appeared on behalf of the opposite parties.

3. Brief facts of the case are that the petitioners have filed release application under Section 21 (i) of U.P.Act No. 13 of 1972 for release of their house No. 114 B, Mohalla- Sadar Bazar, Pargana- Haveli Awadh, Tehsil- Sadan, District- Faizabad. Admittedly, the deceased opposite party was tenant in it, who has died during the pendency of the writ petition as opposite party No. 3 and his heirs have been substituted who did not appear in spite of service.

4. The landlords moved application for release on the ground of personal requirement which was rejected on the ground that both the applicants were employed in armed forces and are posted at their respective place of posting and they shall not have to live permanently in Faizabad City in the near future. Due to this fact, the learned Prescribed Authority rejected the application for release and did not consider the question of comparative hardship.

5. The landlord preferred Miscellaneous Appeal No. 01/2003 (P.A) which has also been dismissed. The learned Appellate court has observed that the tenant Bache Lal has died who was a patient of Laprosy and due to his death he has no personal requirement of the accommodation in question but the learned Appellate court held that his widow is living in the disputed house along with her children and, as such, it cannot be said that the tenant last his requirement to occupy the disputed premises.

6. The learned Appellate court did not consider the case of the parties on merits and disposed of the appeal in a cursory manner. He has not at all discussed the bona fide requirement of the building in question by its landlord. Learned Prescribed Authority has held that since the landlords are employee in the Indian Army, the applicant no. 1 was posted in Dogra Regiment Centre and applicant No. 2 was posted in Air Force at Pune. Both the applicants have pleaded that during vacations they have to come along with their families to live in their Home City. Moreover, there is a family of applicants and they have no other house in Faizabad city except the disputed premises. The learned Prescribed Authority did not consider the need of the applicants in a pragmatic manner. The two applicants who were landlords of the disputed premises have right to visit their home town. Their need to the disputed premises cannot be denied by mere posting outside the home town. Learned Prescribed Authority has not discussed or reached to the conclusions as to when each applicant could attain the age of superannuation and rejected the personal requirement on the ground of assessment as "near future'. It is not the requirement of law that the landlords have to permanently live in the disputed premises.

7. In **Mohd. Ayub and Anr. vs. Mukesh Chand [(2012) 2 SCC 155],** in which it has been held, as under:-

"It is well settled the landlord's requirement need not be a dire necessity. The court cannot direct the landlord to do a particular business or imagine that he could profitably do a particular business rather than the business he proposes to start. It was wrong on the part of the District Court to hold that the appellants' case that their sons want to start the general merchant business is a pretence because they are dealing in eggs and it is not uncommon for a Muslim family to do the business of non vegetarian food. It is for the landlord to decide which business he wants to do. The Court cannot advise him. Similarly, length of tenancy of the respondent in the circumstances of the case ought not to have weighed with the courts below."

8. Hon'ble Apex Court has also relied upon its earlier decision and has held that the courts below should not have been swayed by the fact that the landlords are the government servants and are posted outside District Faizabad. The financial position or the status of the landlords can deny them the fruits to enjoy their own building. If the impugned approach, as observed by both the Courts below, is found to be correct, an affluent landlord can never get possession of his premises even, if he proves all his bona fide requirements.

9. It is also important to note that there is nothing on record to show that, during the pendency of this litigation, the opposite parties made any genuine efforts to find out any accommodation. In the ultimate analysis, I am of the view that the perverse findings of the courts below, in aspect of the bona fide requirement and comparative hardship must be set aside.

10. As observed by the Hon'ble Apex Court in the abovementioned case, I am mindful of the fact that when the tenant is asked to move out of the premises, some hardship is inherent and if such hardship is to be taken into consideration then no release applicant can ever be allowed. The occupation by the tenant of the building for a long time cannot be a determinative factor. While concluding, I rely upon the law laid down by the Hon'ble Apex Court in **Ram Kumar Barnwal vs. Ram Lakhan [2007(5) SCC 660]**, in which it has been held as under:-

"The High Court, as noted supra, held that even if it is found that the findings of the courts below are erroneous in law the matter has remanded to the Prescribed Authority as the release application was filed quarter of century ago, and bona fide need, and comparative hardship change by the passage of time. The writ petition was dismissed granting liberty to the appellant to file fresh release application.

It is settled position in law that subsequent events can be taken note of. The High Court, even though referred to the relevance of the subsequent events erroneously came to the conclusion that even if the judgment and order passed by the courts below are erroneous in law, the matter will have to be remanded to the Prescribed Authority. There is no such requirement in law. In fact, after noticing that the release application was filed about quarter of century back, it is really unfortunate that the High Court instead of deciding the matter dismissed the writ petition granting liberty to file fresh release application. In other words, instead of shortening litigation the High Court's order would mean unnecessary prolongation of litigation."

11. It has also been held in **Ragavendra Kumar vs. Firm Prem Machinery and Co. [2000(1) SCR 77**] that, "It is settled position of law that the landlord is best judge of his requirement for residential or business purpose and he has got complete freedom in the matter, (See: Prativa Devi (Smt.) v. T.K Krishnan, [1996] 5 SCC 353. In the case in hand the plaintiff-landlord wanted eviction of the tenant from the suit premises for starting his business as it was suitable and it cannot be faulted."

12. In **Malpe Vishwanath Acharya and Ors. vs. State of Maharashtra and Anr. [(1998) 2 SCC 1]**, in which the Hon'ble Apex Court has held, as under:-

"Insofar as social legislation, like the rent control act is concerned, the law must strike a balance between rival interests and it should try to be just to all. The law ought not to be unjust to one and give a disproportionate benefit or protection to another section of the society. When there is shortage of accommodation it is desirable, nay, necessary that some protection should be given to the tenants in order to ensure that they are no exploited. At the same item such a law has to be revised periodically so as to ensure that a disproportionately larger benefit them the one which was intended is not given to the tenants. It is not as if the government does not take remedial measures to try and offset the effects of inflation. In order to provide fair wage to the salaried employees the government provides for payment of dearness and other allowances from time to time."

13. I have taken cognizance of the landmark judgment of the Hon'ble Apex Court in **Bega Begum vs. Abdul Ahad Khan [(1979) 1 SCC],** in which is has been held, as under:-

"Moreover, section 11(h) of the Act uses the words 'reasonable requirement' which undoubtedly postulate that there must be an element of need as opposed to a mere desire or wish. The distinction between desire and need should doubtless be kept in mind but not so as to make even the genuine need as nothing but a desire as the High Court has done in this case. It seems to us that the connotation of the term 'need' or 'requirement' should not be artificially extended nor its language so unduly stretched or strained as to make it impossible or extremely difficult for the landlord to get a decree for eviction. Such a course would defeat the very purpose of the Act which affords the facility of eviction of the tenant to the landlord on certain specified grounds. This appears to us to be the general scheme of all the Rent Control Acts prevalent in other States in the country. This Court has considered the import of the word 'requirement' and pointed out that it merely connotes that there should be an element of need".

14. In **Kewal Singh vs. Smt. Lajwanti [(1980) 1 SCC 290]**, the Hon'ble Apex Court has held as under;-

"Before discussing the relevant provisions of the Act it may be necessary to observe that the Rent Control Act is a piece of social legislation and is meant mainly to protect the tenants from frivolous evictions. At the same time in order to do justice to the landlords and to avoid placing such restrictions on their right to evict the tenant as to destroy their legal right to property certain salutary provisions have been made by the legislature which give relief to the

landlord. In the absence of such a legislation a landlord has a common law right to evict the tenant other in the determination of the tenancy by efflux of time or for default in payment of rent or other grounds after giving notice under the Transfer of Property Act. This broad right has been curtailed by The Rent Control Legislation with a view to give protection to the tenants having regard to their genuine and dire needs. While the rent control legislation has given a number of facilities to the tenants it should, not be construed so as to destroy the limited relief which it seeks to give to the landlord also. For instance one of the grounds for eviction which is contained in almost all the Rent Control Acts in the country is the question of landlord's bonafide personal necessity. The concept of bonafide necessity should be meaningfully construed so as to make the relief granted to the landlord real and practical. "

15. In view of the discussions as made above, the landlord has got success in proving his bona fide requirement and there is no need to remand back this matter afresh which will ultimately delay the disposal of the case and lingering out unnecessarily.

16. In result, the writ petition is allowed. Both the orders passed by learned Prescribed Authority as well as the learned Appellate Court are set aside and the release application is allowed, which stands released in favour of the landlord-petitioners. The learned Prescribed Authority shall proceed on to execute the release order in terms of the release order contained in sub-section 6 of Section 21 of U.P. Act No. 13 of 1972.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.07.2013

BEFORE
THE HON'BLE SUDHIR KUMAR SAXENA, J.

Habeas Corpus No. 190 of 2013

Shalu Mishra ...Petitioner
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri G.S. Pandey, Sri Himanshu Tiwari

Counsel for the Respondents:
G.A.

Constitution of India, Art. 226- Habeas corpus Petition-petitioner when marriage solemnized in Arya Samaj Mandir-girl being less than 17 years-according to High School certificate-more than 17 years-but as per medical certificate her age found 19 years-if variation of 3 years allowed-found major-even being minor-if marriage accepted-only the husband entitled to get her custody-even before this court expressed girl desire to joint the company of her husband-petition allowed-direction issued accordingly.

Held: Para-29 & 30

29. In view of the above decision, it is apparent that detention of Shalu Mishra in Naari Niketan, despite her objection, merely on the ground that according to High School certificate she is less than 18 years although medical report suggested her age to be 19 years, cannot be treated as legal. Sessions Judge has himself while making transitory arrangement observed that his order shall be subject to the decision of this writ petition.

30. Taking into consideration the marriage certificate, educational certificate, medical reports regarding

age and her categorical statement, this Court is of the opinion that this petition deserves to be allowed.

Case Law discussed:
[2013(1) JIC 578 (All.)]; [2013 (1) JIC 224 (All.)]; Crl. Misc. Case No. 1705 of 2012(u/s 482 Cr.P.C.); AIR 2009 AP 52

(Delivered by Hon'ble Sudhir Kumar Saxena, J.)

1. This Habeas Corpus petition has been filed under Article 226 of the Constitution of India seeking the release of Shalu Mishra from Naari Niketan, Lucknow.

2. I have heard Sri G.S. Pandey, learned counsel for petitioner, Sri Sunil Dixit, learned counsel for respondent and Km. Nand Prabha Shukla, learned A.G.A.

3. Briefly stated petitioner's case is that Sunil Kumar Mishra married Shalu Mishra on 16.05.2013 before 'Arya Samaj Mandir, Aliganj, Lucknow'. Copy of marriage certificate as well as photographs have been filed to buttress the submission. Parents of Shalu Mishra are trying to marry her with some other person, although she is married wife of Sunil Mishra.

4. It is stated that mother of Shalu Mishra lodged an F.I.R. against Sunil Mishra, registered as Case Crime No. 872 of 2013 under Sections 363, 366, 120-B I.P.C., Police Station Purwa, District Unnao alleging that Sunil Mishra had enticed Shalu Mishra, aged about 16 years, with the collusion of Mukesh and Ashish and father of Sunil Mishra is also involved in the incident.

5. Apprehending his arrest, Sunil Mishra filed a Writ Petition No. 4189 of 2013 (MB) in this Court wherein following order was passed on 21.05.2013:

"Heard learned counsel for the petitioners and also learned A.G.A. appearing for the State. We have been taken through the allegations contained in the F.I.R. and the material on record. The victim petitioner no.2 is present in the Court and has been identified by her counsel. It is submitted by learned counsel for the petitioners that she has married with petitioner no.1 out of her own free will and both are major. Issue notice to respondent no.3 who may file counter affidavit within four weeks. Learned A.G.A. may also file counter affidavit within the same period. Rejoinder affidavit may thereafter be filed within two weeks. List this matter after expiry of the aforesaid period. Till the next date of listing, the arrest of the petitioners, who are involved in case crime no.617 of 2013 under Sections 363, 366 and 120-B I.P.C P.S. Purwa District Unnao shall remain stayed."

6. After obtaining interim order of this Court, when they were returning, Jai Prakash Tiwari, Rajendra @ Bawali intercepted and assaulted them. Bhola Mishra, father of the girl and one Anoop dragged Shalu and her husband and took them in a Bolero vehicle forcibly and beat them up. Shalu was taken to her parental house forcibly where she was detained against her wishes.

7. Matter was reported to DGP by Kailash Mishra, father of Sunil Mishra by means of application dated 24.05.2013, with copy to S.P., Unnao and concerned police station. It is submitted that since Shalu Mishra is major, she cannot be detained by respondents, as such order of her release may be passed.

8. This Court on 03.06.2013 directed S.P., Unnao to hold enquiry into the allegations made in the application dated 24.05.2013.

9. A.G.A. informed the Court that application dated 24.05.2013 led to the registration of a Case Crime No. 696 of 2013, under Sections 364-A, 307, 352, 506, 323 I.P.C. on 04.06.2013 and on 05.06.2013 final report was prepared.

10. Shalu Mishra was directed to appear in the Court who stated that she wants to go with Sunil Mishra. Case was fixed on 13.06.2013 on which date S.O., Mahila Thana, Unnao submitted report informing that Shalu Mishra had stated that she and her husband were dragged by Jai Prakash Tiwari and Rajendra @ Bawali and taken them in a Bolero vehicle forcibly from where she was detained in her parental house.

11. This Court directed S.P., Unnao to get the investigation done by the officer not below the rank of Deputy S.P. as Shalu in her statement partly confirmed the incident dated 21.05.2013. So far as the investigation is concerned, it is going on and no comment is required from this Court. So far as habeas corpus petition is concerned, learned counsel for the petitioner submitted that Shalu Mishra and Sunil Mishra both are major, having married, have a right to live together without any interference from anybody. She cannot be detained against her wishes.

12. Learned counsel for the private respondents submits that according to educational certificate, Shalu Mishra is minor, as such, her marriage was illegal. Moreover, she is now detained in 'Naari Niketan' in pursuance of order passed by Sessions Judge, Unnao on 01.06.2013. Consequently, her detention is not illegal and petition is not maintainable.

13. From the case diary submitted by learned A.G.A., it appears that date of birth of Shalu Mishra recorded in High School Marksheet is 21.02.1996, as such, she was less than 18 years on 16.05.2013 i.e. date of marriage. She was medically examined by the Police in district hospital, Unnao. According to medical report, she was found to be more than 19 years.

14. It further appears that Investigating Officer produced Shalu Mishra before the Sessions Judge, Unnao on 01.06.2013 where Sunil Mishra claimed her custody. Raj Kumari, mother of Shalu also claimed her custody. Sessions Judge, Unnao directed Shalu Mishra to be placed in Naari Niketan and fixed 04.06.2013 for further orders. On 04.06.2013, learned Sessions Judge recorded the statement wherein Shalu Mishra disclosed her date of birth 21.02.1996, however, she disclosing her actual age to be 19 years, expressed her willingness to go with her husband. Sessions Judge observed that according to medical report, she was about 19 years. Learned Sessions Judge believing the age recorded in High School Certificate to be correct, treated her minor and directed her to be detained in Naari Niketan. This order was further subjected to the order that may be passed by this Court in this writ petition.

15. Except under the provisions of Juvenile Justice Act where question regarding determination of age of juvenile in conflict with law is concerned, there is

no law that age mentioned in educational certificate has to be preferred over the age recorded by doctor on the basis of radiological observations, while determining the age of a victim or witness.

16. It is not clear as to under what provisions of law, Sessions Judge has sent Shalu Mishra to Naari Niketan. Even minor cannot be detained against her wishes in Naari Niketan. Shalu Mishra categorically stated before Sessions Judge that she wants to go with her husband. She has specifically stated that she does not want to go Naari Niketan. Her detention in Naari Niketan is absolutely illegal.

17. It is argued that it is not a case of private detention as such Single Judge cannot hear this matter.

18. In reply it is submitted that petition was filed on 30th May, 2013 before this Court challenging private detention of Shalu Mishra in Home; after filing of the writ petition, she was produced before the Sessions Judge for deciding the question of custody who sent her to Naari Niketan.

19. Matter has come up before this Court after report of Stamp Reporter. In the matter of violation of fundamental rights, Court has a duty to zealously safeguard the same.

20. Sri Sunil Dixit, learned counsel for the respondents has cited a decision of this Court given in the case of **Smt. Sakshi Tomar Vs. State of U.P. and others [2013(1) JIC 578 (All)].**

21. The aforesaid case was decided on it's own facts as apparent from Para-7 of the judgment. Court found that there was no proof of marriage. Victim stated her place of marriage to be some temple in Mansoorie while Munnu Bhati stated the place of marriage to be some Shiv Temple at Ghaziabad. Her date of birth being 20.09.1996, she was less than 16 years on the date of alleged marriage i.e. 26.05.2012. Moreover, the Court has found on the basis of it's own assessment of X-ray report that she was below 18 years. Regarding age, there was no material. Court upheld the detention of victim in Naari Niketan. Court has specifically relied on the finding in Para-7 that no marriage has been proved.

22. In the instant case, not only certificate of marriage has been filed but also on the date of alleged marriage, even according to High School Certificate, she was more than 17 years and according to medical certificate, she was more than 19 years, as such, above cited case has clearly no application.

23. The case of **Smt. Manoja Devi and Another Vs. State of U.P. and others [2013(1) JIC 224 (All)]** was also decided on it's own facts. Court has found that "Corpus was telling a lie and according to medical examination report also she was aged about 18 years". So far as the person claiming her custody was concerned, Court observed that " he could not disclose the name and address of his owner. He stated that he wanted to keep corpus in his detention and ready to maintain her as wife but he did not appear to be mature person." Consequently, Court did not find it proper to give corpus in the custody of Santosh. This decision is also not useful to the respondents.

24. This Court is not going into the merits of the investigation and the

statement given by her before the I.O. or the Magistrate. In this Court she has categorically stated that she does not want to stay in Naari Niketan. She wants to go with her husband Sunil Mishra.

25. To prove the marriage, marriage certificate has been filed, thus this marriage is not void, even if, wife is minor. Therefore, husband has a right to seek the custody of his wife being her natural guardian. It has been held by this Court in the case of **Sonu Paswan Vs. State of U.P. and Another passed in Criminal Misc. Case No. 1705 of 2012 (u/s 482 Cr.P.C.)** that:

"husband is the natural guardian of a married girl and it is not in the welfare of female to keep her in Nari Niketan for prolonged period, particularly when she wants to join the company or remain in the custody of her husband, who would be the natural guardian."

26. It has been held by Andhra Pradesh High Court in the case of **Kokkula Suresh Vs. State of A.P. and others AIR, 2009 AP 52** that husband being natural guardian under the provisions of Hindu Minority and Guardianship Act, 1956, is entitled to have the custody of his minor wife as marriage is neither void nor voidable.

27. A Division Bench of this Court in the case of **Smt. Saroj Vs. State of U.P. and others (Habeas Corpus writ petition no. 19037 of 2011)** faced with the similar problem concluded that:

".....Victim of an offence under Sections 363, 366-A, 366 or 376 I.P.C. could not be falling in the category of an accused, as such no court could be authorized under any provisions of law to authorize the detention of such a lady even into protective custody if the lady objects to such detention.

.....There is no age bar when it comes to valuing the liberty of a person be she a woman or be he a gent. Even a child has a right to avail of his or her liberties."

28. In another case of **Smt. Lakshmi @ Kamini & another Vs. State of U.P. and others (Habeas Corpus writ petition no. 33814 of 2011**), a Division Bench of this Court consisting of Hon'ble Dharnidhar Jha and Ramesh Sinha,JJ. dealt with a case where age recorded in medical report was at variance with the age mentioned in the educational certificate. Following observations can be usefully quoted :

".....We want to point out that there was no such law which could justify the above observation of the A.C.J.M, that in a case of present nature the assessed age of the victim in an offence of the present nature has to be discarded in the light of the entries made in the school records. Probably, the A.C.J.M., Farrukhabad having in his mind the provisions of Juvenile Justice (Care and Protection of Children) Rules, 2007, by virtue of Rule 12, had granted credence to the age of a victim of such an offence which is mentioned in the school leaving certificate over the medically assessed age of such a victim.

.....We have repeatedly been pointing out that the victim of an offence under Sections 363, 363A or 366 I.P.C. may not be confused as an accused. She may also not be treated, if she is below 18 years of age

as a juvenile in conflict with law, and the law applicable to juvenile may not be applicable to such a victim of the offence. We have also noted at some earlier occasions that even a child had its rights internationally recognized which as per cultural heritage and constitutional provisions inherently assumed the character of fundamental rights of a child and no Court could have the authority to encroach upon those rights of a child. If at all any offence is constituted by facts, no law could justify the dentention of such a victim if there is a dispute of custody of the victim.

.....On account of being a citizen of India, she could have enjoyed the fundamental rights and move in whatever direction she desired if that movement was not detrimental to the Constitutional provision and national security."

29. In view of the above decision, it is apparent that detention of Shalu Mishra in Naari Niketan, despite her objection, merely on the ground that according to High School certificate she is less than 18 years although medical report suggested her age to be 19 years, cannot be treated as legal. Sessions Judge has himself while making transitory arrangement observed that his order shall be subject to the decision of this writ petition.

30. Taking into consideration the marriage certificate, educational certificate, medical reports regarding age and her categorical statement, this Court is of the opinion that this petition deserves to be allowed.

31. Petition is allowed.

32. Superintendent, Government Protective Home, Lucknow is directed to set Shalu Mishra free to go with Sunil Mishra.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.07.2013

BEFORE
THE HON'BLE SAEED-UZ-ZAMAN SIDDIQI, J.

Second Appeal No.352 of 1993

Ram Pratap and Ors. ...Appellants
Versus
Gulab ...Respondent

Counsel for the Appellant:
Sri S.K. Srivastava, Sri A.D.R. Srivastava
Dr. L.P. Mishra

Counsel for the Respondents:
Nazim Ali Siddiqi

C.P.C. Section-100- Second Appeal suit for specific performance decreed by Trial Court first appellate court dismissed suit on ground of transaction being contravention of Section 168-A-direction for refund of earnest money with 12% interest per annum-at Second appeal stage-suit was rightly dismissed by first appellate Court but, when second appeal is going to be decided-existing provision shall be considered-accordingly when by U.P. Amendment Act no 27 of 2004-provision of Section 168-A shall ceased to operate after expiry of 2 years-suit liable to decreed question decided in favor of appellant-appeal allowed.

Held: Para-13
In the above mentioned case the sale deed had been executed and in the instant case before this Court the sale deed is to be executed. Learned First Appellate Court has decided the matter in accordance with law as applicable on the date of decision. But, this Court has decided the second appeal as on today when Section 168-A is no more in force and, as such, the discretion to decree the suit by specific performance of contract cannot be legally denied to the plaintiffs/appellants. As of now, there is

no impediment, obstacle or defect in execution of sale deed by its executor in favor of the person in whose favour agreement has already been executed long back.

Case Law discussed:
(1991) 2 SCC 236; Second Appeal No. 845 of 2011; Writ C No. 14489 of 2008; (2000) 2 SCC 536; (1999) 7 SCC 314; [2007 (2) AWC 1327]; (2000) 2 SCC 536; (1999) 7 SCC 314; [2007 (2) AWC 1327]; Writ C No. 2785 of 1985.

(Delivered by Hon'ble Saeed-Uz-Zaman Siddiqi, J.)

1. The instant second appeal has been preferred against the judgment and decree dated 01.10.1993, passed by learned First Additional Civil Judge, Bahraich, in Civil Appeal No.2 of 1991, by which the Regular Civil Appeal was allowed and the judgment and decree dated 18.11.1989, passed by learned Vth Additional Munsif, Bahraich, in Original Suit No.135 of 1985 has been set aside.

2. Brief facts of the case are that the appellants filed suit for specific performance of contract relating to plot no.177/178 situated in Village Majhaw, Pargana Dharamapur, Tehsil Nanpara, District Bahraich, of which the defendant was bhumidhar. The said land was purchased by the defendant in auction from Cooperative Department vide sale deed dated 26.3.1982. At the time of purchase the defendant has obtained Rs.1500/- from the plaintiffs on the condition that he shall execute the sale deed of one acre of land so purchased in favour of the plaintiffs and registered agreement dated 26.3.1982 was executed between the parties. In furtherance of the execution of sale deed the defendant has delivered possession over one acre of land to the plaintiff and, as such, the defendant is bound to execute the sale-deed for which the plaintiffs have already been ready and are ready to perform their part of contract. Since the defendant did not execute the sale-deed. Hence, the suit was filed. The defendant has admitted that he has purchased the disputed property in public auction in the year 1981 and the sale-deed in favour of the defendant was executed on 26.03.1982. But, it has been pleaded that the defendant is an illiterate person and he has accompanied the plaintiffs as witnesses, who got the fictitious agreement executed which came to notice of the defendant, when he received the notice sent by the counsel for the plaintiffs; the defendants are not in possession over the disputed property and, as such, the suit is barred by Section 34 of the Specific Relief Act. In the replication, the plaintiffs have alleged that the defendant is an illiterate person. In view of the pleadings of the parties, the learned Trial Court framed issues, the parties led their evidence. After conclusion of hearing, the learned Trial Court decreed the plaintiffs' suit and the defendant was directed to execute the sale-deed in favour of the plaintiffs within two months. The defendant preferred the Civil Appeal No. 02 of 1991. Learned First Appellate Court has re-assessed the evidence in a detailed manner and has concurred with the findings of the learned Trial Court which have not been challenged before this Court as on point of facts, there is no dispute between the parties.

3. The learned First Appellate Court has held that by directing the decree for specific performance of Contract, there has been violation of law as provided under Section 168 (A) of U.P.Z.A. & L.R. Act and, as such, it has dismissed the suit for specific performance of contract and

has decreed the suit for refund of earnest money together with interest at the rate of 12 per cent per annum. Aggrieved by the aforesaid decree, the plaintiffs have preferred this appeal.

4. During the course of appeal, appellant Nos. 2 & 3 have died and their heirs have been substituted. The appeal was admitted vide order dated 10.11.1993 on substantial question No. 1, which is as under:-

" 1. Whether has the learned Lower Appellate Court committed an illegality in allowing the defendant's appeal by holding that the purported sale shall be violative of Section 168-A of the U.P.Z.A. & L.R. Act without taking into consideration that the said provision is not attracted in the matter of compulsory sale and is only applicable in the matter of voluntary sale ?"

5. I have heard learned counsel for the parties and have gone through the records.

6. Admitted factual position is that the parties have entered into an agreement to sell, which has been concurrently held by both the courts below as proved and final. The learned First Appellate Court has exercised its discretion not to direct Specific Performance and instead directed to refund of the earnest money together with interest at the rate of 12 per cent per annum on the ground that decreeing specific performance shall be violative of Section 168 (A) of U.P.Z.A. & L.R. Act, which has been omitted by U.P. Act No. 27 of 2004. Prior to omission, it reads as follows:-

"168-A. Transfer of fragments- (1) Notwithstanding the provisions of any law for the time being in force, no person shall transfer whether by sale, gift or exchange any fragment situate in a consolidated area except where the transfer is in favour of tenure-holder who has a plot contiguous to the fragment or where the transfer is not in favour of any such tenure-holder the whole or so much of the plot in which the person has bhumidhari rights, which pertains to the fragment is thereby transferred.

2.The transfer of any land contrary to the provisions of sub-section (1) shall be void.

3. When a bhumidhar has made any transfer in contravention of the provisions of sub-section (1) the provisions of Section 167 shall mututis mutandis, apply."

7. It debars a person from transferring by sale any fragment situated in a consolidated area. The learned First appellate court has passed the impugned judgment and decree dated 01.10.1993, when this section was in force. Now, the factual position is that the sale has not yet been completed in its sub-judice and this appeal is being decided today in the year 2013 when this provision is not enforced. What would be its effect ? While deleting Section 168 (A) by U.P. Act No.27 of 2004 it was provided that this special provision shall cease to be in force after expiry of two years from the date of commencement of this Act. In similar matter, the Hon'ble Apex Court in **Mithlesh Kumari and anr. v. Fateh Bahadur Singh and anr. (1991) 2 SCC 236**, has held as under:-

"Applying the law to the facts of the case in hand we find that the bhumidhar Jang Bahadur's land admeasuring 10 bighas, 12 biswas and 10 biswansis was itself admittedly a fragment. Jang Bahadur entered into an agreement to sell the land on 5.4.1966 and the first respondent Fateh Bahadur on payment of advance of Rs. 4000 is stated to have had possession of the land. That sale would attract the provisions of Section 168-A if it resulted in transfer of the fragment. The sales to the appellants. Kalawati defendant No. 2 was dated 2.9.1966 and to Mithlesh Kumari defendant No. 3 was dated 21.12.1966. These two sales would be covered by the old provisions of sections 166 and 167, which sections did not deal with the case of bhumidhar but only by sirdar or asami. But Section 168-A would be attracted and the provisions of Section 167 would mutatis mutandis be applicable.'

'Festinatio justitiae est noverea informateeni. (Hob. 97) Hasty justice is stepmother of misfortune. Injustum est nisi tota lege inspecta, de una aliqua ejus particula proposita judicare vel respondere. It is unjust to decide or respond to any particular part of a law without examining the whole of the law."

8. In S**econd Appeal No.845 of 2011 (Vimal Kumar & ors. v. Smt. Vinod Kumari**) I fully agree with the view of the lower appellate court that as Section 168-A has been deleted hence no relief can be granted to the defendants on the basis thereof." In **Second Appeal No.1138 of 2011 (Vijay Bahadur v. Lakshmi Devi) and Second Appeal No.1139 of 2011 (Vijay Bahadur v. Lakshmi Devi and anr.**) this Court has held that "Plea of bar of Section 168-A of U.P.Z.A. & L.R. Act was also raised, which prohibited transfer of fragment. However the said section has been deleted w.e.f. August, 2004. Moreover such a plea could not be raised by the appellant who himself transferred part of the land." In **Writ-C No.14489 of 2008** (Smt. Sumita Devi v. Sushila Devi & ors.) this Court has held as under:- this Court has held that "

"Moreover as held by the Appellate Court/ A.D.J. plea of sale deed being hit by Section 168-A of the Act under the facts and circumstances of the case, could be raised only by the State or Gaon sabha and respondent no.2 had absolutely no locus standi to agitate the matter. The sale deed was executed by respondent no. 5 in favour of petitioner and both of them were fully satisfied and the Gaon Sabha or the State Government had not challenged the same. In this scenario, no other person had any authority to agitate the matter.

The words 'consolidated area' have not been defined either under U.P. Consolidation of Holdings Act or U.P. Zamindari Abolition & Land Reforms Act. The definition of 'Consolidation area' was irrelevant for the purposes of section 168-A of U.P. Z.A. & L.R. Act. The word 'Consolidation' has been defined under Section 3(2) of U.P. C.H. Act as follows:-

[(2) 'Consolidation' means re-arrangement of holdings in a unit amongst several tenure-holders in such a way as to make their respective holdings more compact];

Explanation- For the purpose of this clause, holding shall not include the following:

(i) Land which was grove in agricultural year immediately preceding the year in which the notification under Section 4 was issued:

(ii) to (vii) - not relevant.

Accordingly grove is not included in the 'Consolidated area' which can only mean rearranged chak.

Moreover provisions of Section 168-A were quite harsh. The Section has also been deleted. U.P. Act No. 27 of 2004 which deleted section 168-A made the previous transactions hit by the said section voidable (in stead of void) and curable (capable of being validated) on payment of some nominal fees within a particular period which has now expired (Section 11). Accordingly, for these two reasons the section shall be interpreted (for the sake of past transactions) liberally, in favour of vendor and vendee."

9. In relation to interpretation relating to repeal or deletion a full bench of the Hon'ble Apex Court has held in **Kolhapur Canesugar Works Ltd. & anr. v. Union of India and ors. (2000) 2 SCC 536** has held:-

"The position is well-known that at common law, the normal effect of repealing a statute or deleting a provision is to obliterate it from the statute book as completely as if it had never been passed, and the statute must be considered as a law that never existed. To this Rule, an exception is engrafted by the provisions of Section 6(1). If a provision of a statute is unconditionally omitted without a saving clause in favour of pending proceedings, all actions must stop where the omission finds them, and if final relief has not been granted before the omission goes into effect, it cannot be granted afterwards. Savings of the nature contained in Section 6 or in special Acts may modify the position. Thus the operation of repeal or deletion as to the future and the past largely depends on the savings applicable. In a case where a particular provision in a statute is omitted and in its place another provision dealing with the same contingency is Introduced without a saving clause in favour of pending proceedings then it can be reasonably inferred that the intention of the Legislature is that the pending proceeding shall not continue but a fresh proceeding for the same purpose may be initiated under the new provision.

In the present case, as noted earlier. Section 6 of the General Clauses Act has no application. There is no saving provision in favour of pending proceedings. Therefore, action for realisation of the amount refunded can only be taken under the new provision in accordance with the terms thereof."

10. Moreover, the settled legal position is that it must not be forgotten that a matter has to be decided as per law existing on that date. The Hon'ble Apex Court in the case of **Union of India & ors. v. Indian Charge Chrome and anr. (1999) 7 SCC 314** has clearly held that the law which is to be applied in the case if the law prevailing on the date of decision making. In a catena of decisions the Hon'ble Apex Court has reiterated the settled legal position that the matter has to be decided on the basis of law existing on the date of decision and not on the basis of the law prevailing on the date of initiation of proceeding. Since second appeal is a substantive remedy it is continuation of proceeding. Recently, in **Ravi Shankar Tripathi v. Board of**

Revenue, [2007 (2) AWC 1327] a Division Bench of this Court has exhaustively dealt with this legal position.

11. In **Writ-C No.2785 of 1985 (Charan Singh v. VII A.D.J.**) this Court has held as under:-

"That Section 168-A of U.P.Z.A.&L.R. Act has been deleted w.e.f. 23rd August 2004 in U.P. This amendment being only prospective will have no application in the present case. As such the orders impugned in this writ petition may be confirmed."

There is no doubt that deletion of Section 168-A is prospective. However, as no sale deed has yet been executed hence the Section as it remained in existence only until 23.8.2004 cannot be applied to the sale deeds to be executed after the said date even if they are executed pursuant to agreements for sale executed during the period when the said Section was on the statute book."

12. In Second Appeal No.2585 of 1974 (Smt. Janki and anr. v. Murari Lal and ors.) this Court has held as under:-

"In terms of the above said amendments in the present case, the sale deed dated 15.1.1969 executed by Smt. Ganga Devi in favour of Amar Singh and Murari Lal being void under Section 168-A as it stood before the commencement of the Act 2004, was deemed to have been voidable in terms of Section 11 of the special provisions and further amended by Act No.27 of 2004 by which Section 11 has also been omitted as it stood and has been replaced by Section 4 of U. P. Act No.13 of 2004, in terms of which the alleged sale deed dated 15.1.1969 alleged to have become void stands voidable in the case of transfer of such fragment, provided, it has not been entered in the revenue records in favour of the State Government, on the date of the commencement of the U.P. Act No.27 of 2004 or U.P. Act No.13 of 2005 as the case may be and such transferees may get such transfer validated by depositing such fee and within such time and in such manner as may be notified by the State Government. In view of the above said findings, the first question is decided accordingly."

13. In the above mentioned case the sale deed had been executed and in the instant case before this Court the sale deed is to be executed. Learned First Appellate Court has decided the matter in accordance with law as applicable on the date of decision. But, this Court has decided the second appeal as on today when Section 168-A is no more in force and, as such, the discretion to decree the suit by specific performance of contract cannot be legally denied to the plaintiffs/appellants. As of now, there is no impediment, obstacle or defect in execution of sale deed by its executor in favour of the person in whose favour agreement has already been executed long back.

14. On the basis of discussions made above, substantial question of law is decided in favour of the appellants and, as such, the appeal deserves to be allowed. Accordingly, appeal is allowed. Judgment and decree of the learned First Appellate Court

15. Accordingly, second appeal is allowed. Judgment and decree of the learned First Appellate Court dated

1.10.1993 is set aside and the judgment and decree dated 18.11.1989, passed by learned Vth Additional Munsif, Bahraich in Original Suit No.135 of 1985 is confirmed. The respondent is directed to execute the sale deed of the disputed piece of land in favour of the appellants within two months from today, failing which, the plaintiffs shall be entitled to get the sale deed executed through the agency of the Court. In the circumstances of the case the parties shall bear their own costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.07.2013

BEFORE
THE HON'BLE SIBHGAT ULLAH KHAN, J.

Second Appeal No. 466 of 1979

Ram Sewak Singh & Anr. ...Appellant
Versus
Ram Abhilakh Singh & Ors...Respondents

Counsel for the Petitioner:
Sri K.P. Singh, Sri Amit Mukherjee
Sri D.C. Mukherjee, Sri N.B.Singh
Sri Nagendra Singh

Counsel for the Respondents:
S.C., Sri S.C. Misra, Sri A.K. Verma
Sri Avinash Srivastava

CPC-Section-100- Second Appeal suit for specific performance-on based upon Registered agreement to sale-decreed by Trail Court-set-a side by first Appellate court on ground attesting witness of agreement deed not examined where as defendant/respondent on basis of un-registered agreement deed already executed sale deed-shocking that neither sale consideration given before Registrar, nor mentioned about payment made on the fact of execution of agreement-oral evidence Rs. 1000/- given at the time of executor of agreement-contrary to that sale deed-discloses entire amount already given at the time of execution of agreement-held-after 01.01.77 registration being compulsory under section 54 of T.P. Act by amendment Act No. 57 of 1976 by virtue of explanation of section 3-suit decreed subject to payment of entire sale consideration within stipulated period.

Held: Para-14
Solemn registered transactions cannot be avoided on such flimsy bogus self serving pleas. The findings are not only perverse but shocking to the judicial conscience. Such findings can very well be set aside in second appeal vide Dinesh Kumar Vs. Yusuf Ali, AIR 2010 SC 2679 and Union of India Vs. Ibrahimuddin, 2012 (8) SCC 148.

Case Law discussed:
2005 (1) SCC 162; AIR 2010 SC 2679; 2012 (8) SCC 148; AIR 2013 SC 434.

(Delivered by Hon'ble Sibghat Ullah Khan, J.)

1. At the time of arguments on 8.4.2013 no one had appeared on behalf of respondents. Accordingly, only the arguments of Sri D.C. Mukherjee, learned counsel for the appellants were heard and judgment was reserved.

2. This is plaintiffs' Second appeal arising out of original suit no.3 of 1978, Ram Sewak Singh and others Vs. Pramod Kumar and others. The suit was filed for specific performance of an agreement for sale and for cancellation of subsequent sale deed dated 30.12.1997. The suit was decreed on 20.7.1978 by Civil Judge Pratapgarh. Against the said decree subsequent purchaser filed Civil appeal no.140 of 1978 Ram Abhilakh Singh & others Vs.Ram Sewak Singh and others, District Judge Pratapgarh

through judgment and decree dated 8.5.1979 allowed the appeal, set aside the judgment and decree passed by the trial court and dismissed the suit of the plaintiffs for specific performance of agreement for sale dated 21.11.1977 and for cancellation of the subsequent sale deed hence this Second appeal.

3. According to the plaint allegations, Pramod Kumar, defendant no.1 was Bhoomidhar of agricultural land in dispute, total area 3 bigha 17 biswa 11 biswancies, he agreed to sell the said land to the plaintiffs for Rs.12,000/- after receiving Rs.5000/- as earnest money and executed registered agreement for sale on 21.11.1977 and that defendant no.1 afterwards illegally sold the property in dispute to defendant no.2 to 7 on 30.12.1977 who had full knowledge of the agreement.

4. Defendants denied execution of the agreement dated 21.11.1977 and further pleaded that prior to the sale deed dated 30.12.1977 an unregistered agreement for sale had been executed in favour of defendant no.2 to 7 by defendant no.1 on 10.10.1976. Trial court found the registered agreement for sale dated 21.11.1977 to have been executed and held that as the agreement was registered hence defendant nos. 2 to 7 were presumed to have knowledge of the same. It was further found that no unregistered agreement dated 10.10.1976 as alleged by defendants was executed by defendant no.1 in favour of defendant nos. 2 to 7. Lower appellate court reversed all the findings and also held that defendants no. 2 to 7 had no knowledge of the registered agreement dated 21.11.1977.

5. In the sale deed dated 30.12.1977, there is no mention of any earlier unregistered agreement for sale dated 10.10.1976.

6. This Second appeal was admitted on 9.8.1979 on the following substantial questions of law:

1. Whether having held that subsequent transfer had constructive notice of the agreement dated 21.11.1977 in favour of the plaintiffs, was the learned District Judge legally correct in holding that the defendants no. 2 to 7 were transferres in good faith?

2. Whether the District Judge was legally correct in discarding the observation made by the trial court in respect of demeanour of defendant no.1 in the witness box merely on the ground that no note regarding demeanour had been recorded by the trial court at the time the deposition was recorded?

7. In my opinion the following two substantial questions of law are also necessary to be decided in this appeal for its complete adjudication. Learned counsel for the appellant has been heard on these questions also which are as follows:

3. Whether finding of the lower appellate court that defendants no.1 had executed an unregistered agreement for sale in favour of defendant no.2 to 7 on 10.10.1976 is illegal and perverse.

4. Whether the findings of the lower appellate court that defendant no.1 did not execute registered agreement for sale in favour of plaintiffs on 21.11.1977 are erroneous in law and perverse?

First Question:-

8. As far as the first substantial question of law is concerned it has to be decided in favour of the appellant since 1.1.1977 agreement for sale of immovable property in U.P. is compulsorily registrable through amendment made in Section 54 of T.P. Act by U.P. Act no. 57 of 1976. By virtue of explanation 1 of Section 3 of T.P. Act, where any transaction relating to immovable property is required by law to be and has been effected by a registered instrument any person acquiring such property shall be deemed to have notice of such instrument.

Question No.3:-

9. As far as question no.3, is concerned it has also to be decided in favour of the appellants as in the sale deed dated 30.12.1977 there is absolutely no mention of alleged earlier unregistered agreement for sale dated 10.10.1976. In this regard learned counsel for the appellant has cited an authority of the Supreme Court reported in **Sargunam V. Chidambaran. 2005(1) SCC 162** holding that non-mentioning of the agreement in the sale deed makes the existence of the agreement doubtful.

10. The fantastic explanation of this omission given by the defendants that when they came to the registration office for preparation of the sale deed dated 30.12.1977 they forgot to bring the unregistered agreement for sale with them is concerned it was utterly baseless. Firstly, the execution of the sale deed could be postponed. Secondly, some one could be sent to bring the agreement for sale and thirdly at least it should have been mentioned in the sale deed that there was an earlier agreement for sale. As defendants No.2 to 7 were aware of registered agreement in favour of the plaintiff hence it was impossible for them not to mention in the sale deed about the earlier agreement in their favour, if it had been in existence. In the unregistered agreement an amount of Rs.1000/- was shown to have been paid as earnest money out of total sale consideration of Rs.12,000/-. Under the sale deed no amount was shown to have been paid on the date of sale. The only thing which was mentioned was that the entire sale consideration had earlier been paid. In the agreement no subsequent payment was shown. This disproved execution of the unregistered agreement .

11. Such types of unregistered agreements were being freely manufactured to defeat genuine claims hence in U.P. such agreements were made compulsorily registerable w.e.f. 1.1.1977.

Question No.4:-

12. Findings of the lower appellate court that agreement for sale dated 30.12.1977 was not executed by defendant no.1 in favour of the plaintiff is perverse and patently erroneous in law. It was a registered document hence there was a presumption of its correctness. It was for defendants to dislodge the presumption which was not done.

13. Point no.4 framed by the lower appellate court pertained to the validity of the agreement dated 21.12.1977. One of the reasons given by the lower appellate court is that attesting witness or scribe was not examined. This is not necessary. The other reason given is that Mahesh Ptatap Singh, PW 3 did not sign the agreement as attesting witness. Two other

persons had already signed the agreement as attesting witnesses. Pramod Kumar defendant no.1 categorically admitted his signatures on the agreement dated 21.11.1977, however, he stated that he had been administered intoxicant i.e. Ganja and wine. There was no allegation that it was given against his wishes. D.W. 1 did not state as to whether he was habitually drinking wine and smoking Ganja or not. If a person is habitual to drinking wine and taking ganja he does not lose his senses by consuming them.

14. In any case sub-registrar did not make any endorsement that the executant of the agreement did not appear to be in proper senses. If a person has taken some intoxicant willingly then he can not escape even the consequences of his criminal act (Section 85, I.P.C.) D.W. 1 apart from stating that he had taken Ganja and wine did not say that he had completely lost control over thinking and taking decision. The only thing stated by him was that he was not in his proper sense. Unless he stated and proved that he was unable to understand the consequences of his actions, the plea could not even be considered. Solemn registered transactions cannot be avoided on such flimsy bogus self serving pleas. The findings are not only perverse but shocking to the judicial conscience. Such findings can very well be set aside in second appeal vide **Dinesh Kumar Vs. Yusuf Ali, AIR 2010 SC 2679** and **Union of India Vs. Ibrahimuddin, 2012 (8) SCC 148.**

15. Accordingly, the finding of the lower appellate court is set aside and it is held that registered agreement dated 21.11.1977 is a genuine, valid document. Question of law No.4 is decided in favour of the appellants.

16. In view of the above findings there is absolutely no need to decide the second question of law.

17. Second appeal, therefore, deserve to be allowed.

18. However, 36 years have passed since the execution of the agreement price of land must have escalated a lot during this period. In such a situation the Supreme Court in the following authorities has held that while decreeing the suit for specific performance higher amount may be directed to be paid by the plaintiff.

(1) Pratap Lakshman Muchandi vs. Shamlal Uddavadas Wadhwa AIR 2008 SC 1378

(2) Satya Jain (D) Thr. L.Rs. and Ors. vs. Anis Ahmed Rushdie (D) Tr. L.Rs. and Ors. AIR 2013 SC 434.

19. Accordingly, Second appeal is allowed after deciding questions no. 1,3 and 4 in favour of the appellants.

20.Judgment and decree passed by the lower appellate court is set aside. Judgment and decree passed by the trial court decreeing the suit for specific performance of agreement for sale is restored with the condition that instead of Rs.7000/- balance sale consideration, plaintiff shall pay Rs.1,15,000/- as balance sale amount. This amount shall positively be deposited before the trial court within two months failing which this decree as well as the agreement for

sale shall stand rescinded in terms of Section 28 of Specific Relief Act.

21. If the aforesaid amount is deposited within two months then notices must immediately be issued to the defendants to execute the sale deed and on their failure to do so, sale deed shall be executed by the executing court. The deposited amount shall be paid to the defendants after the execution of the sale deed and delivery of possession to the plaintiff. Till then, the amount shall be kept by the executing court in some good interest bearing account with some nationalized bank for one year renewable for the same period after every year. When ever it is paid to the defendants; it shall be paid along with accrued interest.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.05.2013

BEFORE
THE HON'BLE DEVI PRASAD SINGH, J.
THE HON'BLE ASHOK PAL SINGH, J.

Service Bench No.563 of 2012

Prem Chandra Srivastava ...Petitioner
Versus
The State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Jagdish Prasad Maurya

Counsel for the Respondents:
C.S.C.

Constitution of India- Art. 14, 226- Financial Hand Book Vol. II Part(2 to 4) Para 49- Higher pay scale-petitioner being confirmed employee as passenger tax superintendent-allowed to work on higher post of ARTO-keeping in view of recommendation dated. 08.07.2010 by Transport Commissioner-about 27 similarly situated persons given higher pay excluding the petitioner-held-action of state govt. wholly unjustified-equal can not be treated unequal-petition allowed with cost of Rs. 2 lac.

Held: Para-12
Thus, the action of the State Government is not only violative of statutory right of the petitioner to avail the benefit of higher pay-scale in pursuance to the provisions contained in Financial Hand Book but it is also discriminatory since others have been granted benefit of salary of the officiating post, hence hit by Art. 14 of the Constitution of India.

Case Law discussed:
[2009(27) LCD 1013]; 1993 Vol. 3 SCC 677; 1990 (2) SCC 715; 2003 Vol. 2 SCC 673; AIR 1988 SC 130; AIR 1980 SC 2841; (2005) 6 SCC 344

(Delivered by Hon'ble Devi Prasad Singh, J.)

1. Heard learned counsel for the petitioner and learned Standing Counsel. Since affidavits have been exchanged, with the consent of the parties' counsel, the writ petition is being finally disposed of at admission stage.

2. The petitioner has approached this Court under Art. 226 of the Constitution of India claiming salary of the higher post of A.R.T.O on the ground that he has officiated on the said post for about five years. The petitioner has staked his claim in view of the provisions contained in Financial Hand Book.

` 3. The petitioner has joined on the post of Passenger Tax Superintendent on 27.3.1985. He is a permanent employee duly selected in accordance with rules for the post of Passenger Tax Superintendent. On 13.6.2003, the petitioner was directed to discharge duty of the post of A.R.T.O.

by office memorandum of the said date, a copy of which has been filed as Annexure No.3 to the writ petition. While permitting the petitioner to discharge duty on the post of A.R.T.O., it was provided that the petitioner shall not claim any financial gain as well as seniority of the said post. The petitioner continued on the post of A.R.T.O. Upto 31.12.2008.

4. According to the petitioner's counsel, since the petitioner has continuously discharged duty on the post of A.R.T.O from 13.6.2003 to 31.12.2008, he is entitled for payment of salary of the said post. It is submitted that though the officiating promotion was done on 13.6.2003 for a short period but since, in exigency of service, he had continued for about five years, the respondents should have paid salary of the post of A.R.T.O..

5. Earlier, the petitioner had filed a writ petition No.1828(S/B) of 2011 which was decided by judgment and order dated 18.10.2011. While deciding the writ petition, this Court directed the Transport Commissioner, U.P and the Finance Controller, U.P., Lucknow to look into the matter with regard to payment of arrears of salary in the revised pay-scale in accordance with law, by passing a speaking and reasoned order within three months and refer the matter to the State Government, if necessary. In pursuance to the order of this Court, by the impugned order, the petitioner's representation has been rejected on the ground that the petitioner shall not be entitled for payment of salary of the higher post. While passing the impugned order, the Principal Secretary of the government has relied upon a Division Bench judgment of this Court dated 24.3.2011, passed in writ petition No.63740 of 2006 Subhash Chandra Kushwaha and others versus State of U.P. and others. Relevant portion from the judgment has been reproduced in the impugned order.

6. A plain reading of the relevant portion of the judgment, reproduced in the impugned order reveals that it does not relate to payment of salary with regard to officiating post.

7. Learned counsel for the petitioner has invited attention of this Court another Division Bench judgment, of which one of us (Hon'ble Devi Prasad Singh, J) was a member, reported in **[2009(27) LCD 1013] Subhash Chandra Kushwaha versus The State of U.P and others** (Writ Petition No.1448(S/B) of 2012 decided on 20.10.2008), which relates to payment of salary during the period when the incumbent officiates on higher post. In the case of Subhash Chandra Kushwaha, relied upon by the petitioner's counsel, the incumbent discharged duty on the post of A.R.T.O and after considering the provisions contained in para 49 of the Financial Hand Book, it has been held that the incumbent shall be entitled for payment of salary of the higher post. Relevant portion from the judgment of Subhash Chandra Kushwaha (supra) is reproduced as under :

"4. From the plain reading of the provisions contained in Para 49 of Chapter VI of Financial Hand Bood. Vol. II (Parts II to IV), it is evident that a government servant who is formally appointed to hold full charge of the duties of a higher post in the same office as his own and in the same cadre/line of promotion, in addition to his ordinary duties, shall be paid the pay admissible to

him, if he was appointed to officiate in the higher post, unless his officiating pay is reduced under Rule 35 but no additional pay shall be allowed for performing the duties of a lower post. The provisions contained in Rule 49 of the Financial Hand Book seem to provide that a government servant who officiates on the higher post shall be entitled for payment of pay-scale admissible to such higher post. For convenience, Para 49 of Chapter VI of the Financial Hand Book, Vol. II (Parts II to IV) is reproduced as under :

"CHAPTER VI- COMBINATION OF APPOINTMENTS

49. The Government may appoint a Government servant already holding a post in a substantive or officiating capacity to officiate, as a temporary measure, in one or more of other independent posts at one time under the State Government. In such cases, his pay is regulated as follows :

(i)where a Government servant is formally appointed to hold full charge of the duties of a higher post in the same office as his own and in the same cadre/line of promotion, in addition to his ordinary duties, he shall be allowed the pay admissible to him, if he were appointed to officiate in the higher post, unless his officiating pay is reduced under Rule 35 but no additional pay shall be allowed for performing the duties of a lower post.

ii) where a Government servant is formally appointed to hold dual charge of two posts in the same cadre in the same office carrying identical scales of pay, no additional pay shall be admissible irrespective of the period of dual charge;

Provided that if the Government servant is appointed to an additional post which carries special pay, he shall be allowed such special pay,

(iii) where a Government servant is formally appointed to hold charge of another post or posts which is or are not in the same office, or which, though in the same office, is or are not in the same cadre/ line of promotion, he shall be allowed the pay of the higher post, or the highest post if he holds charge of more than two posts, in addition to ten percent of the presumptive pay of the additional post or posts, if the additional charge is held for a period exceeding thirty days but not exceeding ninety days :

Provided that if in any particular case, it is considered necessary that the Government servant should hold charge of another post or posts for a period exceeding ninety days, the concurrence of the State Government in the Finance Department shall be obtained for the payment of the additional pay beyond the period of ninety days.

(iv) No additional pay shall be admissible to a Government servant who is appointed to hold current charge of the routine duties of another post or posts irrespective of the duration of the additional charge.

(v) If compensatory or sumptuary allowances are attached to one or more of the posts the Government servant shall draw such compensatory or sumptuary allowances as the State Government may fix :

Provided that such allowances shall not exceed the total of the compensatory and sumptuary allowances attached to all the posts."

In the case of Subhash Chandra Kushwaha(supra), the provision contained in para 49 Chapter VI of the Financial Hand Book has been reproduced and relied upon which reveals that where a Government servant is formally appointed to hold full charge of the duties of a higher post in the same office , he shall be allowed to pay salary admissible to him of the higher post.

8. The provision contained in Financial Hand Book has got statutory force. Any condition contained in the officiating order contrary to the provisions contained in the Financial Hand Book which confers statutory right on the employees shall not be sustainable and suffers from vice of arbitrariness.

9. Apart from above, in para 8 of the writ petition, the petitioner has given the names of as many as many as 8 persons who were working on the post of Passenger Tax Officer and officiated on the post of A.R.T.O. They were given salary of the post of A.R.T.O for the period when they have officiated in compliance of the provisions contained in Financial Hand Book.

10. In the counter affidavit, a vague assertion has been made by the State Government and the contents of para 8 of the writ petition have not been denied with regard to payment of higher pay-scale to the officiating officers. For convenience, para 8 of the counter affidavit is reproduced as under :

"That the contents of paragraphs 6, 7 and 8 of the writ petition as stated are not admitted. The Government vide its order dated 25.1.2011 had directed and the office of the Transport Commissioner vide its order dated 31.01.2011 has issued consequential order that all similar kinds of arrangements as a Stop Gap Measure giving additional charge of the post of Assistant Regional Transport Officer should be terminated forthwith. Any officer still working on additional charge of Assistant Regional Transport Officer has been doing so only on the strength of orders granted by this Hon'ble Court in writ petition filed by him."

11. In case the pleading of the writ petition is not denied and a vague and illusive reply is given, then an adverse inference may be drawn with regard to correctness of the pleading contained in the writ petition. Hence, it may be assumed that similarly situate persons have been given higher pay-scale of the post of A.R.T.O by the State.

12. Attention has been invited by the petitioner's counsel to the letter dated 8.7.2010 (Annexure-8) sent by the Transport Commissioner to the Principal Secretary, Transport which contains the names of 29 persons including the petitioner with recommendation that the officers officiating on the higher post for long time may be paid salary of the post of A.R.T.O. However, out of the recommendation sent by the Transport Commissioner, except the petitioner, all others have been paid higher pay-scale. At the face of record, while deciding the representation in pursuance to the order passed by this Court (supra), the government has imparted discriminatory treatment while dealing with the subject matter. Thus, the action of the State Government is not only violative of statutory right of the petitioner to avail the benefit of higher pay-scale in pursuance to the provisions contained in Financial

Hand Book but it is also discriminatory since others have been granted benefit of salary of the officiating post, hence hit by Art. 14 of the Constitution of India.

13. It is well settled proposition of law that equals cannot be treated unequally vide 1993 Vol. 3 SCC 677 Venkeshwar Theatre versus State of Andhra Pradesh, 1990 (2) SCC 715, Direct Recruit Class II Engineer Vs. State of Maharashtra , 2003 Vol. 2 SCC 673 Onkar Lal Bajaj versus Union of India, AIR 1988 SC 130 Velur Educational Trust versus State of Andhra Pradesh, AIR 1980 SC 2841 J.P. Kulshreshtra versus Allahabad University.

` Since 28 officiating A.R.T.Os have been given salary of the officiating post, it is unjustifiable on the part of the State Government to deny the same benefit to the petitioner.

14.The impugned order seems to be an incident of arbitrary exercise of power, that too under the teeth of judgment of this Court. In case the court directs the State Government to decide a representation in accordance with law by passing a speaking and reasoned order, then it shall be incumbent on the State Government and the authority concerned to adjudicate the controversy after taking into account the entire facts and circumstances and the provisions of law. The petitioner claims salary of the higher post not only in pursuance to the judgment of this Court (supra) but also claiming parity of the higher pay-scale on the ground that similarly situate persons were given the salary of officiating post. While passing the impugned order, why the Principal Secretary has not considered the plea raised by the petitioner in the writ petition is not borne out. Learned Standing Counsel also failed to satisfy why similarly situate persons have been granted salary of the higher pay-scale but the petitioner has been denied. Counter affidavit also does not seem to give a specific reply with regard to applicability of Financial Hand Book (supra).

Since it is for the second time the petitioner has been compelled to approach this Court and having retired on 31.8.2012, coupled with the fact that the petitioner has suffered mental pain, agony and financial loss, it is a fit case where exemplary cost should be awarded in view of law settled by Hon'ble Supreme Court in the case reported in **(2005) 6 Supreme Court Cases 344, Salem Advocate Bar Association (II), Vs. Union of India.**

15. In view of above, the writ petition deserves to be and is hereby allowed. A writ in the nature of certiorari is issued quashing the impugned order dated 24.2.2012 (Annexure No.1) with all consequential benefits. A writ in the nature of mandamus is issued directing the respondents to pay difference of salary as well as arrears for the period when the petitioner discharged duty and officiated on the post of A.R.T.O, expeditiously, say within a period of two months from the date of receipt of a certified copy of the present judgment.

Cost is quantified to Rs.2 lacs which shall be deposited in this court within two months. Out of the cost of Rs.2 lacs, the petitioner shall be entitled to withdraw Rs.1 lac and the remaining Rs.1 lac shall be remitted to the Medication Centre, Lucknow. In case the cost is not deposited, it shall be recovered as arrears

of land revenue. However, it shall be open for the Chief Secretary, Government of U.P to recover the cost from the concerned authorities who have passed the impugned order.

Registry to take follow up action.

The writ petition is allowed accordingly.

APPELLATE JURISDICTION
CIVIL- SIDE
DATED: ALLAHABAD 27.05.2013

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Second Appeal No. 570 of 2001

Jhurai ...Appellant
Versus
Ram Bali ...Respondent

Counsel for the Petitioner:
Sri R.K. Chitragupt, Sri Siddharth Srivastava

Counsel for the Respondents:
...

U.P. Zamindari Abolution & Law Reform Act 1951-Section 134- Cancellation of sale deed-on ground when sale deed executed-the executer had no right-as before conversion of status from 'Sirdar' to bhumidhar made as after despite-she died-held-status stood change only on date of deposit of 20 time revenue-date of declaration immaterial-court below rightly dismissed the suit-no substantial question of law involved-appeal dismissed.

Held: Para-5
However, this view has not been approved by Apex Court in Deo Nandan and another Vs. Ram Saran and others, AIR 2000 SC 1192 wherein it has been held that Bhumadhari rights will accrue to a Sirdar on the date of deposit of twenty times land revenue and rest of the act is only ministerial. In view of aforesaid decision of Apex Court in Deo Nandan (supra) it cannot be said that the law laid down by this Court in Bharat Singh (supra) is a good law and, therefore, the reliance placed on aforesaid decision is totally misconceived. In Deo Nandan (supra) the Apex Court has construed Section 134 of Act, 1951

Case Law discussed:
AIR 2000 SC 1192; 1971 RC 371; 1981 A.L.J. 402; 2012(5) ADJ 678

(Delivered by Hon'ble Sudhir Agarwal, J.)

1. Heard Sri Siddharth Srivastava, learned counsel for the appellant.

2. The plaintiff instituted Original Suit No. 37 of 1984 for cancellation of sale deed dated 20.09.1974 on the ground that vendor, Smt. Mohra had died before the date of alleged execution of sale deed; she was only a Sirdar on the date when sale deed was allegedly executed and has no right to transfer the same by sale; and Section 43 of Transfer of Property Act, 1882 (hereinafter referred to as the "Act, 1882") has no application in the case in hand.

3. From the record, however, it cannot be disputed that Smt. Mohra deposited twenty times of land revenue as required under Section 134 of U.P. Zamindari Abolition and Land Reforms Act, 1951 (hereinafter referred to as the "Act, 1951") on 20.09.1974 and thereafter the sale deed was executed. It was a registered deed. The courts below have found that Smt. Mohra died on 28.09.1974.

4. On behalf of appellant reliance is placed on a Single Judge judgment of this Court in **Bharat Singh and another Vs. Smt. Bhudevi and another, 1987 RD 23** wherein it was held that after deposit of twenty times of land revenue if the incumbent Sirdar died, no Bhumadhari Sanad could have been issued in favour of that person as it would be a nullity and no benefit or right would accrue on this basis. Relying on **Raghunandan Singh Vs. Yashwant Singh, 1978 RD 183**, it has been held that the change of status of Sirdar into Bhumidhar occurs when the Assistant Collector makes judicial grant. The Court said that it would mean that when judicial order for grant of a certificate is passed, that would be relevant.

5. However, this view has not been approved by Apex Court in **Deo Nandan and another Vs. Ram Saran and others, AIR 2000 SC 1192** wherein it has been held that Bhumadhari rights will accrue to a Sirdar on the date of deposit of twenty times land revenue and rest of the act is only ministerial. In view of aforesaid decision of Apex Court in Deo Nandan (supra) it cannot be said that the law laid down by this Court in Bharat Singh (supra) is a good law and, therefore, the reliance placed on aforesaid decision is totally misconceived. In Deo Nandan (supra) the Apex Court has construed Section 134 of Act, 1951 and said:

"Section 134, from its plain language, indicates and shows that on the application being made and 10 times the land revenue being paid, the sirdar becomes entitled 'with effect from the date on which the amount had been deposited' to a declaration that he has acquired the rights mentioned in Section 137 of the Act."

6. Thereafter it has also considered the Full Bench judgment in **Banshidhar Vs. Smt. Dhirajadhari and others, 1971 RC 371** and Single Judge decisions **Mobin Khan Vs. Chunnu Khan and others, 1981 A.L.J. 402 and Raghunandan Singh (supra)** and then the Court said:

"In our opinion, the said decisions run counter to the plain language and meaning of Sections 134 and 137 as they stood at the relevant point of time."

7. The judgment in **Bharat Singh (supra)** has heavily relief on **Raghunandan Singh (supra)** which has been held to be not a correct decision and, therefore, it follows that the decision in Bharat Singh (supra) is also no longer a good law, in view of recent decision of Apex Court in Deo Nandan (supra). It may be worthy to mention that the decision in Deo Nandan (supra) has also been followed by this Court in **Chandan Singh Vs. First Additional District Judge and others, 2012(5) ADJ 678.**

8. In view of above, no substantial question of law has arisen in this matter. The appeal is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 29.05.2013

BEFORE
THE HON'BLE RAJIV SHARMA, J.
THE HON'BLE VISHNU CHANDRA GUPTA, J.

W.P. No. 657(MB) of 2002
with
W.P. No. 367(MB) of 2002, W.P. No. 388(MB) of 2002, W.P. No. 658(MB) of 2002,

W.P. No. 659(MB) of 2002,W.P. No. 660(MB) of 2002,W.P. No. 661(MB) of 2002,
W.P. No. 662(MB) of 2002,W.P. No. 663(MB) of 2002,W.P. No. 664(MB) of 2002,
W.P. No. 665(MB) of 2002,W.P. No. 666(MB) of 2002,W.P. No. 667(MB) of 2002,
W.P. No. 668(MB) of 2002,W.P. No. 669(MB) of 2002,W.P. No. 670MB) of 2002,
W.P. No. 671(MB) of 2002,W.P. No. 672(MB) of 2002,W.P. No. 673(MB) of 2002,
W.P. No. 674(MB) of 2002,W.P. No. 695(MB) of 2002,W.P. No. 2354(MB) of 2004,
W.P. No.2493(MB) of 2004, W.P. No.2510(MB) of 2004,W.P. No.2511(MB) of 2004
and 693(MB) of 2002,

Anoop Kumar Jaiswal & Anr ...Petitioners
Versus
The State of U.P. and Ors... Opp. Parties

Counsel for the Petitioners:
Sri Appoli Srivastava

Counsel for the Opposite Parties:
C.S.C., Sri Namit Sharma, Sri R.K. Singh, Sri Shailendra Singh Chauhan and Sri Shashi Prakash

U.P. Number of Location of Excise shop Rules 1910-Rule 5(8) read with U.P. Excise Act-Section 40(2)(e)and (f)-with General Clause Act, 1904- Power of Nagar Nigam to issue license to run foreign liquor shop-contention that the petitioners are license holder from excise department-demand of license fee by Nagar Nigam-unwarranted-held misconceived-objection raised by Nagar Nigam-rightly decided by Collector-bye laws providing Rs. 6000/- per annum for country made liquor and Rs. 12000/-for foreign made liquor-not excessive-petitions dismissed.

Held: Para-28
As stated in foregoing paragraphs, Nagar Nigam is a body that has to perform certain obligatory duties. These duties are provided under Section 114 of the Nagar Nigam Adhiniyam. A cursory look at the section will make it abundantly clear that these duties are directly related to public welfare, health, peace and well being. Further, in order to carry out these duties there is a huge financial burden that the Nagar Nigam has to meet, this financial burden is reduced by collecting taxes and fees in lieu of these services. As averred above, Rule 5(8) enshrines that in urban areas, no new shop shall be opened without notice to the Nagar Mahapalika, Town area or notified area, as the case may be. Sending of notice is not a mere formality. Requiring of notice denotes that if any objection is made by the Nagar Nigam it will be decided by the collector. Thus the objections raised by the Nagar Nigam cannot be ignored or taken lightly.

Case Law discussed:
(1975) 1 SCC 737; [(1995) 1 SCC 574]; J.T. 1996(7) SC 16; (JT 1997 (1) SC 625; (1999) 2 SCC 274; AIR 2001 Alld. 343; AIR 1996 SC 2560; AIR 1997 SC 1168;

(Delivered by Hon'ble Rajiv Sharma, J.)

1. In the afore-captioned batch of writ petitions, the cause of action for filing writ petitions and the relief sought are identical in nature and as such all the writ petitions are being decided by a common judgment.

2. Heard Sri S.K. Srivastava, Ms. Appoli Srivastava, Sri Amitabh Rai, Ms. Sujata Srivastava, Mr. Manish Kumar, Mr.Ahilesh Kalra and Mr.Shailendra Kumar Singh, learned Counsel for the petitioners and Sri Namit Sharma, Sri R. K.Singh, Sri Shailendra Singh Chauhan, Sri Shashi Prakash Singh and Sri Shafiq Mirza, learned Counsel for the respective

opposite parties and Sri H. P. Srivastava, learned Additional Chief Standing Counsel.

3. All the petitioners, except the petitioners of Writ Petition No. 2493 (MB) of 2004, Writ Petition No. 2511 (MB) of 2004, writ petition no. 2510 (MB) of 2004 and writ petition no. 2354(MB) of 2004, are holders of excise licenses for selling Indian Made Foreign Liquor in sealed bottles for which licences were granted to them as per provisions of The U.P. Excise Act, on payment of license fee for financial year 2001-2002 by the Collector, Lucknow. They have questioned the bye-laws framed by Nagar Nigam,Lucknow, which enjoins upon the petitioners to take licence, in view of clause 5 and 7 of the Bye-laws, from Nagar Nigam for selling Indian Made Foreign Liquor (IMFL) and pay Rs. 12,000/- per annum as licence fee.

4. According to petitioners, Nagar Nigam does not have any power to impose a license on the petitioners when they have already obtained a license from the Excise Department under the U.P. Excise Act. It has been contended on behalf of the petitioners that U.P. Excise Act and the Rules framed thereunder fully cover all aspects incidental to the excise business. Also, the license granted to them lays down very strict conditions for a liquor shop to operate. The conditions include the location of the shops, its opening and closing time, the premises at which the shop is located can be searched any time not only by the excise inspector but even by the police officers. Therefore, petitioners argue that there is nothing left for the Nagar Nigam to regulate upon.

5. According to petitioners, the U.P. Excise Act has been enacted by the State Government under Entries 8 and 51 of List II, Schedule VII of the Constitution and therefore, the bye-laws cannot have an overriding effect upon a constitutionally valid Act. Further, a local body cannot superimpose its authority over that of the State body as the excise business is already controlled by the State through the Excise Commissioner. The license to the petitioners have been granted by the Excise Department but if the Nagar Nigam also starts granting license this will lead to conflict as denial of license by the Nagar Nigam will render the license granted by the Excise department ineffective or useless.

6. The principle of taking license fee requires providing of certain services in lieu of it but bye-laws formulated by the Nagar Nigam does not prescribe or lay down the type of services, which they will render to an Excise licensee. Lucknow Nagar Nigam has sought to justify the said bye-laws on the basis of Section 541 (20) read with Section 438 of U.P. Nagar Nigam Adhiniyam. Section 541 and 438 of U. P. Nagar Nigam Adhiniyam speaks about the premises where any trade is to be done and details of premises can be prescribed. The bye-law is silent on this point. Similarly, Section 438 (1) (d) provides for taking licence for doing trade. In fact, if entire section is perused, it would reflect that it intends to control the dangerous trade. The word 'trade' used in this section would not be so called trade of liquor. The reason that there are certain trades on account of their pernicious nature cannot be called trade as is commonly understood. In such alleged trades, like Excise, gambling, lottery etc, it is only the privilege of the State to exploit the earnings of money. It may do itself or through it's agency under it's

strict control. The State only sells its privilege to an Excise licencee as held in **Hari Shanker and others vs. The Deputy Excise and Taxation Commissioner and others;** (1975) 1 SCC 737. In ordinary trade, there is a fundamental right under Article 19 (1) (g) of the Constitution, but in Excise Trade there is no fundamental right as held by the Apex Court in number of cases. The Apex Court in the case of **Khodey Distillery Ltd. versus State of Karnataka** [(1995) 1 SCC 574] has held that the Excise Trade is "Res Extra Commercian" that is non-commercial i.e. trade of no commerce. Therefore, selling of liquor is not covered by Section 541 and 438 of the Nagar Nigam Adhiniyam.

7. It has also been vehemently contended that prior to formulating bye laws by the Nagar Nigam, its proposal has to be published in the Government Gazette under Section 543 of the said Adhiniyam, inviting objections from public, which is lacking in the instant case and as such bye-laws enacted by the Nagar Nigam suffers from procedural defect. Moreover, there is no notification of the State Government for imposing licence fee contained in the bye-laws. It was through Government order dated 27.10.1994 that licence fee was imposed on IMFL which was a new item and imposing licence fee on new item was in breach of Section 543 of the Act.

8. Lastly, it has been argued on behalf of petitioners that there is vast distinction between 'fee' and 'tax'. The Tax is revenue for the State as well as for the Corporation to meet its obligations. Fee is usually charged for rendering some service, which cannot be source of income. Lucknow Nagar Nigam in its counter affidavit has admitted that it is regulatory as well as compensatory and it has filed it's budget but no expenditure has been shown in it for regulating Excise Trade. Under the garb of taking 'Anugya Patra' as provided in the Bye-laws, the Nagar Nigam is granting licences, which is to be taken by the licencees of IMFL shop and imposing licence fee upon it, as would be clear from clause 5 & 7 of the Bye Laws which provides for obtaining licence from Nagar Nigam. The end result would be that there will be dual control on excise business of both Nagar Nigam & Excise Department, and if no permission or licence is granted by Nagar Nigam, then the same would nullify the Excise licence granted by the Collector, Lucknow.

9. Petitioners of Writ Petition No. 2354 (MB) of 2004, Writ Petition No. 2510 (MB) of 2004 and writ petition No. 2511 (MB) of 2004 were granted licence by the Excise Collector for running Indian Made Foreign Liquor or country liquor shop in district Unnao and petitioners of Writ Petition No.2493 (MB) of 2004 were granted Excise License to run English Wine Shop and country liquor shop in District Rae Bareli.

10. In Writ Petition No. 2493(MB) of 2004, petitioner no.1 was granted licence to run an English Wine Shop at Rae Bareli for the Excise Year 2003-2004, whereas petitioner no. 2 was granted licence to run a country liquor shop by the Collector, Rae Bareli for the Excise Year 2003-04.

11. Petitioners of Writ Petition No. 2493 (MB) of 2004, Writ Petition No. 2354 (MB) of 2004, Writ Petition no. 2510 (MB) of 2004 and Writ Petition no.

2511 (MB) of 2004 have questioned the bye-laws framed by the respective Nagar Palikas in purported exercise of powers under Section 298 of the Uttar Pradesh Municipalities Act, 1916 whereby licence fee is recoverable by the Nagar Palika from the persons running the excise shops. According to petitioners, under Section 298 (1) of the U.P. Municipalities Act, the Nagar Palika Parishad has got powers to make bye-laws for the purpose of promoting or maintaining the health, safety and convenience of inhabitants of the municipal area of the district and for the furtherance of the Municipal Administration under the Act, in the district. However, this Section does not empower the Nagar Palika to charge any licence fee on excise shops which are exclusively covered by the provisions of the Uttar Pradesh Excise Act. It has been contended that licence fee is being charged from the petitioners for the alleged purpose of regulating the excise business of the petitioners. When the licence of the petitioners is already being regulated under the provisions of the Excise Act and Rules framed thereunder for which the State Government has already provided separate mechanism under the Excise Act. Therefore, no restrictions or conditions can be imposed by the Nagar Palika Parishad, on the business of the petitioners or for that matter any regulatory fee can be charged by the Nagar Palika Parishad.

12. In contrast, Counsel for the respondents have argued that the contesting respondents were much within their power in formulating the impugned bye laws. Clarifying the position, it has been submitted that under Section 541 of the Nagar Nigam Act, the Nagar Nigam and under Section 298 (1) of the U.P. Municipalities Act, the Nagar Palika Parishad is vested with the power to frame bye-laws from time to time in respect of the matters envisaged in different sub-section of Section 541, so long as the bye-laws are not inconsistent with the Nagar Nigam Adhiniyam. Further, a reading of Section 541(2), (36), (41) together with Section 438(1)(a) and (d), trade in country liquor as well as IMFL liquor has been regulated by the Nagar Nigam in its bye-laws, hence it cannot be said that the Nagar Nigam is incompetent to frame the bye-laws in exercise of the power vested in it under the Act.

13. Inviting our attention towards Uttar Pradesh Number and Location of Excise Shop Rules, 1968 framed in exercise of the powers vested under Clause (e) and (f) of sub-section(2) of Section 40 of the Uttar Pradesh Excise Act, 1910 read with Section 21 of the U.P. General Clauses Act, 1904, and in supersession of all rules and orders on the subject, made by the Governor, learned Counsel for the Nagar Nigam submitted that Rule 5(8) enshrines that in urban areas, no new shop shall be opened without notice to the Nagar Mahapalika, Town area or notified area, as the case may be.

14. Section 114 of the Nagar Nigam Adhiniyam provides for obligatory duties of the Corporation. Sub section (46) of Section 2 of the Nagar Nigam Adhiniyam defines "nuisance" to include any act, omission, place or thing which causes or is likely to cause injury, danger, annoyance or offence to the sense of sight, smell or hearing or which is or more may be dangerous to life or injurious to health or property. Thus, it is

evident that for carrying out the obligatory duties, huge amount of money is required, which is recovered by way of municipal taxes/fees.

15. Moreover, as far as notification pertaining to bye-law is concerned, it has been pointed out that the impugned bye-law was duly notified in the U.P. Gazette dated 29.03.1997 and public notice was also given through leading newspaper in the year 2000. Therefore, there is no procedural defect as asserted by petitioners. According to him,under section 541, the Nagar Nigam is fully competent to pass such laws in matters envisaged in different sub-sections of section-541, so long as bye-laws are not inconsistent with the Nagar Nigam Adhiniyam.

16. Before dealing with the rival contentions, it would be relevant to mention that though it is said that there is no generic difference between the tax and a fee and the taxing power of a State may manifest itself in different forms known respectively as special assessments, fees and tax. Our Constitution has for legislative purposes, made a distinction between the tax and fee. Hence while drafting the Bill or making the legislation, one has to keep in mind the relevant entries of the Constitution of India. The distribution of the power to levy a tax in not identical, with that of the power to levy a fee. Taxes are specifically distributed as between the Union and the State Legislation by various entries in List I and List II and residuary power to levy a tax which is not enumerated in any of the entries lies under Entry 97 of List I exclusively for the Parliament. On the other hand, entry relating to fee has been specifically mentioned in the end of the three List I, II and III.

17. Every legislature has the power to levy fee which is co-extensive with power to legislate with respect to substantive matters and legislature may while making law relating to a subject matter within its competence, levy a fee with reference to the services that would be rendered by the State under such Law. Taxes are specifically divided between List I Entries 82 to 92A and in List II Entries 46 to 63. The fees are however, not mentioned specifically. There is a general entry towards the end of each list which empowers the legislature to levy a fee in respect of any matter over which it has legislative power according to the relevant List. The power to levy fee is thus distributed in Entry 96 of List I, 66 of List II and 46 of List III. The result is that power of legislature to levy a fee or tax is to be determined by complying different test. If a fee is levied on the capacity of the payer, then it shall not be treated as fee and will be held to be a tax.

18. The traditional view, as asserted by the Counsel for the petitioners, that there must be actual quid pro quo for a fee has undergone a sea change. In this connection, we may refer to and rely upon the decision of Hon'ble The Apex Court in M/s.Kishan Lal Lakhmi Chand & Ors. vs. State of Haryana & ors. (Judgments Today) 1993 (4) SC page 426 (para 5): where it was held by Hon'ble The Supreme Court :-

"The traditional view that there must be actual quid pro quo for a fee has undergone a sea change. The distinction between a tax and fee lies primarily in the fact that a tax is levied as part of a common burden, while a fee is for payment of a specific benefit or privilege although the special advantage is

secondary to the primary purposes of regulation in public interest, if the element of revenue for general purposes of the State predominates, the levy becomes a tax. In regard to fee, there is, and must always be, co-relation between the fee collected and the service intended to be rendered. In determining whether a levy is a fee, the true test must be whether its primary and essential purposes it to render specific services to a specified area or class; it may be of no consequence that the State may ultimately and indirectly be benefited by it. The power of any legislature to levy a fee is conditioned by the fact that is must be "by and large" a quid pro quo for the services rendered. However, co- relationship between the levy and the services rendered/expected is one of general character and not of mathematical exactitude. All that is necessary is that there should be a "reasonable relationship" between the levy of the fee and the services rendered. There is no genetic difference between a tax and a fee. Both are compulsory extractions of money by public authorities. Compulsion lies in the fact that payment is enforceable bylaw against a person in spite of his unwillingness or want of consent. A levy in the nature of a fee does not cease to be of that character merely because there is an element of compulsion or coerciveness present in it, not is it a postulate of a fee that it must have direct relation to the actual service rendered by the authority to each individual nor that each should obtain the benefit of the service."

19. In view of the aforesaid law laid down by Hon'ble Apex Court in **M/s Kishan Lal Lakhmi Chand vs. State of Haryana,** there may be a regulatory fee and a compensatory fee. In the cases of licence fee, which is a regulatory fee, the condition of quid pro quo is not necessary. It would, therefore, appear that a provision for the imposition of licence fee does not necessarily lead to the conclusion that the fee must be only for services rendered."

Same view was taken:-

P. Kannadsan etc. vs. State of Tamil Nadu & other etc. J.T. 1996 (7) SC 16. It has been observed that :

"Even in the matter of fees, it is not necessary that element of quid pro quo should be established in each and every case, for it is well settled that fees can be both regulatory and compensatory and that in the case of regulatory fee, the element of quid pro quo is totally irrelevant."

20. In **Vam Organic Chemicals Limited and Anr. vs. State of U.P. & Ors**. (JT 1997 (1) SC 625)-

"..... has approved that there is a distinction between the fees charged for licence. i.e. regulatory fees and the fees for the services rendered as compensatory. It approved the view that in case of regulatory fees like the licence fees, existence of quid pro quo is not necessary."

21. In this connection, we may also refer to a recent decision of Hon'ble the Apex Court in (1999) 2 Supreme Court Cases 274 **Secunderabad Hyderabad Hotel Owners Association & Ors. vs. Hyderabad Municipal Corporation, Hyderabad & another.** Relevant paragraph 9 reads as under:-

"9. It is, by now, well settled that a licence fee may be either regulatory or compensatory. When a fee is charged for

rendering specific services, a certain element of quit pro quo must be there between the services rendered and the fee charged so that the licence fee is commensurate with the cost of rendering the service although exact arithmetical equivalence is not expected. However, this is not the only kind of fee which can be charged. Licence fee can also be regulatory when the activities for which a licence is given required to be regulated or controlled The fee which is charged for regulation for such activity would be validly classifiable as a fee and not a tax although no service is rendered. An element of quid pro quo for the levy of such fees is not required although such fees cannot be excessive."

22. In **Dr. Chakresh Kumar Jain and Ors. v. State of U.P. and Ors**., AIR 2001 Alld. 343, a Division Bench of this Court pointed out the distinction between a compensatory fee and a regulatory fee. Quid pro quo is required in the case of a compensatory fee but not for a regulatory fee. In **P. Kannadasan v. State of Tamil Nadu and Ors.**, AIR 1996 SC 2560, the Supreme Court observed that there is no need for any element of quid pro quo in a regulatory fee. The Supreme Court took the same view in the **State of Tripura and Ors. v. Sudhir Ranjan Nath,** AIR 1997 SC 1168. Regulatory fees are charged because staff has to be engaged for enforcing the regulations, and their salaries have to be paid and other expenses incurred in this connection. In view of the above clear legal position, the case laws relied upon by the petitioners are of no avail to them.

23. It is wrong to say that the liquor has no correlation with increasing health disease, the health hazards of liquor intake are well known and time and again liquor has proved a threat to peace and law and order. There is no denying that the effects of liquor intake cause nuisance to public. The state government by a Government Order dated 27.10.94 had issued directions to all Nagar Nigam/Nagar Palika Parishad/Nagar Panchayat throughout the State of U.P. in respect of imposition of license fee in respect of the commodity along with the rate of fee to be charged. A list of commodities and the fee to be charged was annexed with the said Government Order. One of the objects of this government order was to empower the Nagar Nigam to create its sources of income in order to meet its huge financial burden for providing different services and carrying out the obligations prescribed under the Act for the public purposes. By another Government Order the State Government directed the Nagar Nigam/Nagar Palika Parishad/Nagar Panchayat to amend the bye-laws. Therefore, this imposition of fee was done not only with respect to liquor trade but in respect of other commodities as well. Hence in this case there is no violation of Article 14 of the constitution. Further the imposition of license fee is different from the levy of excise duty or fee under the Excise Act. The Nagar Nigam in this case is not charging for any other tax in respect of liquor and it is only the license fee that is being charged for the aforestated purposes, so there is no question of dual taxation. Also, the subject matter in case of fee by the Nagar Nigam and that of the Excise license is very different. Therefore, both should not be confused to be one and the same.

24. Moreover, as far as notification of the bye-law is concerned, it has been

pointed out that the impugned bye-law was duly notified in the U.P. Gazette dated 29.03.1997 and public notice was also given through leading newspaper in the year 2000, as well as in the year 2001 on 06.02.2001 and 21.03.2001 requiring the persons carrying trade in liquor to obtain license from Nagar Nigam before opening of new shops which was also in consonance with rule 5(8) of Uttar Pradesh Number and Location of Excise Shops Rules, 1968.

25. Under section 541, the Nagar Nigam is fully competent to enact laws in matters envisaged in different sub-sections of section-541, so long as the bye-laws are not inconsistent with the Nagar Nigam Adhiniyam. The section 541 (20), (36) and (41) state as under :-

"(20) the control and supervision of all premises used for any of the purposes mentioned Section 438 and of all trades and manufactured carried thereon and the prescribing and regulating of the construction, dimensions, ventilation, lighting, cleansing, drainage and water supply of any such premises.

(36) securing the protection of public markets, gardens, public parking places and open spaces vested in or under the control of the Corporation from injury, or misuse, regulating there management and the manner in which they may be used by the public and providing for proper behavior of persons in them.

(41)fixing of fees for any license, sanction or permission to be granted by or under this act; from the perusal of Sub Section -20 of Section 541, it has been provided that the control and supervision of all premises used for any of the said purposes mentioned in section 438and for all trade and manufactures carried thereon and the prescribing and regulating of the construction, dimensions, ventilation, lighting, cleansing drainage wand water supply of any such premises;

The section 438 of the Act, provides:

` 1)Except under and in conformity with the terms and conditions of a license granted by the Mukhya Nagar Adhikari, no person shall-

a) Keep in or upon any premises any article specified in the bye-laws as the maximum quantity of such article which may at one time be kept in or upon the same premises without a license.

Clause - (d) of sub section (i) of section 438 further provides that no person shall carry on or allow to be carried on, in or upon any premises:

I)any trade or operation connected with any trade specified in the bye-laws,

II) any trade or operation which is dangerous to life or health or property, or likely to create nuisance either from its nature or by reason of the manner in which or the conditions under which, the same, is or is proposed to be carried on.

26. Thus, from the reading of the above sections, it is imminently clear that the IMFL and Country liquor is of such nature that it can be regulated by the Nagar Nigam.

27. Further, as far as the position of the Nagar Nigam is concerned with regards to the state acts and laws in the matter of Excise Shops it is important to our discussion to mention rule known as 'Uttar Pradesh Number and Location of Excise Shop Rules, 1968' framed in exercise of powers under clause (e) and (f) of Sub-Section (2) of Section 40 of

Uttar Pradesh Excise Act, 1910, read with Section 21 of the U.P. General Clauses Act, 1904. The Rule-5(8) of the said rules provide that in urban areas, no new shop shall be opened without notice to the Nagar Mahapalika, Town area or notified area, as the case may be.

28. As stated in foregoing paragraphs, Nagar Nigam is a body that has to perform certain obligatory duties. These duties are provided under Section 114 of the Nagar Nigam Adhiniyam. A cursory look at the section will make it abundantly clear that these duties are directly related to public welfare, health, peace and well being. Further, in order to carry out these duties there is a huge financial burden that the Nagar Nigam has to meet, this financial burden is reduced by collecting taxes and fees in lieu of these services. As averred above, Rule 5(8) enshrines that in urban areas, no new shop shall be opened without notice to the Nagar Mahapalika, Town area or notified area, as the case may be. Sending of notice is not a mere formality. Requiring of notice denotes that if any objection is made by the Nagar Nigam it will be decided by the collector. Thus the objections raised by the Nagar Nigam cannot be ignored or taken lightly.

29. Since we are concerned with a regulatory fee there is no need for any quid pro quo, though the fee cannot be excessive. The assertion of the petitioners that charging of Rs.12,000/- per annum is highly excessive. The bye-laws have provided Rs.6,000/- as licence fee for country-made liquor and Rs.12,000/- for foreign liquor. In our opinion, the fee of Rs.6,000/- for country-made liquor and Rs. 12,000/per annum is not excessive as it works out to only about Rs.500/- and Rs.1,000/- per month, which is a meagre amount.

30. In the result, we do not find any merit in the writ petitions. Writ petitions are accordingly dismissed. Costs easy.

APPELLATE JURISDICTION
CIVIL- SIDE
DATED: ALLAHABAD 23.07.2013

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

First Appeal No. 670 of 1992

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

Counsel for the Petitioners:
S.C., Sri A.K. Mehrotra
Sri Sandeep Mukherjee

Counsel for the Respondent:
Sri P.C. Srivastava

C.P.C. Section-107 Order 41 Rule 23/23 A-Power of Remand by Reference Court-Land acquisition-SLO-given award-reference against that-in absence of sufficient material-no enhancement can be considered-under this background matter remanded for fresh consideration-held-order without jurisdiction-reference being original jurisdiction-in absence of statutory provision-reference Court ceased with jurisdiction of remand-order quashed.

Held: Para-11
In the light of the above decision, the reference court acts as court of original jurisdiction and does not exercises appellate powers while deciding references under Section 18 of the Land Acquisition Act. Therefore, it is denuded of any power to remand the matter.

Case Law discussed:
AIR 1988 SC 1692

(Delivered by Hon'ble Pankaj Mithal, J.)

1. Heard learned Standing counsel for the State of U.P. Sri A.K. Malhotra has appeared for UPSEB/U.P. Power Transmission Corporation Limited for whose benefit the land was acquired but was not specifically impleaded.

2. No one has appeared for respondent despite revised call.

3. The appeal is under Section 54 of the Land Acquisition Act (hereinafter referred to as the 'Act') against the judgment, order and award dated 30.3.1989 passed by the III Additional District Judge, Jaunpur in LAR No. 165 of 1985.

4. The land of village Muradganj, Pargana-Haveli, Tehsil and District- Jaunpur was acquired for establishing 220 KVA Electricity Power Station vide notification under Section 4 of the Act dated 5.11.1981. The Special Land Acquisition Officer (in short SLAO) made an award dated 29.5.1982. The claimant respondent not satisfied by the compensation offered by the SLAO preferred a reference under Section 18 of the Act. The reference has been decided by the impugned judgment, order and award and the matter has been remanded to the SLAO for re-determination of the compensation admissible to the claimant respondent.

5. The remand has been made in view of the award of the reference court passed in LAR No. 73 of 1985 (Shamullah Vs. State) in connection with same acquisition and the sale deed alleged to have been executed by Ram Saran in favour of one Devi Prasad Upadhyaya, Advocate.

6. It is important to note that from the same acquisition several references were preferred which were separately decided. In First Appeal No. 129 of 1988 (District Magistrate Vs. Majid and another) arsing from LAR No. 167 of 1985, the reference court had enhanced compensation on the basis of the above-referred sale deed executed by Ram Saran in favour of Devi Prasad Upadhyaya but without the said sale deed having been produced in evidence.

7. Thus, in the absence of the evidence or any other material on record to prove that the award of the SLAO was inadequate and that the claimants were entitle to higher compensation, the appeal was allowed and the judgment, order and award of the reference court was set aside.

8. On the basis of the judgment, order and award of the reference court passed in the above case of Majid, several other references were decided and the appeals arising therefrom have all been allowed by me including the one arising from the decision in LAR No. 73 of 1985 (Shamulla Vs. State) by a separate judgment of date as the enhancement was based upon the decision rendered in reference of Majid which was set aside.

9. In view of the above, both the grounds on which the remand has been made have ceased to exist.

10. This apart,the power of remand is only available to the appellate court under Section 107 read with Order XLI Rule 23/23 A CPC and the said power is not vested in any court seized of the matter in its original jurisdiction. it is settled vide **Chimmanlal Hargovinddas Vs. Special Land Acquisition Officer AIR 1988 SC 1692** that a reference under Section 18 of the Act is not an appeal

against an award of the SLAO but is in the nature of original proceedings wherein the claimant is in a position of the plaintiff who is supposed to establish that the price offered for his acquired land is inadequate by producing material evidence before the reference court.

11. In the light of the above decision, the reference court acts as court of original jurisdiction and does not exercises appellate powers while deciding references under Section 18 of the Land Acquisition Act. Therefore, it is denuded of any power to remand the matter.

12. In view of the above, the order of remand made by the reference court is patently without jurisdiction and is unsustainable in law for both the reasons indicated above. The impugned judgment, order and award of the reference court 20.3.1989 passed in LAR No. 165 of 1985 is set aside and the appeal is allowed.

APPELLATE JURISDICTION
CIVIL- SIDE
DATED:ALLAHABAD 24.05.2013

BEFORE
THE HON'BLE SHIVA KIRTI SINGH, CHIEF JUSTICE.
THE HON'BLE DILIP GUPTA, J.

Special Appeal No. 699 of 2013

Smt. Soniya ...Petitioner
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri Pankaj Srivastava

Counsel for the Respondents:
C.S.C.

High Court Rules 1952-Chapter VIII Rule 5- special Appeal-against judgment of Single Judge-arises out from order passed by District Magistrate under section 95(1)(g) of U.P. Panchayat Raj Act-whether maintainable?-held-'NO' as the power exercised by the District Magistrate fulfill essential requirement of Tribunal-in view of full Bench decision of Sheet Gupta case-appeal not maintainable.

Held: Para-24
In view of the legal provisions in the Act and the Rules noted and discussed above, it has to be held that the District Magistrate while exercising powers under the first proviso to Section 95(1)(g) of the Act is an authority constituted by the State and clothed with the inherent judicial power of the State to deal with disputes between the parties and to determine them on merits fairly and objectively. In other words, in such a capacity he satisfies the essential requirements of a 'Tribunal'.

Case Law discussed:
2000(4) AWC 2834; AIR 1950 SC 188; AIR 1961 SC 1669; AIR 1963 SC 874; AIR 1965 SC 1595; 2003(1) AWC 44; 2003(1) AWC 508; (1999) 1 UPLBEC 697; (2008) 1 UPLBEC 538; 2011(1) ALJ 694; 2011 (5) ESC 761 (SC) (1994) 6 SCC 241; 2010 (1) CRC 285.

(Delivered by Hon'ble Shiva Kirti Singh, C.J.)

1. The appellant, who was elected as Pradhan of Village Pali Mukimpur, Tehsil Atrauli, District Aligarh in 2010, had filed Writ Petition No.9932 of 2013 for quashing the order dated 6th February, 2013 that was passed by the District Magistrate, Aligarh exercising powers under the first proviso to Section 95(1)(g) of the U.P. Panchayat Raj Act, 1947 (hereinafter referred to as the 'Act') to cease the financial and administrative powers of the Pradhan with a further direction that the said powers shall be performed by a Committee of three members. The learned Judge did not

accept the plea of the petitioner for quashing the said order but, in view of the fact that an Enquiry Officer had been appointed to hold the enquiry against the petitioner, disposed of the writ petition by the judgment and order dated 22nd February, 2013 with a direction to the District Magistrate to take a final decision in the matter. This Special Appeal has been filed for setting aside the aforesaid judgment and order dated 22nd February, 2013 passed by the learned Judge and for quashing the order dated 6th February, 2013 passed by the District Magistrate, Aligarh.

2. Learned Standing Counsel appearing for the respondents raised a preliminary objection that the Special Appeal filed under Chapter VIII, Rule 5 of the Allahabad High Court Rules, 1952 (hereinafter referred to as the 'High Court Rules') is not maintainable for the reason that it has been filed against a judgment rendered in exercise of writ jurisdiction under Article 226 of the Constitution in respect of an order of a Tribunal made in exercise of jurisdiction under the State Act with respect to a matter enumerated in the State List in the Seventh Schedule to the Constitution.

3. Learned counsel for the appellant, however, submitted that the order passed by the District Magistrate under the first proviso to Section 95(1)(g) of the Act cannot be said to be an order of a Tribunal and, therefore, the Special Appeal would be maintainable.

4. Chapter VIII, Rule 5 of the High Court Rules, while providing that an appeal shall lie to the Court from a judgment and order of one Judge, provides for certain exceptions and one of them is that it will not lie when the order is made by one Judge in exercise of jurisdiction conferred by Article 226 of the Constitution in respect of any order of a Tribunal made or purported to be made in the exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution.

5. The issue, therefore, that arises for consideration in the Special Appeal is whether the District Magistrate functions as a Tribunal while exercising powers under the first proviso to Section 95(1)(g) of the Act and whether the said Act is with respect to any of the matters enumerated in the State List in the Seventh Schedule to the Constitution.

6. Entry No.5 of the State List in the Seventh Schedule to the Constitution relates to "local government, i.e. to say the constitution and powers of municipal corporations, improvement trusts, the district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration". The preamble to the Act mentions that the Act has been enacted since it was expedient to establish and develop the local self-government in the rural areas of Uttar Pradesh and to make better provisions for the village administration and development. The legislative field is, therefore, clearly referable to entry no.5 of the State List in the Seventh Schedule to the Constitution.

7. It now remains to be seen whether the District Magistrate functions as a Tribunal while exercising powers under the first proviso to Section 95(1)(g) of the Act.

8. Division Benches of this Court have time and again considered what

authorities or bodies would be considered to be 'Tribunal' for the purpose of determining whether a Special Appeal would be maintainable under Chapter VIII, Rule 5 of the High Court Rules.

9. In **Pratappur Sugar and Industries Ltd. Vs. Deputy Labour Commissioner, Gorakhpur & Anr.** reported in **2000 (4) AWC 2834**, the Court examined whether the Deputy Labour Commissioner would function as a 'Tribunal' while exercising powers under Clause (LL) of the Standing Orders governing the conditions of employment of Workmen in Vaccum Pan Sugar Factories because if the Deputy Labour Commissioner functions as a Tribunal, then the Special Appeal filed against the order of a learned Judge in a writ petition filed under Article 226 of the Constitution to assail the order of the Deputy Commissioner would not be maintainable. The Division Bench, after noticing that "Tribunal" has not been defined in High Court Rules, observed that while using the expression "judgment, order or award of a Tribunal or Court" in Rule 5 of Chapter VIII of the High Court Rules, the framers had in their mind the words used in Article 136 of the Constitution which provides that the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any case or matter passed or made by any Court or Tribunal. It, therefore, considered it appropriate to consider the various decisions of the Supreme Court wherein the test to determine whether an authority or body is a 'Tribunal' under Article 136 of Constitution was considered and after referring to the decisions of the Supreme Court in **Durga Shankar Mehta Vs. Raghuraj Singh, AIR 1950 SC 188, Hari Nagar Sugar Mills Vs. Shyam Sunder, AIR 1961 SC 1669, Engineering Mazdoor Sabha Vs. Cycles Ltd., AIR 1963 SC 874 and Associated Cement Companies Vs. P.N. Sharma & Anr., AIR 1965 SC 1595,** observed :-

"12. The test applied by the Supreme Court in determining whether any body or authority has the status of a Tribunal for the purpose of Article 136(1) of the Constitution can safely be applied while interpreting Chapter VIII, Rule 5 of the Rules of the Court. **Therefore, what is to be seen is whether the judgment or order which was subject matter of challenge in the writ petition filed under Article 226 or 227 of the Constitution had been given by a body or authority which had been constituted by the State and had been clothed with the State's inherent judicial power to deal with disputes between the parties and to determine them on merits fairly and objectively.**

13. Applying the test laid down by the Supreme Court, it will be clear that the standing orders have been made by means of a notification issued by the State Government in exercise of power conferred by Section 3(b) of the U.P. Industrial Disputes Act. Therefore, it is the State which has conferred the authority upon the Additional/Deputy Labour Commissioner to determine the age of a workman in Vaccum Pan Sugar Factory. The Additional/Deputy Labour Commissioner records findings after giving notice to both the parties and giving them opportunity to lead oral and documentary evidence. Although, strict rule of evidence is not applicable in such determination, still the matter is decided

fairly and objectively on the basis of evidence adduced by the parties. **The decision taken has to be consistent with the principles of natural justice and general principles of law. Sub-clause 6 of clause (LL) lays down that the order passed by the Deputy Labour Commissioner regarding the age of the concerned workman shall be final and shall not be questioned by any party before any Court and thus a finality is attached to the decision.** The proceedings before the Deputy Labour Commissioner have, therefore, "trapping of Court". All these factors lead to irresistible conclusion that Deputy Labour Commissioner while deciding a dispute under clause (LL) of the standing orders functions as a Tribunal."

(emphasis supplied)

10. This decision was followed by the Division Bench in **Commissioner, Meerut & Ors. Vs. Jaswant Sugar Mills Ltd. & Ors**. reported in **2003 (1) AWC 44** and it was held that the Commissioner, while exercising powers under Rule 285-I of the U.P. Zamindari Abolition and Land Reforms Rules, 1952 for setting aside the sale, functions as a Tribunal since the decision that is taken by the Commissioner has to be consistent with the principles of natural justice and general principles of law. .

11. In **P.G.T. Components (P.) Ltd. NOIDA & Ors. Vs. Assistant Provident Fund Commissioner & Anr.** reported in 2**003 (1) AWC 508,** the Division Bench held that the Provident Fund Commissioner, while discharging the duties under the provisions of Employees' Provident Fund and Miscellaneous Provisions Act, 1952, acts as a Tribunal.

12. In **Jai Prakash Agarwal Vs. Prescribed Authority (Sub-Divisional Magistrate), Sadar, District Deoria & Ors.** reported in **(1999) 1 UPLBEC 697** Division Bench of this Court held that the Prescribed Authority, while exercising powers under Section 25(1) of the Societies Registration Act, 1860, functions as a Tribunal and, therefore, the Special Appeal would not be maintainable against the order passed in a writ petition filed to assail the said order of the Prescribed Authority. The relevant observations are :-

"12. Now if the aforesaid test is applied to the Prescribed Authority under Section 25 of the Act, there remains no doubt that it is a tribunal. Under Section 25 Prescribed Authority decides important dispute of election and continuance in office of an office-bearer, which is essentially a dispute of civil nature. The order passed by the Prescribed Authority though has not been said to be final in specific words but sub-section (2) of Section 25 of the Act specifically provides that where by an order made under sub-section (1), an election is set aside or an office-bearer is held no longer entitled to continue in office or where the Registrar is satisfied that any election of office-bearers of a society has not been held within the time specified in the Rules of that society, he may call meeting of the general body of such society for electing such office bearer or office-bearers, and such meeting shall be presided over and be conducted by the Registrar or by any officers authorised by him in this behalf, and the provisions in the Rules, of the society relating to meetings and elections shall apply to such meeting and election with necessary modifications. Thus, the provisions contained in sub-section (2) of

Section 25 of the Act provide that if the election is set aside by the Prescribed Authority a fresh election is required to be held by the Registrar. This is sufficient indication that the order is final. The Prescribed Authority is also required to hear and decide in summary manner any doubt or dispute in respect of the election. Thus, the order has to be passed after hearing parties and giving them opportunity to adduce evidence. From the provisions contained in proviso, it is clear that he decides the dispute in exercise of inherent judicial powers of the State vested in him by the notification."

13. The same view was taken by another Division Bench of this Court in **Mohd. Talib Khan Vs. State of U.P. & Ors. reported in (2008) 1 UPLBEC 538.**

14. It is clear from the aforesaid decisions that the test applied for determining whether any body or authority has the status of a Tribunal is to see whether such body or authority has been constituted by the State and has been clothed with the inherent judicial power of the State to deal with disputes between the parties and to determine them on merits fairly and objectively. It is this test that has to be applied to find out whether the District Magistrate functions as a 'Tribunal' while exercising powers under the first proviso to Section 95(1)(g) of the Act.

15. It will, therefore, be useful to reproduce the relevant provisions of section 95 of the Act which are as follows:-

"95. (1). The State Government may-

(g). remove a Pradhan. Up-Pradhan or member of a Gram Panchayat or a Joint Committee or Bhumi Prabhandhak Samiti or a Panch, Sahayak Sarpanch or Sarpanch of a Nyaya Panchayat if he-

(i) absents himself without sufficient cause for more than three consecutive meetings or sittings,

(ii) refuses to act or becomes incapable of acting for any reason whatsoever or if he is accused of or charged for an offence involving moral turpitude,

(iii) has abused his position as such or has persistently failed to perform the duties imposed by the Act or rules made thereunder or his continuance as such is not desirable in public interest, or

(iii-a) has taken the benefit of reservation under sub-section (2) of Section 11-A or sub-section (5) of Section 12, as the case may be, on the basis of a false declaration subscribed by him stating that he is a member of the Scheduled Castes, the Scheduled Tribes or the Backward Classes, as the case may be.

(iv) being a Sahayak Sarpanch or a Sarpanch of the Nyaya Panchayat takes active part in politics, or

(v) suffers from any of the disqualifications mentioned in clauses (a) to (m) of Section 5-A :

Provided that where, in an enquiry held by such person and in such manner as may be prescribed, a Pradhan is prima facie found to have committed financial and other irregularities such Pradhan shall cease to exercise and perform the financial and administrative powers and functions, which shall, until he is exonerated of the charges in the final enquiry, be exercised and performed by a Committee consisting of three members of Gram Panchayat appointed by the State Government.

.....

(2) .....

(3) No order made by the State Government under this section shall be called in question in any Court "

16. The State Government has delegated the powers to be exercised by it under Section 95(1)(g) of the Act to the District Magistrate by the Notification dated 30th April, 1997.

17. There is a detailed procedure prescribed under Rules 3, 4 and 5 of the Uttar Pradesh Panchayat Raj (Removal of Pradhan, Up-Pradhans and Members) Enquiry Rules, 1997 (hereinafter referred to as the 'Rules') regarding the making of a complaint against a Pradhan and the preliminary enquiry and the same are as follows:-

"3. Procedure relating to complaints.- (1) Any person making a complaint against a Pradhan or Up-Pradhan may send his complaint to the State Government or any officer empowered in this behalf by the State Government.

(2) Every complaint referred to in sub-rule (1) shall be accompanied by the complainant's own affidavits in support thereof and also affidavits of all persons from whom he claims to have received information of facts relating to the accusation, verified before a notary, together with all documents in his possession or power pertaining to the accusation.

(3) Every complaint and affidavit under this rule as well as any schedule or annexure thereto shall be verified in the manner laid down in the Code of Civil Procedure, 1908, for the verification of pleadings and affidavits, respectively.

(4) Not less than three copies of complaint as well as each of its annexures shall be submitted by the complainant.

(5) A complaint which does not comply with any of the foregoing provisions of this rules shall not be entertained.

(6) It shall not be necessary to follow the procedure laid down in the foregoing provisions of this rule, if a complaint against a Pradhan or Up-Pradhan is made by a public servant.

4. Preliminary Enquiry. - (1) The State Government, on the receipt of a complaint or report referred to in Rule 3, or otherwise order the Enquiry Officer to conduct a preliminary enquiry with a view to finding out if there is a prima facie case for a formal enquiry in the matter.

(2) The Enquiry Officer shall conduct the preliminary enquiry as expeditiously as possible and submit his report to the State Government within thirty days of his having been so ordered.

5. **Enquiry Officer.**- Where the State Government is of the opinion, on the basis of the report referred to in sub-rule (2) of Rule 4 or otherwise, that an enquiry should be held against a Pradhan or Up-Pradhan or Member under the proviso to clause (g) of sub-section (1) of Section 95, it shall forthwith constitute a committee envisaged by proviso to clause (g) of sub-section (1) of Section 95, of the Act and by an Order ask an Enquiry Officer, other than the Enquiry Officer

nominated under sub-rule (2) of Rule 4, to hold the enquiry."

18. It needs to be noted that the State Government by the notification dated 30th April, 1997 has also delegated the powers to be exercised by it under the Rules to the District Magistrate.

19. A Full Bench of this Court in **Vivekanand Yadav Vs. State of U.P. & Anr. 2011 (1) ALJ 694** examined at length the provisions of Section 95(1)(g) of the Act and the Rules and observed that the District Magistrate could form his prima facie satisfaction for holding a formal enquiry and cease the financial and administrative powers of the Pradhan only on the preliminary enquiry report submitted by the Enquiry Officer defined under Rule 2(c) of the Rules or on the basis of the preliminary enquiry conducted by the District Magistrate himself. It also observed that before ceasing the financial and administrative powers of the Gram Pradhan, it is not only necessary to seek the explanation or point of view or version of the Gram Pradhan to the charges but it has also to be considered by the District Magistrate before being prima facie satisfied about the financial or other irregularities of the Gram Pradhan. The Full Bench further held that the order passed by the District Magistrate should indicate that the District Magistrate has applied his mind to the aforesaid requirement.

20. It, therefore, transpires that it is the State Government which has been conferred powers under Section 95(1)(g) of the Act and the Rules to take action against the Gram Pradhan but in terms of Section 96-A of the Act, the State Government has delegated the powers to be exercised by it under the first proviso to Section 95(1)(g) of the Act or under the Rules to the District Magistrate by the notification dated 30th April, 1997.

21. Under Rule 3(1) of the Rules, any person making a complaint against a Pradhan or Up-Pradhan may send his complaint to the District Magistrate which shall be in the manner provided in sub-rules (2),(3) and (4) of Rule 3. Under sub-rule (2), the complaint should be accompanied by the affidavit of the complainant and also affidavit of all persons from whom he claims to have received information together with all documents in his possession pertaining to the accusation. The complaint and the affidavit as well as any schedule or annexure has to be verified in accordance with the procedure prescribed under the Code of Civil Procedure, 1908 for verification of pleadings and affidavits and under sub-rule (5) of Rule 3, a complaint which does not comply with any of the provisions of sub-rules (1) to (4) of Rule 3 shall not be entertained. Under Rule 4 of the Rules, the District Magistrate, on the receipt of a complaint or otherwise, may order the Enquiry Officer who should be the District Panchayat Raj Officer or any other 'district level officer' to be nominated by him to conduct a preliminary enquiry with a view to finding out if there is a prima facie case for a formal enquiry in the matter but before forming such satisfaction, he has necessarily to obtain the point of view or version of the Gram Pradhan to the charges and also to consider them on merits. Though a detailed procedure for holding the formal enquiry has been provided for under Rules 6 and 7 of the Rules but even at the stage of the preliminary enquiry, the

District Magistrate is required to take the decision fairly and objectively and the decision so taken by the District Magistrate cannot be called in question in any Court in view of the provisions of sub-section (3) of Section 95(1) of the Act. Thus, the contention of learned counsel for the appellant that the Rules only provide for the procedure for holding the preliminary enquiry and not with respect to the order to be passed by the District Magistrate cannot be accepted.

22. Learned counsel for the appellant placed the decision of the Supreme Court in **Dayaram Vs. Sudhir Batham & Ors.** reported in **2011 (5) ESC 761 (SC)** to support his contention that the District Magistrate does not function as a Tribunal. The matter was placed before the Larger Bench of the Supreme Court as doubts were raised regarding the correctness of direction no.13 earlier given by the Supreme Court in **Kumari Madhuri Patil Vs. Additional Commissioner, Tribal Development, (1994) 6 SCC 241** that when the order passed by the Scrutiny Committee regarding the caste certificate was challenged before the High Court under Article 226 of the Constitution, then the matter may be disposed of by a Single Judge and no further appeal would lie against that order to the Division Bench and the order would only be subject to Special Leave Petition before the Supreme Court under Article 136 of the Constitution. The Larger Bench of the Supreme Court held that the direction that no further appeal would lie against a decision of a Single Judge of the High Court to the Division Bench was not valid since it was well settled that an appeal is a creature of the Statute and if the Statute or the Letters Patent of the High Court or Rules provide for an appeal, then an appeal will lie and the power cannot be taken away by a judicial order. This decision makes it clear that the relevant Rules of the High Court regarding Special Appeal have to be looked into and, therefore, does not help the appellant at all.

23. The contention of the learned counsel for the appellant that the present Special Appeal would be maintainable as it does not fall in any of the six categories under which the Special Appeal will not lie as indicated in paragraph 15 of the Full Bench decision of this Court in Sheet Gupta Vs. State of U.P. reported in 2010 (1) CRC 285, cannot be accepted. The fifth category mentioned in paragraph 15 of the Full Bench decision is :-

"..... However, such special appeal will not lie in the following circumstances:

1. .....;
2. .....;
3. .....;
4. .....;

5. the order made by one Judge in the exercise of jurisdiction conferred by Article 226 or Article 227 of the Constitution of India in respect of any judgment, order or award by

(i) the tribunal,

(ii) Court or

(iii) statutory arbitrator

made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution of India;

6. ....."

24. The Full Bench clearly observed that under paragraph 5 referred to above,

the Special Appeal will not lie if the District Magistrate functions as a Tribunal and the Act is with respect to a matter enumerated in the State List in the Seventh Schedule to the Constitution. In view of the legal provisions in the Act and the Rules noted and discussed above, it has to be held that the District Magistrate while exercising powers under the first proviso to Section 95(1)(g) of the Act is an authority constituted by the State and clothed with the inherent judicial power of the State to deal with disputes between the parties and to determine them on merits fairly and objectively. In other words, in such a capacity he satisfies the essential requirements of a 'Tribunal'.

25. Such being the position, the District Magistrate, as in the case of a Deputy Labour Commissioner while passing the order under the Standing Orders or the Commissioner of the Division while exercising powers under Rule 285-I of the U.P. Zamindari Abolition and Land Reforms Rules, 1952 or the Provident Fund Commissioner exercising powers under the provisions of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952, would function as a 'Tribunal' while exercising powers under the first proviso to Section 95(1)(g) of the Act.

26. The Special Appeal is, therefore, not maintainable and is, accordingly, dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.07.2013

BEFORE
THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.

Service Single 715 of 2007.

Nagendra Nath Tripathi .Petitioner
Versus
State Cane Service Authority & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vishal Singh, Sri Amar Bahadur Singh
Sri Jagdish Pratap Pandey

Counsel for the Respondents:
C.S.C., Sri K.S. Pawar

Constitution of India, Art. 226- Principle of Natural Justice-dismissal order with recovery of loss of Rs. 1,28,184.31/- without supplying the copy of documents and enquiry report-held-dismissal order not sustainable-quashed-with liberty to proceed further from stage of show cause notice-with all supported document-utilized for considering dismissal-take final decision within 2 month.

Held: Para-19
I am of the considered opinion that by not providing the said document/material, the respondents have failed to conform to the principles of natural justice. Assessment of quantum of loss allegedly caused by the petitioner has been done while passing the impugned order of dismissal and recovery against the petitioner on the basis of report submitted on 12.07.2005 which, admittedly, was submitted much after submission of inquiry report dated 09.08.2004 and issuance of show cause notice dated 05.10.2004.

Case Law discussed:
1996 UPLBEC 285

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

1. Heard Sri Vishal Singh, learned counsel for petitioner and Sri K.S.Pawar, learned counsel for respondent no.1.

2. Under challenge in the instant writ petition is an order dated 28.12.2006

by means of which Cane Commissioner/Chairman State Cane Services Authority, U.P. dismissed the services of petitioner and also ordered recovery of an amount of Rs.1,28,184.31/- from him.

3. Assailing the impugned order of punishment, Sri Vishal Singh, learned counsel for petitioner has strenuously argued that while passing the impugned order and also while conducting the inquiry, the respondents have not followed the provisions contained in Regulation 68 of U.P. Cane Cooperative Service Regulations, 1975 (hereinafter referred to as 'Regulation, 1975).

4. Drawing attention of the Court to Regulation 68 of Regulation 1975, Sri Vishal Singh has submitted that the said provision mandates the employer to issue second show cause notice and in the instant case before passing the impugned order of dismissal, the proposed order of punishment itself was not served on the petitioner, which amounts to flagrant violation of the mandatory provision contained in Regulation 68 of Regulation, 1975. He also stated that on account of non observance of provision contained in Regulation 68, the entire departmental proceedings drawn and carried out against the petitioner are illegal and hence based on such illegal proceedings, the impugned punishment order is also not tenable.

5. The second limb of argument of Sri Vishal Singh in support of the case of the petitioner is that there are certain documents and materials which were collected by the department after conclusion of inquiry by the Inquiry Officer and even after submission of inquiry report by the Inquiry Officer which the petitioner was never confronted with. It is not only that the material, as is reflected in the letter dated 12.07.2005, was collected but was used by the respondents to pass the impugned order of punishment. Sri Vishal has vehemently submitted that in fact the entire departmental proceedings have been conducted on absolutely wrong premise inasmuch as without ascertaining the loss, the departmental proceedings were initiated and subsequently the loss which has allegedly been caused to department has been ascertained after conclusion of inquiry by the Inquiry Officer. His further submission is that without forming an opinion about actual loss, departmental proceedings could not be instituted or initiated against the petitioner.

6. On the other hand, Sri K.S.Pawar, learned counsel for respondent no.1 has submitted that the procedure as prescribed under Regulation 68 of Regulation, 1975 has strictly been followed in the instant case and also that the said provision contained in Regulation 68 does not mandate the departmental authorities to issue any show cause along with the proposed order of punishment or to invite comments from the delinquent officer, as is being canvassed by Sri Vishal Singh. He has further submitted that so far as the letter dated 12.07.2005 is concerned, the requisite information was sought and furnished only with a view to fasten and saddle the proportionate liability on the petitioner after he was found guilty in the departmental proceedings and hence by ascertaining information even after completion of inquiry by the Inquiry Officer, no wrong has been committed.

7. Countering the submissions made by Sri Vishal Singh, Sri K.S.Pawar has

stated that departmental proceedings were instituted against the petitioner on the basis of satisfaction of the appointing authority as prima facie case of loss to the department was found against the delinquent officer and hence merely because the exact quantum of loss was not ascertained, initiation/institution of inquiry against the petitioner cannot be faulted.

8. Having considered the arguments made by learned counsel for respective parties, the first question which needs consideration by the Court is as to whether in the instant case there has been any violation of procedure of departmental inquiry as mandated by Regulation 68 of Regulation 1975 or as to whether there has been any deviation there from.

9. To bring home the ground based on alleged non observance of provision contained in Regulation 68 of Regulation, 1975, Sri Vishal Singh has submitted that the said provision mandates issuance and service of second show cause notice with the proposed order of punishment, which in the instant case was not done, hence, procedure adopted and followed by respondents while conducting the departmental proceedings against the petitioner is not lawful.

10. In support of his contention, Sri Vishal Singh has relied upon the judgement rendered by the Hon'ble Apex Court on the case of **Jagdish Prasad vs Sachiv Zila Ganna Committee, Muzaffar Nagar and another, reported in 1986 UPLBEC 285.**

11. A perusal of Regulation 68 reveals that the complaint relating to the charges against the delinquent officer is required to be reduced in writing and communicated to the official concerned. Further, the evidence proposed to be relied upon in support of the charge is also to be given to the delinquent officer and thereafter delinquent officer is required to be called upon by the Inquiry Officer to submit his explanation in respect of charges. After the explanation is furnished, a date is to be fixed for personal hearing and on the date of personal hearing, both oral and documentary evidence is to be produced. The delinquent officer on the said date is also to be permitted to cross examine such witnesses as he likes. Thereafter, delinquent officer is to be given an opportunity to produce his own witnesses or documents in support of his case. The Inquiry Officer on the basis of entire evidence available before him has to give his findings on each charge and also to recommend the punishment which in his opinion should be inflicted on the delinquent officer. The said inquiry report is to be submitted to the competent authority. After submission of the inquiry report, if the competent authority proposes to dismiss, remove or reduce in rank the delinquent officer, he shall inform the delinquent officer concerned of the proposed action to be taken and shall give another opportunity to delinquent officer to defend himself. Thus, from perusal of the scheme contained in Regulation 68 of Regulation, 1975, it is abundantly clear that phrase "another opportunity to the official to defend himself" has been used only with a view to provide an opportunity to the delinquent officer to submit his reply/explanation to the inquiry report along with show cause notice containing the proposed punishment. The requirement of Regulation 68 of Regulation, 1975, thus, is that before taking the final decision in the matter of punishment, the proposed punishment should be intimated to

the delinquent officer. In case, the punishing authority gives a show cause notice containing the proposed punishment along with inquiry report requiring the delinquent officer to submit his explanation/reply, the same would meet the requirement of giving another opportunity to him to defend himself.

12. As far as the reliance placed by Sri Vishal Singh on the judgement in the case of **Jagdish Prasad (supra)** is concerned, it may be noticed that it was a case where the delinquent officer was removed for the reason that he was found not suitable for employment in the Cane Society. The order of removal was based on the employee, in the said case, having been caught in corruption while working with his erstwhile employer and his services were terminated by the erstwhile employer. It is further to be noticed that in the case of Jagdish Prasad (supra), only show cause notice was issued to the employee concerned and no charge sheet etc. was served as is required to be done in Regulation 68 of Regulation, 1975.

13. It is in the facts of the said case that Hon'ble Apex Court has observed that any order of removal passed in violation of Regulation 68 of Regulation, 1975 is not sustainable. The said judgement, in my considered opinion, does not come to the aid of Sri Vishal Singh, learned counsel for petitioner as he has submitted that it was incumbent upon the respondents to have served copy of proposed order of punishment itself. In the instant case a charge sheet was served on the petitioner, requiring him to furnish his statement of defence and further he was also given opportunity of personal hearing before the Inquiry Officer. The Inquiry Officer thereafter submitted his inquiry report which was furnished to the petitioner along with a show cause notice by the competent authority which contained the proposed punishment. Thus, the procedure as prescribed under Regulation 68 appears to have been followed. In this view, the judgement of Jagdish Prasad (supra) does not have any application so far as the instant case is concerned.

14. As observed above, the mandate of Regulation 68 of Regulation, 1975 as regards, " another opportunity to the official to defend himself" will be fulfilled in case the appointing authority gives a show cause notice mentioning therein the proposed punishment along with inquiry report.

15. What needs to be examined in this case next is as to whether show cause notice containing in the proposed punishment along with inquiry report was served on the petitioner or not. In this regard, a reference may be made to annexure SA-2 annexed with the supplementary affidavit filed by one Sri Rajesh Mishra on behalf of the respondents, which is a show cause notice dated 05.10.2004. It is also noteworthy that admittedly, inquiry report is of 09.08.2004 whereas show cause notice is subsequent to submission of inquiry report i.e. 05.10.2004. Perusal of the aforesaid show cause notice dated 05.10.2004 clearly reveals that inquiry report dated 09.08.2004 was sent to the delinquent officer along with the said show cause notice and further that show cause notice required the petitioner to submit his reply/explanation as to why he should not be inflicted with the major penalty.

16. Yet by means of another letter dated 12.05.2005, which has also been annexed as annexure SCA-1 annexed with supplementary counter affidavit, a reminder was sent to the petitioner to submit his reply to show cause

notice dated 05.10.2005. Thus, in my considered opinion, show cause notice dated 05.10.2004 which not only contains the proposed punishment the appointing authority intended to inflict upon the petitioner but also contains the inquiry report dated 09.08.2004 as its annexure. In this view, it is difficult to agree with the submission of learned counsel for petitioner that requirement of Regulation 68 of Regulation, 1975 in the instant case was not fulfilled, thus the said argument merits rejection and is hereby rejected.

17. Taking up the second limb of argument advanced by learned counsel for petitioner to the effect that while passing the impugned order various materials collected subsequent to submission of inquiry report dated 09.08.2004 has been taken into account without confronting the petitioner with the said documents and materials, a reference may be made to letter dated 12.07.2005 written by Inquiry Officer/Deputy Cane Commissioner to the Cane Commissioner/Secretary of State Cane Services Authority, U.P. A perusal of the aforesaid letter dated 12.07.2005 reveals that even after submission of inquiry report and after issuance of show cause notice dated 05.10.2004, various materials were collected by the Cane Services Authority through the Inquiry Officer which were submitted as late as on 12.07.2005. The impugned dismissal order also mentions that the petitioner has been found to be guilty of causing loss to the extent of Rs.1,28,184.31/- on the basis of report submitted by the Deputy Cane Commissioner/Inquiry Officer. A perusal of inquiry report dated 09.08.2004 does not, however, reveal that quantum of alleged loss caused by the petitioner was ever ascertained by the Inquiry Officer. The figure of Rs. 1,28,184.31/-. has been borrowed from the letter dated 12.07.2005 written by the Inquiry Officer to the State Cane Services Authority as is apparent from the minutes of meeting of the Authority held on 03.02.2006.

18. On being confronted as to whether the minutes of meeting dated 03.02.2006 and the letter dated 12.07.2005 or the material on the basis of which the said letter/report dated 12.07.2005 has been prepared, were ever provided to the petitioner, learned counsel for respondents could not give any satisfactory reply. It is, thus, abundantly clear that the petitioner was never confronted either with the letter/report dated 12.07.2005 or even with the minutes of meeting of Cane Services Authority dated 03.02.2006. It is also noticeable that the letter/report dated 12.07.2005 and the material on the basis of which said report has been prepared as also the minutes of meeting dated 03.02.2006 have been made the basis of saddling the petitioner with the responsibility of alleged loss allegedly caused by him. Thus, it does not leave any room of doubt that the impugned punishment order is based on certain documents and materials which the petitioner was never confronted with.

19. It is settled principles of law that any document, material or evidence, which is taken into account for the purposes of passing order of any of major penalties, has to be provided to the delinquent officer and since in the instant case the material available in the letter/report dated 12.07.2005 was never provided to the petitioner neither the said report was given to him, I am of the considered opinion that by not providing the said document/material, the respondents have failed to conform to the principles of natural justice. Assessment of quantum of loss allegedly caused by the petitioner has been done while passing the impugned order of dismissal and recovery against the petitioner on the basis of report submitted on 12.07.2005 which, admittedly, was submitted much after submission of inquiry report dated 09.08.2004

and issuance of show cause notice dated 05.10.2004.

20. In view of the aforesaid finding that the dismissal order has been passed in flagrant violation of principles of natural justice, on this ground alone, the impugned order of punishment deserves to be quashed.

21. As regards submission of learned counsel for petitioner that the respondents took a decision for initiation of departmental proceedings against the petitioner even without ascertaining the exact loss, hence, the very initiation of departmental proceedings cannot sustain, it may be observed that at the time of taking decision to initiate departmental proceedings, prima facie satisfaction of the competent authority suffices to support the decision. Thus, this argument raised on behalf of petitioner by Sri Vishal Singh is not tenable.

22. However, as observed above, the departmental proceedings against the petitioner have been initiated in violation of principles of natural justice inasmuch as the report dated 12.07.2005, the material contained therein and also the minutes of meeting dated 03.02.2006 were never provided to the petitioner. The impugned order of punishment dated 28.12.2006 cannot legally be permitted to survive.

23. Accordingly, the writ petition is allowed and the impugned order of punishment dated 28.12.2006 as contained in annexure no.1 to the writ petition is hereby quashed.

24. It has been stated at the bar that the petitioner has attained the age of superannuation on 28.02.2011. In these circumstances, it is made open to the respondents to initiate departmental proceedings from the stage which has been found to be initiated in the instant judgement.

25. If respondents decide to initiate proceedings again, they shall serve show cause notice to the petitioner which would contain proposed punishment which the competent authority may intend to inflict on the petitioner. The show cause notice shall also be accompanied by the inquiry report and the copy of letter/report dated 12.07.2005 along with other relevant material on the basis of which letter/report dated 12.07.2005 has been prepared and also minutes of meeting dated 03.02.2006. The petitioner shall also be given an opportunity for personal hearing.

26. If the respondents take a decision to initiate inquiry again, as mentioned above, the same shall be completed within a period of two months from the date a certified copy of this order is produced before the authority concerned.

27. However, there will be no order as to cost.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 29.07.2013

BEFORE
THE HON'BLE VISHNU CHANDRA GUPTA, J.

U/S 482/378/407 No.767 of 2013

Shashikant Prasad ...Applicant
Versus
The State Thru. C.B.I/A.C.B...Respondent

Counsel for the Petitioner:
Sri Nandit Srivastava, Sri Tapeshwar Kumar Maurya

Counsel for the Respondents:
Sri Bireshwar Nath

Code of Criminal Procedure-Section 197- where the investigation report with case diary-matter placed before Govt. for sanction-and the govt. failed to grant or refuse the sanction within period-specified by Apex Court in Vineet Narayan case-whether the Magistrate empowered to take cognizance and proceed further-after application of judicial mind?-held-'yes'.

Held: Para-14 & 15

14. At the same time it would be incumbent upon the court that while exercising doctrine of deemed sanction the trial court must think and apply its mind to the facts of the case and then proceed in accordance with law. If the court comes to the conclusion that on the basis of investigation conducted by the investigating agency or on the basis of the complaint made by the complainant that necessary ingredients of particular offence are not available and prima facie case is not made out then merely because investigating officer has submitted charge-sheet or complaint has been filed and the state government has not taken any decision for grant of sanction within the time schedule fixed by Apex Court, it shall not be treated that court may proceed with blind eyes and without forming an opinion of prima facie case to proceed. In absence of the sanction the responsibility of the court increases because the safeguard under section 19 of P.C.Act available to the public servant has been lifted by the act of the court.

15. In view of the above facts and circumstances of the case and law propounded by the Apex Court no illegality or infirmity is found in the impugned order passed by the trial court taking cognizance in the matter to prosecute the accused person including petitioner.

Case Law discussed:
1998 SCC (Crl.) 307; 2012 AIR SCW 1249

(Delivered by Hon'ble Vishnu Chandra Gupta, J.)

1. Short question for consideration before this Court in this petition is-

Whether trial Court is competent to proceed with the case on the basis of deemed sanction to prosecute the accused,if prosecution sanctioned is not accorded by competent authority/State within the period of four months in terms of the direction issued by Apex Court in Vineet Narain and another Vs. U.O.I. and another (1998 SCC(Cri) 307) ?

2. Brief facts for deciding this petition under section 482 Cr.P.C. are that Central Bureau of Investigation (for short "CBI") registered a case of criminal breach of trust, cheating, forgery, using forged documents as genuine, criminal conspiracy and criminal misconduct under Sections 409, 420, 467, 468, 471, 120-B of Indian Penal Code (for short 'IPC') and section 13(2) of Prevention of Corruption Act, 1988 (for short 'PC Act') against Mohammad Syed Kasim Raza and fifteen others for the alleged food grain scam. The CBI investigated the matter and submitted charge-sheet in this matter in the court of special Judge, Anti Corruption (West), U.P. Lucknow against the petitioner and others. CBI after conclusion of investigation asked for prosecution sanction to prosecute the petitioners and some other accused. The State Government granted sanction against some of the accused but no order has been passed in regard to prosecution sanction so far as the petitioner is concerned. CBI in this case filed a copy of letter sent to the Chief Secretory, State of U.P. on 13.7.2012. by which sanction was sought against petitioner Sashikant Prasad. The Government has not taken any decision in regard to prosecution sanction so far as petitioner is concerned in spite of aforesaid letter. On account of inaction on the part of State Government, CBI submitted charge-sheet arising out of RC 0062010A0027/14.12.2012 in the Court of Special Judge, Anti Corruption (West) CBI,

Lucknow against the petitioner and other co-accused under Sections 120B, 420, 468 and 471 I.P.C. And 13(2) read with section 13(1)(d) of P.C. Act. It was submitted by the learned counsel for the petitioner that the charge-sheet has been submitted after registration of crime under the orders passed by the Division Bench of this Court at Lucknow on 30.12.2010 in Writ Petition No. 10503 of 2009 (M/B) (**Vishwanath Chaturvedi Vs. Union of India**). The charge-sheet was submitted in the trial court in the light of thee Judgement delivered in **Vineet Narain and others Vs. Union of India and another, 1998 SCC (Cri) 307**, wherein time limit was fixed by the Apex Court to take decision for grant or refusal of sanction to prosecute person concerned. The period fixed in Vineet Narain's case (Supra) had already expired, but the government has not taken any decision. Hence in this case the court deemed that sanction has been accorded on account of default of State Government to take decision in the matter and issued process against accused including the petitioner to appear before court vide order dated 4.12.2012. Aggrieved by the aforesaid order this petition has been filed.

3. Heard the learned Counsel for Petitioner and the learned Counsel for CBI and also learned AGA.

4. It has been submitted by the learned counsel for the petitioner that the Apex court in a recent matter (Special Leave to Appeal (Criminal) No. 5027 of 2013) considered the aspect of section 197 Cr.P.C and held that even in the case of a retired government servant, sanction under section 197 Cr.P.C. is also required. The Apex Court by an interim order stayed the prosecution of the petitioner and on the strength of this interim order it has been contended that to prosecute the government servant sanction under section 197 Cr.P.C. is also required. It is further submitted that in **Vineet Narain's case (Supra),** the Apex Court issued certain directions and for implementation and suggested the Governments to carry out necessary amendment in the light of the directions in the statute book, but the legislature has not amend the law on the point of deemed sanction.

5. In recent case the Hon'ble Supreme Court in **Dr. Subramanian Swamy V. Dr. Manmohan Singh and Anr) 2012 AIR SCW 1249** in paragraph 56 again requested the parliament to make necessary amendment by introducing time limit under Section 19 of the PC Act. The relevant paras 55 and 56 of the said judgement are reproduced here-in -below

"55. I may not be understood to have expressed any doubt about the constitutional validity of Section 19 of the P.C. Act, but in my judgment the power under Section 19 of the P.C. Act must be reasonably exercised. In my judgment the Parliament and the appropriate authority must consider restructuring Section 19 of the P.C. Act in such a manner as to make it consonant with reason, justice and fair play.

56. In my view, the Parliament should consider the Constitutional imperative of Article 14 enshrining the rule of law wherein `due process of law' has been read into by introducing a time limit in Section 19 of the P.C. Act 1988 for its working in a reasonable manner. The Parliament may, in my opinion, consider the following guidelines:

a) All proposals for sanction placed before any Sanctioning Authority,

empowered to grant sanction for the prosecution of a public servant under section 19 of the P.C. Act must be decided within a period of three months of the receipt of the proposal by the concerned authority.

b) Where consultation is required with the Attorney General or the Solicitor General or the Advocate General of the State, as the case may be, and the same is not possible within the three months mentioned in clause (a) above, an extension of one month period may be allowed, but the request for consultation is to be sent in writing within the three months mentioned in (a) above. A copy of the said request will be sent to the prosecuting agency or the private complainant to 62 intimate them about the extension of the time limit.

c) At the end of the extended period of time limit, if no decision is taken, sanction will be deemed to have been granted to the proposal for prosecution, and the prosecuting agency or the private complainant will proceed to file the chargesheet /complaint in the court to commence prosecution within 15 days of the expiry of the aforementioned time limit."

6. It has been submitted by the learned counsel for the petitioner that law laid down in Vineet Narayan's case (supra) has no binding effect in absence of any legislative amendment made in P.C. Act. It was further submitted that in Vineet Narain's case (Supra) certain directions have been given by the Apex Court to CBI and Central Vigilance Commission (for short 'CVC'). Direction no. 15 deals with time frame for according sanction which runs as follows:-

"Time limit of three months for grant of sanction for prosecution must be strictly adhered to. However, additional time of one month may be allowed where consultation is required with the Attorney General (AG) or any other law officer in the AG's office."

7. In this regard paragraph 61 of the judgement of Vineet Narain's Case (Supra) is very important and so it is reproduced hereinbelow :

"61. In the result, we strike down Directive No. 4.7(3) of the Single Directive quoted above and issue the above directions, which have to be construed in the light of the earlier discussion. The Report of the Independent Review Committee (IRC) and its recommendations which are similar to this extent can be read, if necessary, for a proper appreciation of these directions. To the extent we agree with the conclusion and recommendations of the IRC, and that is a large area, we have adopted the same in the formulation of the above directions. These directions require the strict compliance/adherence of the Union of India and all concerned."

8. In the light of this paragraph no room left to doubt that the direction given in Vineet Narain's case (Supra) ought to have been strictly complied with by all concerned including State Government. Therefore, directions issued in Vineet Narain's case (Supra) shall have the binding effect in the light of Article 141 of Constitution of India.

9. It was further submitted by the learned counsel for the petitioner that the direction no. 15 was with regard to fix the limit, which has to be adhered to by all concerned but what would happen if it is

not complied with? According to counsel for petitioner the remedy would be of initiating proceeding of contempt and not to take it as deemed sanction to prosecute.

10. Sri Bireshwar Nath, learned counsel appearing for CBI drew attention of this court towards the judgement of Division Bench of this Court delivered in **Writ Petition No. 10503 (M/B) of 2009 (Vishwanath Chaturvedi Vs. Union of India),** wherein the Division of this court keeping in view the direction issued in Vineet Narain's case (Supra) fixing time limit to accord sanction has held that in default of taking decision to accord sanction within the time fixed, the sanction shall be deemed to have been granted.

Paragraph 151 of the said judgment is reproduced herein below:

"In view of above, we allow the writ petition subject to observation made and finding recorded hereinabove and issue the following directions for compliance not only in the interest of present controversy but to safeguard the future public interest till Act is appropriately amended (supra) by the Parliament:-

i)The C.B.I. shall proceed with further enquiry not only with regard to Ballia, Lakhimpur and Sitapur but also with regard to Varanasi, Gonda and Lucknow District.

ii)All those cases where the State agencies found that the foodgrains have been smuggled outside the State of U.P. or to other countries, immediately, they shall refer such cases to the C.B.I for further investigation.

Iii) It shall not be necessary for the C.B.I or State agencies to obtain sanction under the statutory provisions with regard to present controversy where from initial stage, prima facie intentionally, deliberately and in a planned manner, the foodgrains were lifted from godown for sale either in open market or to smuggle outside the State of U.P or to other countries.

iv) Subject to exception above(supra), the Chief Secretary of the State of U.P is directed to ensure that not only in the present controversy but in all cases where State agencies or the C.B.I or other investigating agency moves an application for sanction under the Code of Criminal Procedure or Prevention of Corruption Act, 1988 or any other law for the time being in force, a decision should be taken within a period of three months. In absence of any decision with due communication, it shall be deemed that the sanction has been accorded, charge-sheet shall be filed and the trial Court shall proceed with trial to logical end in accordance to law.

v) Investigation into every accusation made against each and every person on a reasonable basis, irrespective of the position and status of such person shall be conducted and completed expeditiously. It is imperative to retain public confidence in the impartial working of the State agencies.

A message must be given by the investigating agencies keeping in view the concept of equality enshrined in the Constitution that, "Be you ever so high, the law is above you." Law must take its course to punish the guilty.

vi) Directorate of Enforcement, Ministry of Finance, Government of India shall also proceed with search and seizure of assets, property, cash or kind earned

under food scam under the Prevention of Money Laundering Act and Foreign Exchange Management Act or any other law time being in force expeditiously.

Vii) The State and the central agencies shall proceed with the investigation expeditiously and conclude the same within a period of six months. At the interval of every two months, they shall submit a status report to this Court henceforth till filing of the charge-sheet/report to Court concerned.

It shall be open to the C.B.I. and State agencies to proceed with investigation with regard to food scam not only up to the year 2007 but even beyond the said year in case some link evidence/material is found with regard to continuance of diversion of food under various schemes of the State and CentralGovernment.

Viii) As and when a charge-sheet is filed, the trial Court shall proceed with the trial and conclude the same expeditiously and preferably within a period of one year.

Registrar General shall communicate the order passed by this Court and circulate to all Courts concerned and submit a compliance report within one month.

Registry shall send a copy of the present judgment to the Secretary, Law, Government of India as well as to the Principal Secretary, Law and Chief Secretary of the State of U.P. to consider for appropriate amendment in the Prevention of Corruption Act, 1988 in the light of observations, made in the body of judgment. Till the law is appropriately amended by the State of U.P. (State Amendment) or the Central Government, findings recorded and directions issued shall be followed by all investigating agencies and subordinate courts of the State while dealing with corruption cases. Copy of the judgment shall also be provided to the Addl. Solicitor General of India as well as the Advocate General of the State for appropriate action. A copy shall also be sent to the Directorate of Enforcement, Ministry of Finance, Government of India for appropriate action in the light of the directions issued (supra).

The writ petition is allowed accordingly. No order as to costs.

In view of above, we allow the writ petition subject to observation made and finding recorded hereinabove and issue the following directions for compliance not only in the interest of present controversy but to safeguard the future public interest till Act is appropriately amended(supra) by the Parliament :-

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sale either in open market or to smuggle outside the State of U.P or to other countries.

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A message must be given by the investigating agencies keeping in view the concept of equality enshrined in the Constitution that, "Be you ever so high, the law is above you." Law must take its course to punish the guilty.

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State while dealing with corruption cases. Copy of the judgment shall also be provided to the Addl. Solicitor General of India as well as the Advocate General of the State for appropriate action. A copy shall also be sent to the Directorate of Enforcement, Ministry of Finance, Government of India for appropriate action in the light of the directions issued (supra).

The writ petition is allowed accordingly. No order as to costs."

11. Perusal of this paragraph reveals that unless the amendment is made by the parliament in the light of Vineet Narain's case (Supra) the concept of deemed sanction shall be there. The order dated 3.12.2010 passed by the Division Bench of this Court in the aforesaid writ petition was assailed by the State before Apex Court by filing a Special Leave Petition (c) No.11563 of 2011. The Apex Court while entertaining the appeal vide its order dated 18.4.2011 has passed the following interim order:-

"..... Ad-inteirm stay of the direction No. (iii) in para 155 and the second part of directions no. (viii) in para 155 requiring the reports to be submitted to the High court in read to every investigation at interval of two months.

In regard to directions no. (iv) in para 155 of the impugned order, the period three months mentioned therein shall be substituted by the period 'six months' ....."

12. Perusal of it shows that the Apex court has not stayed the operation of direction (iv) given in para 155 but simply extent period from three months to six months which shows that concept of deemed sanction has been accepted by the Apex court . In Dr. Subramanian Swamy's case (supra). The Apex court again reminded to the Parliament to do its job. The guide line no. 3 of para 56 deals with concept of deemed sanction.

13. As such if Investigating Officer asked for grant of sanction from the government, after expiry of time limit fixed as above, the prosecuting agency or complainant may ask the trial court to proceed in the matter on the basis of deemed sanction.

14. At the same time it would be incumbent upon the court that while exercising doctrine of deemed sanction the trial court must think and apply its mind to the facts of the case and then proceed in accordance with law. If the court comes to the conclusion that on the basis of investigation conducted by the investigating agency or on the basis of the complaint made by the complainant that necessary ingredients of particular offence are not available and prima facie case is not made out then merely because investigating officer has submitted charge-sheet or complaint has been filed and the state government has not taken any decision for grant of sanction within the time schedule fixed by Apex Court, it shall not be treated that court may proceed with blind eyes and without forming an opinion of prima facie case to proceed. In absence of the sanction the responsibility of the court increases because the safeguard under section 19 of P.C.Act available to the public servant has been lifted by the act of the court.

15. In view of the above facts and circumstances of the case and law propounded by the Apex Court no illegality or infirmity is found in the impugned order passed by the trial court

taking cognizance in the matter to prosecute the accused person including petitioner.

16 In this matter the trial court after discussing the merit of the case , proceeded to summon the petitioner and the learned counsel for the petitioner has not argued on merit of the case and pressed only point of deemed sanction, so no finding is required to be recorded by this Court at this stage on merit of the case.

17. In view of the above, the petition sans merit and is dismissed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 04.07.2013

BEFORE
THE HON'BLE IMTIYAZ MURTAZA, J.
THE VISHNU CHANDRA GUPTA, J.

Criminal Appeal No. 853 of 2005

Naviullah @ Magroo ...Appellant
Versus
The State of U.P. ...Respondents

Counsel for the Petitioner:
Sri Manoj Kumar Mishra , Sri C M Shukla
Sri Girdhari Lal Shukla , Sri Ramendra Kumar Misra
Sri Shailesh Kumar Srivastava and Sri Shama Kidwai

Counsel for the Respondents:
G.A.

Criminal Appeal- Against conviction of life imprisonment with fine of Rs. 10,000/-- under section 302, 201, 376 I.P.C.- conviction of appellant based upon confession made before magistrate- without certifying about mental condition- non mentioning guilt of appellants- statement recorded in sketchy and hurried manner without following mandatory legal requirement u/s 164(4)-can not be considered for conviction-prosecution failed to prove the case beyond doubt-conviction set-a-side.

Held: Para-63 & 69

63. The judicial confession recorded by the magistrate has failed the test of being a reliable evidence owing to the reason of its been recorded in absence of knowing the mental condition of appellant at the time of recording of statement, non specifying of certificate, non mentioning of acceptance of guilt of the appellant, non mentioning of reason of confessing the crime and the treatment meted out to the appellant at the police station. Thus, seeing the holistic purview the confessional statement of the appellant has been recorded in a sketchy and hurried manner without observing the mandatory legal requirements.

69. In view of the above we are of the firm opinion that the confessional statement has not been recorded in accordance with mandatory provisions of law. Therefore, the trial court wrongly considered the confession as an incriminating circumstance. It is also relevant to mention here that the alleged confession is not admission of guilt by the appellant and cannot be considered by the court of law for recording finding of conviction under Section 302 IPC.

Case Law discussed:
[([2008) 16 SCC 714]; AIR 1956 SC 217; AIR 1957 SC 637; AIR 1963 SC 1094; (1978) 4 SCC 90; AIR 1981 SC 2007; (1995) 2 SCC 76; (2001) 4 SCC 9; (2010) 8 SCC 233; [AIR 1936 PC 253]; (2007) 1 SCC (Crl.) 702; (2011) 2 SCC 490;

(Delivered by Hon'ble Imtiyaz Murtaza, J.)

1. Challenge in the present appeal is to the Judgment and order dated 10.05.2005, passed by IV Additional Sessions Judge, Gonda in Sessions Trial no.59 of 2002

arising out of Case Crime No.132 of 2000 Police Station Sadulla Nagar, District Gonda (Present District Balrampur), whereby appellant-accused was convicted under Section 302 IPC and sentenced to life imprisonment with fine of Rs.10,000/- and two years rigorous imprisonment in default stipulation.

2. The brief conspectus of prosecution version shun unnecessary details is such that P.W.1 Masiuddin S/o Zhau R/o Village Ali Kulhiya, Pure Kulhiya, P.S. Sadulla Nagar the then District Gonda now Balrampur lodged a report at Police Station Sadulla Nagar on 13.03.2000 at 8.15 a.m., got written by Majibullah Siddiqui of Village Newada, that his daughter Reshma Bano aged about 9 years left home towards North at about 7.00 PM on 11.03.2000 to purchase biscuit from a nearby kiosk (Dabli) but disappeared in front of the house of Tikai Verma, he then alongwith other villagers went in search of his daughter but could not found till the morning of 13.03.2000 when he found the mutilated cadaver of his daughter in the sugarcane field of Tikai Verma. The chik FIR no.28 (Ext.Ka10) was prepared by Head Moharrir Ravi Pratap Singh (P.W.7) at P.S. Sadulla Nagar on 13.03.2000 at 8.15 AM and Case Crime No.132 of 2000 was registered under Section 302, 201 I.P.C. against unknown miscreant, the text of which was entered in GD no.16 (Ext.Ka-9); SO Vijay Bahadur Singh has been entrusted the investigation and after collecting other material and completing requisite procedure of investigation submitted charge sheet under Sections 302, 201 and 376 I.P.C. The case was committed to the court of Sessions.

3. The Sessions Judge has framed charges against the appellant under Sections 302, 201 and 376 I.P.C. The case of the appellant was of false implication and claimed trial. The prosecution in order to prove its case examined eight witnesses. P.W.1 Masiuddin (father of deceased), P.W.2 Ramzan Ali (real paternal uncle of deceased), P.W.3 Rabia (mother of deceased), P.W.4 Nur Mohammad (witness of memo of recovery of excreta of deceased & plain earth, scissor, cloth of appellant, cloth of deceased, plain & blood soaked earth), P.W.5 Dharm Raj (last seen witness), P.W.6 Indra Dev Dubey A.C.J.M. (recorded statement of appellant u/s 164 Cr.P.C.), P.W.7 Ravi Pratap Singh (scribe of chik FIR, GD & appeared as secondary witness for I.O. Vijay Bahadur Singh) and P.W.8 Dr.P.S.Singh (conducted post mortem of deceased); the appellant has produced two witnesses D.W.1 Home Guard no. 2312 Amin Ahmad (he alongwith a constable took appellant to court on 15.03.2000 at 10.15 a.m.) and D.W.2 Mahesh Dutt Tiwari, Bandi Rakshak, District Jail Gonda (produced Gate Book of Jail filed a copy of Jail register dated 15.03.2000, 19.20 hrs. (Ext.Kha-1).

4. The learned Sessions Judge convicted appellant under section 302 IPC and acquitted under section 376 and 201 IPC. Hence this appeal.

5. We have heard Sri Shailesh Kumar Srivastava and Sri C. M. Shukla Advocate for the appellant and Ms. Ruhi Siddiqi learned AGA for the State.

6. The Learned Counsel for appellant submitted that there is no direct evidence in the case. The chain of incriminating circumstances is not complete.The recoveries do not connect

appellant with the crime.The Sessions Judge wrongly placed reliance on judicial confession which has been recorded in contravention of mandatory provisions of law.

7. Per contra learned AGA has supported the findings recorded by the trial court.

8. In order to appreciate the rival contentions of the counsel for the parties it is necessary to examine the evidence on record.

9. PW-1 Masiuddin deposed that on 11.3.2000 at about 7:00 his daughter Reshma Bano aged about 9 years, had gone to purchase biscuit from the shop of Nabiullah alias Mangru. A little earlier his eldest daughter Sakina Bano had gone to purchase Pan from the shop of Mangru. At the time of dusk his daughter Reshma Bano did not return, therefore, they started searching for her but her whereabouts could not be known. At that time Dharamraj Badhai was also sitting at his house. He told him that in the evening at about 7:00 he had gone to purchase biscuit from the shop of Mangru. At that time Reshma Bano was present at the kiosk of Mangru. Reshma Bano had asked for one Nalli and he had given her one Nalli and thereafter he came to his house. His daughter Sakina also told him that when she was going to purchase Pan Reshma Bano had also gone to the shop. She returned after purchasing Pan and her sister stayed back. On the next day, they were searching for her. On the second day Mangru had told him that after Dharamraj had purchased biscuit, Reshma had returned towards the side of her house and he had seen her going up to the house of Tikai Verma. On the third day they again started searching. The accused Naviullah told them to see towards the side of sugarcane field of Tekai Verma. He went towards the field of sugarcane crop of Tikai Verma and saw the dead body of his daughter Reshma in mangled condition. Her Shalwar was lying apart. He started crying. Several persons of the village reached there. Someone had thrown the body after committing murder and she had been brutally murdered. He also stated that he had dispute with respect to some land with Tikai Verma, Sagar and Hanuman which is still pending in the court of Commissioner. After recovery of the dead body he had lodged report, which is Ex. Ka-1.

10. In cross examination, he stated that he did not name anyone in the report. He had no suspicion on Naviullah. He further stated that later on he came to know that actual accused is Sonu Singh. Naviullah had knowledge that Sonu Singh had committed murder but he did not tell. Had Naviullah told him everything correctly, then actual accused Sonu Singh would have been trapped and Naviullah would not have been confined to jail. He further stated that Bharat Singh is father of Sonu Singh and is resident of village Pure Seer. He owns tractor and motorcycle. He further stated that he had seen Sonu Singh passing in front of his house. He had never seen Sonu Singh sitting with Naviullah and he had no knowledge that Sonu Singh is friendly with Naviullah. He further deposed that on the date of incident, he was not at home but went to Gaura Chowki Market; when he came back, a visitor came to him and stayed there for half an hour then he started beating fodder. He also deposed that he had enquired about his daughter from Naviullah. When he went to enquire

about his daughter from Naviullah, he was returning after closing the shop at about 7:30-8:00 p.m. Naviullah used to close his shop at that time.

11. PW-2 Ramzan Ali deposed that Masiuddin is his real brother. On the date of incident, he was attending the marriage and returned at about 8 p.m. and came to know that Reshma Bano aged about 9 years, is missing. She had gone to purchase biscuit from the shop of Naviullah, where Dharamraj gave one Nalli to Resahma at the shop of Naviullah then came to the house of Masiuddin. In search of Reshma, this witness and Masiuddin went to the house of Naviullah where his father informed that he went to village Alinagar to watch video but when he went to Alinagar, he did not find either Naviullah or his betel shop. On second day he searched for Reshma but he did not find her. However, when Naviullah came to open his shop he intimated that Dharamraj gave one Nalli to Reshma and she returned back home. Reshma Bano was last seen by Dharamraj Badhai on the kiosk of Naviullah. His brother Masiuddin had seen the dead body of Reshma in the sugarcane field of Tikai. Thereafter report was lodged and Inquest was prepared, which is Ex. Ka-2. He further stated that in his presence and in the presence of police and Noor Mohammad, Naviullah told that at the time of rape, stool had passed and he had shown the same to the investigating officer in the field of Tekai and the investigating officer prepared recovery memo which is Ex. Ka-3. At the instance of Naviullah, a scissor was recovered and a recovery memo thereof was prepared which is Ex. Ka-4. The police had also recovered clothes of accused and prepared recovery memo which is Ex. Ka-5.

12. In cross examination, he admitted that the dead body was recovered on the third day and prior to that they had seen the field but nothing was found there. He deposed that the dead body was recovered on the third day at 7 a.m. when his brother had gone to answer the call of nature and he raised alarm. He has proved his signatures on Ex. Ka-3, Ka-4 and Ka-5 and stated that it was not read out to him but due to fear he signed the papers. He further stated that the recovered scissor is for cutting betel leaves. He further stated that Naviullah was arrested on the same day when body of Reshma was found.

13. PW-3 Rabia deposed that on the date of incident, her daughter had gone to purchase biscuit from the shop of Mangru. Mangru is also known by the name Nabiullah. On the said date, she and her husband were beating mustard seeds and Dharamraj Badhai had come to her house. She had searched for her daughter at various places. Dharamraj Badhai had told her that her daughter was present at the shop of Mangru. He had given her one Nalli (biscuit). The shop of Naviullah (Mangru) was closed. On the next day, they had enquired from Mangru. He told that he had seen her daughter alongwith Dharamraj. On the next day, her husband saw the dead body in the sugarcane field of Tikai. During her cross examination she refuted to know about Sonu Singh and further refuted of having any enmity with Tikai Verma.

14. PW-4 Noor Mohammad deposed that the S.I. had collected blood stained and plain earth in his presence and prepared recovery memo (Ex. Ka-6). He had also prepared the recovery memo of the clothes and slippers of Reshma which

is Ex. Ka-7. The clothes of Naviullah taken into possession by the S.I. are Ex. Ka-5. He had also recovered a scissor from the shop of Naviullah which is Ex. Ka-4. He though admitted his signatures on Ex. Ka-3 but stated that he had neither read it nor it was read over to him.

15. In cross examination he admitted that in the shop of Naviullah, Sahu and Parasu also used to sit.

16. PW-5 Dharamraj deposed that Mangru alias Naviullah sells Pan, biscuit, nalli, chocolate etc. He had purchased biscuit of Re. 1 from his shop. At that time daughter of Masiuddin, Reshma was standing there. He had given her one Nalli. Thereafter he came to the house of Masiuddin. He stayed for half an hour at the house of Masiudddin. The children of Masiuddin had asked whether he had seen Reshma. He told them that he had seen Reshma Bano at the shop of Mangru.

17. In cross examination he denied to have given any statement that wife of Masiuddin had enquired about Reshma Bano. He stated that he is not aware as to how his statement has been written by the investigating officer and he refuted to have made such statements to the investigating officer.

18. PW-6 Indra Dev Dubey, Additional Civil Judge, Senior Division, Pratapgarh deposed that on 15.3.2000, he was posted as Judicial Magistrate-I, Balrampur. He stated that on the same day he had recorded the statement of Naviullah under Section 164 Cr.P.C. He had asked questions to get satisfied that the witnesses is deposing independently and without any influence. He told the witness that confession can be read against him and he may be convicted. Thereafter he had read over the statement and obtained thumb impression. He had proved the statement under Section 164 Cr.P.C. of Naviullah as Ex. Ka-8.

19. In cross examination he stated that he did not mention 'confession' in his statement under Section 164 Cr.P.C. After preparing the statement under Section 164 Cr.P.C., he did not write the certificate as mentioned in Section 164 (4) Cr.P.C. He had enquired from Naviullah as to why he wants to confess the crime but he did not mention the reply in his statement. He further stated that he had not recorded the statement in police custody. He was produced for the first time on 15.3.2000. He had given time to ponder over the matter. He was produced in the morning and he had given him a whole day to ponder before making the statement and his statement was recorded after 3:30 p.m. He did not ask any question about the treatment meted out to him by police. He did not mention the question-answer. When the statement was recorded, there was no police personnel present and when the statement was being recorded, no one was permitted to enter the court room.

20. PW-7 S.I. Ravi Pratap Singh deposed that on 13.3.2000, he was posted as Head Moharrir at P.S. Sadulla Nagar. On the basis of the written information given by Masiuddin on 13.3.2000 at 8:15 p.m., he had registered case crime no. 132/2000. He had prepared G.D. also which is Ex. Ka-9. Chik report is Ex. Ka-10. He has proved Ex. Ka-2 to Ka-7 in the handwriting of Vijay Bhadur Singh, the S.H.O. who had died in between. He also proved Ex. Ka-11, 12, 13, 14, 15, 16, 17 and 18, which were prepared by Vijay Bahadur Singh.

21. In cross examination, he deposed that he cannot tell as to when the articles in this case were sent to scientific laboratory and why they were sent belatedly.

22. PW-8 Dr. P.S. Singh, Medical Officer, PHC, Chandauli had conducted autopsy on the dead body of the deceased. He noted the following ante mortem and post mortem injuries on the person of the deceased:

ANTI MORTEM INJURIES

1.Lacerated wound 2 cm. x 0.5 cm. present in front of left elbow

2.Abrasion 10 cm. x 7 cm. present on the front of neck, below chin.

POST MORTEM INJURIES:

23. Both lower limbs below knee absent. Only two femur bones present which had no muscle, whole abdominal parts and walls missing. All internal organs of abdomen and perineum absent, only part of liver present.

24. The defence had examined DW-1 Home Guard Amin Ahmad, who deposed that in March, 2000 he was posted as Home Guard in P.S. Sadulla Nagar. On 13.3.2000 he had brought the sealed dead body of Reshma Bano in mortuary. On 15.3.2000 the accused Naviullah was taken to the court at about 10:15 a.m. where he was produced in the court of Chief Judicial Magistrate for remand. At that time S.I. had also reached there. Firstly the accused was produced in the court of C.J.M. for recording confessional statement and the C.J.M. asked them to produce him before J.M.-I. The magistrate had asked to come after lunch and thereafter statement was recorded. The remand of accused was taken and then he was lodged in Gonda jail at about 7 p.m. When the confessional statement of the accused was being recorded in the court of magistrate, they were sitting at the gate of the court. The S.I. was present alongwith accused in plain dress. When the magistrate had asked them at about 11 a.m. to go out of the court, Vijay Bahadur Singh, S.I. had brought him to the tea shop. Thereafter S.I. had got his statement recorded.

25. In cross examination, he admitted that after recording of Section 164 Cr.P.C. statement, they had produced the accused in the court of J.M.-I around 12 noon. Thereafter he had given time to the accused for pondering over the statement to be given by him and then statement was recorded at 3:30 p.m. When the statement under Section 164 Cr.P.C. was recorded, no police personnel was present in the court room. He himself said that S.I. was sitting.

26. DW-2 Mahesh Dutt Tiwari, had produced the gate book of district jail Gonda for the period 14.3.2000 to 27.3.2000. He deposed that Naviullah after being challaned from police station was lodged in jail on 15.3.2000 at 7 p.m. The copy of entry of the jail book is Ex. Kha-1.

27. The entire gamut of facts and evidence of the present case points to only two categories of evidence; the first is circumstantial evidence and the other is confessional evidence. So far as circumstantial evidence is concerned, the law is settled in plethora of cases like Rukia Begum Vs State of Karnataka [2011 (4) SCC 779], Arun Bhanudas

Pawar Vs State of Maharashtra [2008 (61)ACC 897 (SC)] etc. wherein it is established that the court has to satisfy the following test to held the accused guilty:

1.The circumstances inferring the guilt must be coherently and steadily established.

2.The circumstances must be explicit and precisely points the guilt.

3.The circumstances should cumulatively form a complete chain that conclusively and with all human probability the crime has committed by the accused and none else; and

4.The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that guilt of the accused but should be inconsistent with his innocence.

28. The Sessions Judge has considered following incriminating circumstances against appellant.

1. Last Seen of the deceased along with the appellant.

2. Recoveries under section 27 of the Evidence Act.

3. Confession before magistrate recorded under section 164 CrPC.

29. First incriminating circumstance considered by the Sessions Judge is last seen of the deceased along with the appellant and thereafter deceased was not seen alive. P.W1 Masiuddin has not deposed about the last seen of the deceased along with appellant. In fact he had given clean chit to the appellant. He also stated that when he received information that his daughter did not return he had gone to enquire from Naviullah about 7.30 or 8 p.m. and he was going to his shop after closing. Naviullah used to close his shop at that time.

30. P.W.2 Ramzan Ali had not seen deceased along with appellant. He deposed that he had gone to the house of Naviullah but he was not there and his father had told him that he had gone to Ali Nagar to watch video. When he reached Ali Nagar there was no Pan shop and Naviullah was also not there. He further stated that next day when Naviullah had opened his shop he enquired about Reshma. He told him that Dharam Raj had purchased Nalli (Biscuit) and he had given one Nalli to Reshma. She had returned to her house and he had seen her going upto mango tree.

31. P.W.3 Rabiya is mother of deceased Reshma. She had not seen accused along with deceased.

32. P.W.5 Dharmraj deposed that He had purchased four nallis for one rupee and Reshma daughter of Masiuddin was also there. He had given one nalli to Reshma thereafter he came to the house of Masiuddin and stayed there for half an hour. He further stated that the children of Masiuddin enquired about Reshma Bano and he told them that he had seen her at the shop of Mangru and thereafter he did not see her. He also told them that he had given her one Nalli. He further clarified that he had told them at his house and not at Masiuddin house. He denied to have given statement to investigating officer that he had told about Reshma to the wife of Masiuddin In the cross examination he also stated that in the kiosk of Naviullah, Sahu and Parsu also sit there. The only testimony

to prove the incriminating circumstance of last seen is of P.W. 5 Dharamraj. We have carefully considered the entire evidence to examine whether the evidence on record proves the incriminating circumstance of last seen. P.W.5 Dharamraj has deposed only about the presence of Reshma at the shop of appellant. P.W.1 Masiuddin, father of the deceased, stated that he was searching for Reshma and reached at about 7.30-8 p.m at the shop of appellant and at that time appellant was going home after closing his shop, whereas PW-2 Ramzan Ali stated to have gone to the house of Naviullah at night in search of Reshma Bano from where he was intimated by his father that he had gone to Ali Nagar to watch video. P.W4 Noor Mohd. also admitted that in the kiosk of Naviullah two other persons namely Sahu and Parsu also sit there. In the case of **State of Goa v. Pandurang Mohite, [(2008) 16 SCC 714]**, the Apex Court observed that the last seen theory comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible.

33. It is pertinent to note that PW-5 Dharamraj was purportedly the only last seen witness who saw the deceased at the kiosk of appellant but he has not stated as to at what time he has seen the deceased at the kiosk of appellant. PW-1 Masiuddin, however, stated that on 11.3.2000 at 7 p.m., Dharamraj was at the kiosk and in cross examination he has stated that he went to the kiosk of Naviullah at 7:30 to 8:00 p.m. and found that he was closing the kiosk. Even the informant stated to have seen the deceased returning back home, whereas, the dead body of the deceased was recovered from the field of Tikai Verma on 13.3.2000 at 7:30 p.m. though according to PW-1 Masiuddin he searched the place a day before but could not find the dead body. This creates a genuine doubt on the appellant being author of crime. Moreover, there is a wide gap of time between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead.

34. In view of the above we are of the opinion that the prosecution has not firmly proved that the deceased was last seen along with appellant and being the author of crime.

35. Next circumstance considered by the trial court is recovery of a scissor at the instance of appellant from his shop. Recovery of scissor from the shop of appellant has been believed by the trial court as an incriminating circumstance.

36. P.W.4 Noor Mohd. has proved the recovery of scissor from his shop. It is relevant to point out that the scissor is not connected with the crime. According to serologist report no blood was found on the scissor. The testimony of P.W.8 Dr .P. S. Singh is also very relevant. He admitted that the injuries mentioned in the post mortem report could not be caused by scissor. Therefore, the Sessions Judge has wrongly considered recovery of scissor from the shop of appellant as an incriminating circumstance for completing the chain of incriminating circumstances against the appellant.

37. The Sessions judge did not rely upon the serologist report about the presence of semen on the underwear of the appellant.

38. Lastly, the most important incriminating circumstance relied upon by

the trial court for recording conviction of the appellant is his judicial confession, which is quoted below:

"Bayankarta ko yeh samman diya gaya hai ki woh bayaan karne ke liye swatantra hai aur uska bayaan uske viruddh saakshya ke roop me padha jaaega. Abhiyukt Naviullah ne shapathpoorvak bayaan diya ki main apne gaon me paan bidi ki dukaan karta hoon, Sonu Thakur dopaher ko meri dukaan par aaye aur scooter se aaye thhe unke aage unka tractor ganna lekar jaa raha thha aur Sonu ne ek joda paan khaaya aur paisa baad me dene ko kaha wapas Sonu (7:30 p.m.) saadhe saat baje shaam ko aaye aur kaha ki Mashiuddin ki badi ladki Shakina jab aaye to usey rok lena aur shaam ko 7 baje shakina ki chhoti bahen hasina paan lene aayi tab maine usey rok liya uske baad uski chhoti bahen aayi aur hasina chali gayi aur chhoti bahen mere paas ruki rahi uski umr 9-10 saal rahi hogi.

Sonu 7:30 p.m. ke lagbhag aaya aur ek paan khaaya aur chhoti ladki ko do toffee khilwaya aur hamari dukaan band karwa diya aur hamari kainchi liya aur uske kahne par main chhoti ladki ko ganne ke khet me lekar uske saath gaya scooter dukan par hi khada raha.

Sonu ke kahne par ladki ka salwaar maine utara tab woh rone lagi tab sonu ne kaha ki tum iska gala dabao tab main gala dabaya aur sonu uske saath balatkaar karne laga balatkaar karte samay ladki ka peshab ka sthan bilkul phat gaya aur woh mar gayi tab case chhipane ke liye Sonu ne ladki ka pet phad diya aur ladki ka dono paer hath tod diya aur main kaapne laga aur main chal diya aur Sonu ladki ka paer kahin anyatra ghayab kar diya aur mujhe dhamkaya thha tabhi main kisi ko ghatna nahin bataya.

Main uprokt bayaan swechha se kar raha hoon mujh par koi dabav nahin hai."

39. Section 24 of the Evidence Act provides that, a confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. The relevant provisions for recording confession by magistrate are Section 164, 218 and 463 of the Code of Criminal Procedure which are quoted below.

"Section 164. Recording of confessions and statements. -- (1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial:

Provided that any confession or statement made under this sub-section may also be recorded by audio-video electronic means in the presence of the advocate of the person accused of an offence:

Provided further that no confession shall be recorded by a police officer on whom any power of a Magistrate has been

conferred under any law for the time being in force.

(2)The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily.

(3)If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorise the detention of such person in police custody.

(4) Any such confession shall be recorded in the manner provided in Section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect:--

"I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Signed) A.B. Magistrate."

(5)Any statement (other than a confession) made under sub-section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to the person whose statement is so recorded.

(6) The Magistrate recording a confession or statement under this section shall forward it to the Magistrate by whom the case is to be inquired into or tried.

281. Record of examination of accused.--(1) Whenever the accused is examined by a Metropolitan Magistrate, the Magistrate shall make a memorandum of the substance of the examination of the accused in the language of the Court and such memorandum shall be signed by the Magistrate and shall form part of the record.

(2)Whenever the accused is examined by any Magistrate other than a Metropolitan Magistrate, or by a Court of Session, the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full by the presiding Judge or Magistrate himself or where he is unable to do so owing to a physical or other incapacity, under his direction and superintendence by an officer of the Court appointed by him in this behalf.

(3)The record shall, if practicable, be in the language in which the accused is examined or, if that is not practicable, in the language of the Court.

(4)The record shall be shown or read to the accused, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers.

(5)It shall thereafter be signed by the accused and by the Magistrate or presiding Judge, who shall certify under his own hand that the examination was taken in his presence and hearing and that the record contains a full and true account of the statement made by the accused.

(6)Nothing in this section shall be deemed to apply to the examination of an accused person in the course of a summary trial.

463. Non-compliance with provisions of Section 164 or Section 281.-- (1) If any Court before which a confession or other statement of an accused person recorded, or purporting to be recorded under Section 164 or Section 281, is tendered, or has been received, in evidence finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it may, notwithstanding anything contained in Section 91 of the Indian Evidence Act, 1872 (1 of 1872), take evidence in regard to such non-compliance, and may, if satisfied that such non-compliance has not injured the accused in his defence on the merits and that he duly made the statement recorded, admit such statement.

(2) The provisions of this section apply to Courts of appeal, reference and revision."

40. It has been held in catena of decision by the Apex Court that before proceeding to record the confessional statement, a searching enquiry must be made from the accused as to the custody from which was produced and the treatment he had been receiving in such custody in order to ensure that there is no scope for doubt of any sort of influence proceeding from a source interested in the prosecution still lurking in the mind of the accused. In case the Magistrate discovers on such an enquiry that there is ground for such supposition he should give the accused sufficient time for reflection before he is asked to make his statement and should assure himself that during the time of reflection he is completely out of police influence. An accused should particularly be asked the reason why he wants to make a statement which would surely go against his self interest, of course of trial, even if contrive subsequently to retract the confession. Besides administering the caution, warning specifically provided for in the first part of sub-section (2) of Section 164 Cr.P.C., namely, that the accused is not bound to make a statement and that if he makes one it may be used against him as evidence in relation to his complicity in the offence at the trial, that is to follow. He should also, in plain language, be assured of protection from any sort of apprehended torture or pressure or such extraneous agent like police, in case he declines to make the statement and he give the assurance that even he declines to make the confession he shall not be remanded to police custody. The Magistrate who is entrusted with the duty of recording confession of an accused coming from police custody or jail custody must appreciate his function in that behalf as one of a judicial officer and he must apply his judicial mind to ascertain and satisfy his conscience that

the statement the accused makes, is not borne out of any extraneous influence exerted on him. That indeed is the essence of a "voluntary statement within the meaning of the provisions of Section 164 Cr.P.C.". Moreover, the Magistrate must not only be satisfied as to the voluntary character of the statement, he should also make and leave such on the record, proof of compliance that the imperative requirement of the statutory provision, as would satisfy the court that sits in judgement in the case that the confessional statement was made by the accused voluntary and the statutory provisions were strictly complied with. Section 164 of the Code of Criminal Procedure is a salutary provision which lays down certain precautionary rule to be followed by the Magistrate regarding a confession so as to ensure the voluntariness of the confession and the accused be placed in a situation free from threat or influence of the police. Section 164 Cr.P.C. provides for safeguards for an accused. The provisions contained therein are required to be strictly complied with.

41. The Apex Court in the case of **Aher Raja Khima V. State of Saurashtra reported in AIR 1956 SC 217** has observed that now the law is clear that a confession cannot be used against an accused person unless the Court is satisfied that it was voluntary and at that stage the question whether it is true or false does not arise. It was further observed that it is abhorrent to our notions of justice and fair play, and is also dangerous, to allow a man to be convicted on the strength of a confession unless it is made voluntarily and unless he realises that anything he say may be used against him; and may attempt by a person in authority to bully a person into making a confession or any threat or coercion would at once invalidate it if the fear was still operating on his mind at the time he makes the confession if it would appear to him reasonable for supposing that by making it, he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

42. In **Sarwan Singh V. The State of Punjab reported in AIR 1957 SC 637**- the Apex Court held that prima facie whether or not the confession is voluntary would be a question of fact and we would be reluctant to interfere with a finding of such question of fact unless we are satisfied that the impugned finding has been reached without applying the true and relevant legal test in the matter. As in the case of evidence given by the approver, so too unfortunately in the case of the confession of Sarwan Singh the attention of the learned Judges below does not appear to have been drawn to some salient and grave features which have a material bearing on the question about the voluntary character of the confession.

43. In **Pyare Lal v. State of Rajasthan reported in AIR 1963 SC 1094,** it has been held by the Apex Court that under S. 24 of a confession would be irrelevant if it should appear to the court to have been caused by any inducement, threat or promise. The crucial word is the expression "appears" is "seems". It imports a lesser degree of probability than proof. The standard of a prudent man is not completely displaced, but the stringent rule of proof is relaxed. Even so, the laxity of proof permitted does not warrant a court's opinion based on pure surmise. A prima facie opinion based on evidence and circumstance may be adopted as the standard laid down. To rephrase it, on the

evidence and the circumstances in a particular case it may appear to the court that there was a threat, inducement or promise, though the said fact is not strictly proved. It is further observed that the threat, inducement or promise must proceed from a person in authority and it is a question of fact in each case whether the person concerned is a man of authority or not. What is more important is that the mere existence of the threat, inducement or promise is not enough but in the opinion of the court, the said threat, inducement or promise shall be sufficient to cause a reasonable belief in the mind of accused that by confessing he would get an advantage or avoid any evil of a temporal nature in reference to the proceeding against him. While the opinion is that of the court, the criteria is the reasonable belief of the accused. The section therefore, makes it clear that it is the duty of the court to place itself in the position of the accused and to form an opinion as to the state of his mind in the circumstances of a case. (emphasis supplied)

44. In the case of **Chandran V. The State of Tamil Nadu (1978) 4 SCC 90**, the Apex court has observed that where the Magistrate did not follow the memorandum as required by sub section (4) of section 164 Cr.P.C the Magistrate had certified that "I hope that this statement was made voluntarily". The court had rejected and observed that if, the Magistrate recording a confession of an accused person produced before him in the course of police investigation does not, on the face of the record, certify in clear, categorical term his satisfaction or belief as to the voluntary nature of the confession recorded by him, nor justifies orally as to such satisfaction or belief, the defect would be fatal to the admissibility and use of the confession against the accused at the trial.

45. In the case of **State of M.P. V. Dayaram Hemraj AIR 1981 SC 2007** the confessional statement was not accepted by the courts on the ground " the confessional statement recorded by the Magistrate was in the form of question and answer. The record shows that he was virtually cross examined and whatever he said was in answer to leading questions put by the learned Magistrate.

46. In **Shivappa V. Sate of Karnataka (1995) 2 SCC 76,** the Apex Court has held that "it appears to us quite obvious that the Munsif Magistrate P.W. 13 did not make any serious attempt to ascertain the voluntary character of the confession. The failure of the Magistrate to make real endeavour to ascertain the voluntary character of the confession impels us to hold that evidence on record does not establish that the confessional statement of the appellant recorded under section 164 Cr.P.C. was voluntary".

47. In the case of **Dhanajaya Reddy V. State of Karnataka (2001) 4 SCC 9**, the Apex Court has held that "Omission to comply with the mandatory provisions, one of such being as incorporated in sub-section (4) of Section 164 is likely to render the confessional statement inadmissible". The words "shall be signed by the person making the confession", are mandatory in nature and the Magistrate recording the confession has no option. Mere failure to get the signature of the person making the confession may not be very material if the making of such statement is not dispute by the accused but in cases where the making of the

statement itself is in controversy, the omission to get the signature is fatal.

48. In **S. Arul Raja v. State of Tamil Nadu, (2010) 8 SCC 233**, the Apex Court observed as under:

"Section 164 CrPC provides guidelines to be followed for taking the statement of the accused as a confession. The one essential condition is that it must be made voluntarily and not under threat or coercion. This Court in Aloke Nath Dutta v. State of W.B. (2008)2 SCC(Crl)264,held as under:

"87. Confession ordinarily is admissible in evidence. It is a relevant fact. It can be acted upon. Confession may under certain circumstances and subject to law laid down by the superior judiciary from time to time form the basis for conviction. It is, however, trite that for the said purpose the court has to satisfy itself in regard to: (i) voluntariness of the confession; (ii) truthfulness of the confession; (iii) corroboration.

88.This Court in Shankaria v. State of Rajasthan 1979SCC(Crl)74stated the law thus:

"22. This confession was retracted by the appellant when he was examined at the trial under Section 311 CrPC on 14-6-1975. It is well settled that a confession, if voluntarily and truthfully made, is an efficacious proof of guilt. Therefore, when in a capital case the prosecution demands a conviction of the accused, primarily on the basis of his confession recorded under Section 164 CrPC, the court must apply a double test:

(1) Whether the confession was perfectly voluntary?

(2) If so, whether it is true and trustworthy?

Satisfaction of the first test is a sine qua non for its admissibility in evidence. If the confession appears to the court to have been caused by any inducement, threat or promise such as is mentioned in Section 24, Evidence Act, it must be excluded and rejected brevi manu. In such a case, the question of proceeding further to apply the second test, does not arise. If the first test is satisfied, the court must, before acting upon the confession reach the finding that what is stated therein is true and reliable. For judging the reliability of such a confession, or for that matter of any substantive piece of evidence, there is no rigid canon of universal application. Even so, one broad method which may be useful in most cases for evaluating a confession may be indicated. The court should carefully examine the confession and compare it with the rest of the evidence, in the light of the surrounding circumstances and probabilities of the case. If on such examination and comparison, the confession appears to be a probable catalogue of events and naturally fits in with the rest of the evidence and the surrounding circumstances, it may be taken to have satisfied the second test.' "(emphasis supplied)

49. We have to consider the submission of the counsel for the appellant in the light of the decisions of the Apex Court.

50. The submissions of the counsel for the appellant challenging the confession are two fold.

51. First ground for challenging the confession is that the appellant did not confess to have killed the deceased and the Sessions Judge without properly appreciating the contents of the

confession convicted the appellant under section 302 IPC.

52. Another ground for challenging the confession is that the confession has been recorded in violation of mandatory provision of law and should not have been relied upon by the trial.

53. The Sessions Judge has convicted appellant relying upon the confessional statement of the accused. A perusal of the confessional statement reveals that in fact he has not confessed to have committed the murder. In his confessional statement he stated that Sonu arrived at his shop at 7.30 pm and eaten one Pan and given two toffees to small girl . He got my shop closed and took out his scissor. On his direction he took the girl and accompanied to the sugar cane field and scooter remained parked there. On his direction he had taken out Salwar of the girl and she started crying. Sonu told him to press the neck and he pressed the neck and Sonu started committing rape with the girl which damaged her urinary track and she died. In order to conceal the crime Sonu had tear opened the stomach of the girl and broken both the legs and hands. He further confessed that he was shaking and left the place. Sonu had concealed the leg of the girl at some other place and he had threatened him that is why he did not tell anybody.

54. From the perusal of entire confessional statement it is clear that the appellant had no intention to kill the deceased and he did nothing to kill the deceased. According to his statement he had taken out Salwar of the girl and when she was crying he had pressed the neck. From the statement of appellant it is clear that the deceased died on account of rape and injury caused by Sonu, who has not been prosecuted. The Sessions Judge has already acquitted appellant under section 376 IPC.

55. Now we will consider that the confession which has been recorded by P.W6 can be admitted in evidence as a confession under section 24 of the Evidence Act.

56. The Statement of appellant (Ext.Ka.-8) u/s 164 Cr.P.C. was recorded by P.W.6 Sri Indra Dev Dubey (the then J.M.-1), in first paragraph reveals that he has explained to the appellant that he is free to give statement and his statement shall be read against him thereafter he got administered oath to the appellant and recorded the statement. Lastly, wrote a paragraph that the appellant has given his statement out of free will without any pressure. P.W.6 Sri Indra Dev Dubey stated on oath that he has asked questions from the appellant to know that he has given statement freely and without any pressure and has intimated him that the statement shall be used against him; during the cross examination he has stated that he has not given certificate as provided u/s 164 (4) Cr.P.C., he has not tried to know as to why the appellant wanted to confess, he further stated that on 15.03.2000 appellant was produced before him at 11.00 a.m. but he gave time to the appellant to think and ultimately recorded the statement at 3.30PM. P.W.-2 Ramzan Ali stated on oath that the appellant was arrested on the day when the dead body was recovered i.e. on 13.03.2000; whereas, carbon copy of G.D. Report no.14 at 18.30 of 14.03.2000 paper no. 7/11 of the record reveals that the offence was enhanced to 302/201/376 IPC against arrested appellant; even D.W.2 Mahesh Dutt Tiwari produced the Jail Register and filed a certified copy of the same Ext.Kha-1 which

reveals that the appellant was sent to jail on 15.03.2000 at 19.00 hrs.

57. The above evidence shows that the appellant was arrested a day or two before recording of his confession and taken to Jail. Thus, it is clear that the appellant was brought to the court in police custody where his confessional statement was recorded.He was directly produced before the magistrate for recording confession from police custody.

58. D.W.1 Home Guard Amin Ahmad stated on oath that on 15.03.2000 the appellant was taken to Court at 10.15 am for remand and his statement under Section 164 Cr.P.C. but the court has called at 3.30 pm for recording of the same and at the time of recording the I.O. in plain cloth was present in the court.

59. As P.W.6 Indra Dev Dubey has stated that he gave time to the appellant to ponder over the matter before recording his confession but how the time was granted and whether at the given time appellant could be free to ponder. Moreso, the questions pertaining to mental and physical state of appellant was not taken into consideration by the Magistrate before recording confession and the mandatory certificate was not given.

60. The law on the issue is well settled as Lord Roche in **Nazir Ahmad Vs King Emperor [AIR 1936 PC 253]** observed that: "Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all."

61. In the case of **Babubhai Udesinh Parmar Vs. State of Gujarat (2007) 1 SCC (Crl.) 702** the Apex Court has held that Section 164 provides for safeguards for an accused. The provisions contained therein are required to be strictly complied with. But, it does not envisage compliance with the statutory provisions in a routine or mechanical.

The Apex Court further held as under:

"(16). The court must give sufficient time to an accused to ponder over as to whether he would make confession or not. The appellant was produced from judicial custody but he had been in police custody for a period of 16 days. The learned Magistrate should have taken note of the said fact. It would not be substantial compliance of law. What would serve the purpose of the provisions contained in Section 164 of the Code of Criminal Procedure are compliance of spirit of the provisions and not merely the letters of it. What is necessary to be complied with, is strict compliance of the provisions of Section 164 of the Code of Criminal Procedure which would mean compliance of the statutory provisions in letter and spirit. We do not appreciate the manner in which the confession was recorded. He was produced at 11.15 a.m. The first confession was recorded in 15 minutes time which included the questions which were required to be put to the appellant by the learned Magistrate for arriving at its satisfaction that the confession was voluntary in nature, truthful and free from threat, coercion or undue influence. It is a matter of some concern that he started recording the confession of the appellant in the second case soon thereafter. Both the cases involved serious offences. They resulted in the extreme penalty. The learned Magistrate, therefore, should have allowed some more time to the appellant

to make his statement. He should have satisfied himself as regards the voluntariness and truthfulness of the confession of the appellant."

62. In the case of **Rabindra Kumar Pal v. Republic of India, (2011) 2 SCC 490**, following observations have been made by the Apex Court at page 522 of the report:

"64. The following principles emerge with regard to Section 164 CrPC:

(i)The provisions of Section 164 CrPC must be complied with not only in form, but in essence.

(ii)Before proceeding to record the confessional statement, a searching enquiry must be made from the accused as to the custody from which he was produced and the treatment he had been receiving in such custody in order to ensure that there is no scope for doubt of any sort of extraneous influence proceeding from a source interested in the prosecution.

(iii)A Magistrate should ask the accused as to why he wants to make a statement which surely shall go against his interest in the trial.

(iv)The maker should be granted sufficient time for reflection.

(v)He should be assured of protection from any sort of apprehended torture or pressure from the police in case he declines to make a confessional statement.

(vi)A judicial confession not given voluntarily is unreliable, more so, when such a confession is retracted, the conviction cannot be based on such retracted judicial confession.

(vii)Non-compliance with Section 164 CrPC goes to the root of the Magistrate's jurisdiction to record the confession and renders the confession unworthy of credence.

(viii)During the time of reflection, the accused should be completely out of police influence. The judicial officer, who is entrusted with the duty of recording confession, must apply his judicial mind to ascertain and satisfy his conscience that the statement of the accused is not on account of any extraneous influence on him.

(ix)At the time of recording the statement of the accused, no police or police official shall be present in the open court.

(x)Confession of a co-accused is a weak type of evidence.

(xi)Usually the court requires some corroboration from the confessional statement before convicting the accused person on such a statement."

63. The judicial confession recorded by the magistrate has failed the test of being a reliable evidence owing to the reason of its been recorded in absence of knowing the mental condition of appellant at the time of recording of statement, non specifying of certificate, non mentioning of acceptance of guilt of the appellant, non mentioning of reason of confessing the crime and the treatment meted out to the appellant at the police station. Thus, seeing the holistic purview the confessional statement of the appellant has been recorded in a sketchy and hurried manner without observing the mandatory legal requirements.

64. The learned AGA has submitted that the confessional statement has been recorded by a magistrate and any defect in recording the confessional statement is curable under section 463 of Cr P.C. The

reliance was also placed on the decision of the Apex Court in the case of **Ram Singh v. Sonia**, reported in **(2007) 3 SCC 1** wherein it was observed in para 23 of the report as under:

"23. On 24-8-2001, upon receipt of an application moved by Superintendent of Police for recording dying declaration of A-1 by a Magistrate, DSP Man Singh, who partly investigated the case, approached the Chief Judicial Magistrate, Hissar, who, in turn, marked the said application to Pardeep Kumar, PW 62. On its presentation to PW 62 by DSP Man Singh at 10 p.m. the same day, both PW 62 and DSP Man Singh left for Janta Hospital, Barwala. After reaching the hospital and before recording the statement, PW 62 first sought opinion of Dr. Anant Ram (PW 32) as to the fitness of A-1 to make the statement. As in the opinion of PW 32, A-1 was fit to make the statement, PW 62 proceeded to record it, which is in question and answer form. It appears from Ext. 187 as well as from the questions and answers which were put to A-1 that PW 62 warned A-1 that she was not bound to make any confessional statement and in case she did so, it might be used against her as evidence. In spite of this warning, A-1 volunteered to make the statement and only thereafter the statement was recorded by PW 62. In the certificate that was appended to the said confessional statement PW 62 has very categorically stated that he had explained to A-1 that she was not bound to make a confession and that if she did so, any confession she would make, might be used as evidence against her and that he believed that the confession was voluntarily made. He further stated that he read over the statement to the person making it and admitted by her to be correct and that it contained a full and true account of the statement made by her. It has been further stated by PW 62 in his evidence that at the time of recording of the confession it was he and PW 32, who were present in the room and there was neither any police officer nor anybody else within the hearing or sight when the statement was recorded. It also appears from the evidence of PW 62 that it took about 2½ hours for him to record the statement of A-1, which runs into 5 pages, which he started at 10.53 p.m. and ended at 1.28 a.m. which goes to show that A-1 took her time before replying to the questions put. PW 62 has also stated that she had given the statement after taking due time after understanding each aspect. It also appears that he was satisfied that she was not under any pressure from any corner. Therefore, it is evident from the certificate appended to the confessional statement by PW 62 that the confessional statement was made by the accused voluntarily. Of course, he failed to record the question that was put by him to the accused whether there was any pressure on her to give a statement, but PW 62 having stated in his evidence before the court that he had asked the accused orally whether she was under any pressure, threat or fear and he was satisfied that A-1 was not under any pressure from any corner, that in the room in which the said confessional statement was recorded it was only he and PW 32 who were present and none else and that no police officer was available even within the precincts of the hospital. The said defect, in our view, is cured by Section 463 as the mandatory requirement provided under Section 164(2), namely, explaining to the accused that he was not bound to make a statement and if a statement is made the same might be used against him has been complied

with and the same is established from the certificate appended to the statement and from the evidence of PW 62. Therefore, in the light of our discussion above, we have no hesitation in holding that the judicial confession (Ext. 187) having been recorded according to the procedure set out in Section 164 read with Section 281 and the defect made while recording the same being curable by Section 463, it is admissible in evidence."

65. We have carefully considered the decision of the Apex Court and the evidence on the record.The facts of the case of Ram Singh (supra) are quite different. In the instant case the accused was directly produced before the magistrate from the police custody. According to the testimony of D.W.1 Amin Ahmad he along with one constable had produced accused for recording confession before the magistrate at around 12 O' clock. The magistrate had asked them to come after lunch. The learned magistrate had recorded the statement at 3.30 p.m. It is not disputed in the instant case that the accused was produced before the magistrate from police custody at 12 O' clock and at 3.30 pm confessional statement was recorded.The magistrate had not given certificate as provided under section 164(4) Cr P.C.

66. As observed by the Apex Court in the case of **Pyarey Lal (Supra)** a confession would be irrelevant if it should appear to the court to have been caused by any inducement,threat or promise. It was also pointed out that the crucial word is the expression "appears" is "seems"as it imports a lesser degree of probability than proof.

67. In **Singhara Singh (supra)**, the Apex Court held that a statement that does not prescribe to the procedure laid down in Section 164 Cr.P.C is not admissible as a confessional statement. In this case, the statement has neither been recorded by a Judicial Magistrate nor has it fulfilled procedural requirements, including that of a certificate to be appended by the Magistrate. Hence, the statement is not admissible against the appellant as a confession under Section 164. (emphasis supplied)

68. In the case of **Chandran** (supra) the Apex court has observed that where the Magistrate did not follow the memorandum as required by sub section (4) of section 164 Cr.P.C the Magistrate had certified that "I hope that this statement was made voluntarily". The court had rejected and observed that if, the Magistrate recording a confession of an accused person produced before him in the course of police investigation does not, on the face of the record, certify in clear, categorical term his satisfaction or belief as to the voluntary nature of the confession recorded by him, nor justifies orally as to such satisfaction or belief, the defect would be fatal to the admissibility and use of the confession against the accused at the trial.

69. In view of the above we are of the firm opinion that the confessional statement has not been recorded in accordance with mandatory provisions of law. Therefore, the trial court wrongly considered the confession as an incriminating circumstance. It is also relevant to mention here that the alleged confession is not admission of guilt by the appellant and cannot be considered by the court of law for

recording finding of conviction under Section 302 IPC.

70. The prosecution has failed to prove its case beyond reasonable doubt and the appellant is entitled to acquittal.

71. In the result appeal is allowed. The findings of conviction recorded by the trial court are set aside. The appellant is in jail. He shall be released forthwith unless wanted in any other case.

72. The office is directed to communicate this judgement to the trial court for necessary compliance.

ORIGINAL JURISDICTION
CIVIL- SIDE
DATED: ALLAHABAD 03.07.2013

BEFORE
THE HON'BLE RAN VIJAI SINGH, J.

Civil Misc. Writ Petition No.962 of 2011

Ram Prakash and Ors. ...Petitioners
Versus
Board of Revenue & Ors. ...Respondents

Counsel for the Petitioners:
Sri Shalilendra Singh

Counsel for the Respondents:
C.S.C., Sri Jugal Kishore Gupta
Sri Jugal Kumar Mishra

Constitution of India, Art. 226- Restoration application-rejected by member board of revenue-on ground two different date of knowledge given-admittedly the petitioner's father died on 27.10.2002-case dismissed in default on 19.07.2004-date of knowledge may be 09.06.2007 or 18.06.2007-it is clear that petitioner never engaged the counsel-but was engaged by the father-after death of father-appearance of counsel-wholly unauthorized-one apart from Court is honored for the fact emparting substantial justice and not for shutting the door of justice on technical ground-order rejecting restoration-quashed.

Held: Para-15
Otherwise also, the purpose of establishment of the Courts is to impart the substantial justice to the parties and not to scuttle the process of justice on technicalities. The learned Member has observed that the petitioners were not sure about the date of the knowledge of the order dated 19.7.2004 as at one place, they have mentioned that they have come to know about the order dated 19.7.2004 on 9.6.2007 and at another place they have stated that they came to know the same on 18.6.2007. In my opinion, this will not substantially affect the merit of the restoration application. So far as the other observation of the learned Member with regard to the knowledge of the date fixed in the revision is concerned, it has nowhere been recorded in the order that the counsel who had appeared was engaged by the petitioners and the petitioners were party in the revision, therefore the basis of presumption of the knowledge of the date is totally misconceived.

Case Law discussed:
AIR 1957; AIR 2001; 2009(75) ALR 515; 2012(117) R.D. 413; JT 1987 (1) SC 537-1987(2) SCR 387.

(Delivered by Hon'ble Ran Vijai Singh, J.)

1. Heard Sri Shailendra Singh, learned counsel for the petitioners, learned standing counsel for the State respondents and Sri Jugal Kishore Gupta, learned counsel for the respondent nos. 2 to 13.

2. This writ petition has been filed for issuing a writ, order or direction in the nature of certiorari quashing the orders dated 19.7.2004 and 6.8.2010.

3. Vide order dated 19.7.2004 Reference No. 168 LR of 1994-95 (Mathura Prasad vs. Sukku and others) made by the Additional Commissioner was dismissed in default by the learned Member Board of Revenue whereas vide order dated 6.8.2010 petitioners' restoration application seeking recall of the order dated 19.7.2004 has been rejected.

4. Counter affidavit has been filed by the respondents. Learned counsel for the petitioners does not propose to file rejoinder affidavit to which learned counsel appearing for respondent nos. 2 to 13 has no objection.

5. With the consent of the parties the writ petition is taken up for final disposal.

6. The facts giving rise to the present writ petition are that it appears as reference was made in Revision No. 397/93 Mathura Prasad Vs. Shukhu and others by Additional Commissioner Kanpur Division Kanpur which was numbered as Reference No. 168 LR of 1994-95 (Mathura Prasad vs. Sukku and others). The revision was filed by the father of the petitioners. He was pursuing the matter through his counsel but unfortunately he died in the year 2002 to be more specific on 27.10.2002. The petitioners who are the sons of late Mathura Pradad were unaware of the proceeding of the reference. The said reference was dismissed in default on 19.7.2004. The petitioners have come to know about said order only through the Lekhpal on 9.6.2007. After coming to know about the aforesaid order, a restoration application was filed on 26.6.2007 by the petitioners. The application has been rejected by the learned Member Board of Revenue vide order dated 6.8.2010. While rejecting the application, the learned Member has observed that according to the record, the petitioners/applicants have shown two dates of knowledge of the order dated 19.7.2004. One date happens to be 9.6.2007 and another 18.6.2007 which are contradictory. It is also recorded that from the perusal of the order-sheet dated 29.8.2003, it is apparent that the revisionist had knowledge of the next date i.e. 3.12.2003. Thereafter, another date was fixed on 27.1.2004, on which date, counsel for the revisionist has sought time and on that, next date was fixed on 19.7.2004. On this date, the revision was dismissed in default. The learned Member opined that the restoration application has been filed on misconceived ground for the simple reason that two dates of knowledge of the order dismissing the case in default has been stated by the applicants/petitioners and further, the date fixed in the revision was in the notice of the revisionist' counsel and their absence was deliberate.

7. Learned counsel appearing for the petitioners contended that once the petitioners came with the case that they have come to know the order dated 19.7.2004 in the year 2007 may be on 9.6.2007 or 18.6.2007 there was no occasion for the present petitioners to know about the dates fixed in the revision in the years 2003 and 2004 and the learned Member has erred in dismissing the restoration application.

8. Refuting the submissions of learned counsel for the petitioners, Sri Jugal Kishore Gupta, learned counsel appearing for the respondents submitted that the petitioners themselves were not

sure about the date of the order dismissing the case in default as from the perusal of the record, two dates of knowledge have been shown one 9.6.2007 and another 18.6.2007. Otherwise also, counsel was appearing in the case and had been seeking time. Further there is no explanation as to why counsel has not appeared on the date fixed i.e. 19.7.2004 which was fixed in the presence of the counsel of the revisionist on his request. In his submissions, the restoration application has been filed on misconceived ground, therefore no infirmity can be attached with the impugned order and the writ petition deserves to be dismissed.

9. I have heard learned counsel for the parties and perused the records.

10. The petitioners' case has throughout been that they had no knowledge about the pendency of the reference after the death of their father. They have only come to know about the order dismissing the case in default only through Lekhpal on 9.6.2007 and immediately thereafter an application has been filed for recall of the order dated 19.7.2004. The respondents neither in the counter affidavit nor before the learned Member Board of Revenue have come up with the case that the petitioners' father had not died in the year 2002. This is also not their case that after the death of the father of the petitioners, the petitioners were substituted in the revision/reference. This has also not been stated that the counsel who had appeared in the revision was engaged by the petitioners. In absence of these material, only thing which can be presumed is that after the death of the petitioners' father the counsel who was appearing in the reference had been appearing and perhaps he was also unaware of the death of the father of the petitioners and this cannot be improbable as the petitioners' father was living in Village Nison, District Kanpur Dehat and the reference was pending at Lucknow. Since the date of the death of the father of the petitioners has not been denied, therefore apparently the order dated 19.7.2004 has been passed against the dead person and the appearance of the counsel after the death of the petitioners' father was unauthorized, as the counsel was engaged by the father of the petitioners and once the petitioners' father died, the engagement ceases to operate and the counsel had no authority to appear in the case and even if he had appeared, his appearance is of no avail as it is settled law that the order against the dead person is nullity.

11. The Apex Court in the case of **Leelawati Bai Vs. State of Bombay, A.I.R. 1957,** Pae 521 has held that the order passed against the dead person is a complete nullity.

12. In **A.I.R. 2001, Supreme Court, 2003, Amba Bai and others Vs. Gopal and others**, the Apex Court has held as under:

"As the judgment in the Second Appeal was passed without the knowledge that the appellant had died, the same being a judgment passed against the dead person is a nullity."

13. In **T.Gnanavel and T.S.Kanagaraj and another reported in 2009(75) ALR 515**, the Apex Court has taken the same view by observing as under:-

"19. For the reasons aforesaid, we are of the opinion that the High Court had rightly intercepted the provision of Order XXII, Rule 4(4) of the C.P.C. and accordingly held

that the decree passed by the Trial Court on20th of December, 2002, in O.S. No.3946 of 1999 was a nullity in the eye of law as the defendant had died during the pendency of the suit for specific performance of the contract for sale and no exemption was sought at the instance of the plaintiff/appellant to bring on record the heirs and legal representatives of the defendant before the judgment was pronounced."

14. This Court also in the cases of **Aziz Mohammad (Dead)through Lrs. And another Vs. Deputy Director of Consolidation, Allahabad and others, 2008 (104) RD, 470 and Raj Narain and others Vs. Deputy Director of Consolidation, Ghazipur and others, 2009(106) RD 98 and Subhash Chandra and another vs. Dy. Director of Consolidation, Jaunpur and others 2012 (117) R.D. 413** has held that order passed against the dead person is a nullity

15. Otherwise also, the purpose of establishment of the Courts is to impart the substantial justice to the parties and not to scuttle the process of justice on technicalities. The learned Member has observed that the petitioners were not sure about the date of the knowledge of the order dated 19.7.2004 as at one place, they have mentioned that they have come to know about the order dated 19.7.2004 on 9.6.2007 and at another place they have stated that they came to know the same on 18.6.2007. In my opinion, this will not substantially affect the merit of the restoration application. So far as the other observation of the learned Member with regard to the knowledge of the date fixed in the revision is concerned, it has nowhere been recorded in the order that the counsel who had appeared was engaged by the petitioners and the petitioners were party in the revision, therefore the basis of presumption of the knowledge of the date is totally misconceived.

16. The learned Member was dealing with the restoration application and he ought to have taken the liberal view, even if the persons had knowledge about the dates and committed default in arguing the case while considering the restoration application and deciding the same on merit. The Apex Court in the case of **Collector, Land Acquisition, Anantnag & Anr. Vs. Mst. Katiji & Ors. (JT 1987 (1) SC 537 = 1987 (2) SCR 387)** has held that t**he judiciary is respected not on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so.**

17. In view of foregoing discussions, orders impugned cannot be sustained in the eye of law and the same deserves to be quashed. The writ petition succeeds and is allowed. The orders dated 6.8.2010 as well as 19.7.2004 are hereby quashed. The reference is restored to its original number. Since the reference is very old, the learned Member Board of Revenue, Lucknow shall decide the aforesaid reference expeditiously if possible within six months from the date of receipt of certified copy of the order of this Court without granting any unnecessary adjournments to the learned counsel for the parties.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.07.2013

BEFORE
THE HON'BLE ADITYA NATH MITTAL, J.

Criminal Revision No. 1053 of 2010

Jitendra Kumar Goyal and Anr...Revisionists
Versus
State of U.P. and Anr. ...Opp. Parties

Counsel for the Petitioner:
Sri Rahul Agarwal, Sri Rajiv Lochan Shukla

Counsel for the Respondents:
A.G.A., Sri Abhishek Kumar
Sri Gaurav Sharma, Sri Ranjay Kumar

Cr.P.C. Section 397- Criminal Revision-against rejection of discharge application-offence under section 420, 471, 467, 468 I.P.C.-on ground-dispute being purely civil nature-civil suit already going on-I.O. under pressure on extraneous consideration not conducted proper investigation0-allegation of cheating and forgery not at all attracted-charges being ground less-quashed.

Held: Para-30-
For the facts and circumstances mentioned above, I am of the opinion that the charges against the revisionists are groundless and the findings of Chief Judicial Magistrate, Mathura that this question can be decided only after recording the evidence under Section 137, 154 and 146 of Indian Evidence Act are perverse. It is a dispute of purely civil nature which has been given the criminal colour just to pressurise the revisionists.

Case Law discussed:
AIR 1986 SC 1173; AIR 1999 SC 3845; 2009(64) ACC 454(SC); ACC 69 (SC); 2008(60) ACC 1; 2009(66) ACC 28; (2011) 3 SCC; (2006) 6 SCC 736; (2009) 8 SCC 751; (2006) 6 SCC 736.

(Delivered by Hon'ble Aditya Nath Mittal, J.)

1. Heard learned counsel for the revisionists, learned counsel appearing for opposite party no.2 and learned A.G.A.

2. This criminal revision has been filed against order dated 16.1.2010 passed by learned Chief Judicial Magistrate, Mathura in Case No.4976 of 2008 (State Vs. Jitendra Kumar Goyal & Hemant Kumar Goyal), arising out of Case Crime No.232 of 2008, under Sections 420, 467, 468, 471 I.P.C., P.S. Brindavan, District Mathura, whereby the application for discharge has been rejected.

3. Learned counsel for the revisionists has submitted that the revisionists are the bonafide purchasers of the property in dispute which they had purchased through registered sale deed in the year 1997. The name of the complainant in respect of alleged land in dispute was entered in the year 2008 on the basis of an order of the year 1999. It has also been submitted that there is no explanation for delay in F.I.R. in 2008 regarding an offence allegedly committed in the year 1997. The complainant has not challenged the previous registered sale deed and they are still in existence.

4. Learned counsel appearing for the opposite party no.2 has submitted that the name of the opposite party no.2 has been entered into the revenue records upon an order of Deputy Director of Consolidation which is the highest authority. The litigation was pending since long and it does not make any difference that when the name of the complainant was entered on the land in dispute. The revisionists have committed forgery and have prepared a forged document, therefore, the learned Chief Judicial Magistrate, Mathura has not committed any illegality in passing the impugned order.

5. The opposite party no.2 had lodged an F.I.R. on 14.3.2008 regarding the incident of 10.4.1997 alleging that the opposite party no.2 along with other

brothers is owner in possession of Gata No.320-Ka Panchaiti Gausala Nagar, Brindavan, Mathura and his name has also been entered into the revenue records. It was also alleged that Bhagwan Das had wrongly shown himself as owner of the land and with intention to cause wrongful loss to him, had sold a plot of the land to Jitendra Kumar Goyal and Hemant Kumar Goyal which is forged and fabricated document. Jitendra Kumar Goyal and Hemant Kumar Goyal, knowingly that Bhagwan Das is not the owner of the land, but with intention to cause wrongful loss, have got executed a sale deed in their favour. Upon this application, a case at Crime No.232 of 2008, under Sections 420, 467, 468, 471 I.P.C. was registered and after investigation, the charge-sheet has been filed against present revisionists. It is admitted case of both the parties that the seller of the land namely Sri Bhagwan Das has already died in the year 1999 i.e. much before lodging the F.I.R. and submission of charge-sheet.

6. The revisionists had submitted an application for discharge on the ground that the said land belonged to registered Panchaiti Gausala and the then Secretary Mohan Lal had authorized Basudeo Lohia to execute the sale deed. Basudeo Lohia had executed the sale deed on 16.4.1962 in favour of Sarala Devi regarding plot nos.231, 232, 233, 234 and 235. Subsequently, Sarala Devi by a registered sale deed dated 26.7.1982 sold this property to Dwarika Prasad. Dwarika Prasad subsequently sold this land by registered sale deed in favour of Mohan Aanand Teerth. Mohan Aanand Teerth had sold this land by registered sale deed dated 5.9.1983 in favour of Bhagwan Das and Bhagwan Das had sold this land for a consideration of Rs.4,00,000/- to the revisionists. After the sale, the revisionists got constructed the boundary wall and remained in possession. It was also alleged in the application that the said sale deed has not been declared void by any of the competent court and prior to sale deed of the revisionists, four other registered sale deeds were executed. It was also alleged that the complainant had 1600 square meter area in his name while the total area of Khasra No.320-Ka is huge. It was also alleged that the said Gausala had fallen within the abadi, therefore, the land had became infructuous out of which 529 plots were carved out, out of which five plots have been purchased by the revisionists in the year 1997.

7. Learned Chief Judicial Magistrate, Mathura after hearing both the parties, came to the conclusion that it is a matter of evidence that who is the owner of the land in dispute. Learned court below also came to the conclusion that the evidence of the parties is to be recorded under Section 137/154 of Indian Evidence Act and the opportunities of cross examination has to be given. Learned Chief Judicial Magistrate also came to the conclusion that all the matters can be decided by the trial only and in view of the evidence collected by the Investigating Officer, the application for discharge is liable to be rejected. Accordingly, the application for discharge has been rejected.

8. Section 239 Cr.P.C. provides that if, upon considering the police report and the documents sent with it under Section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge

against the accused to be groundless, he shall discharge the accused, and record its reasons for so doing.

9. At the time of framing of charge, the trial court is required to consider only the police report referred to under Section 173 and the documents sent with it. Documents referred to in the Section include statements of witnesses recorded under Section 161 Cr.P.C. and the charge-sheet. The words appearing in the Section "opportunity of being heard" do not mean examination of any witnesses as they merely give a right of audience to the prosecution and the accused to argue their case in favour of framing charge or discharge.

10. In **Ram Chandra vs. Union of India AIR 1986 Supreme Court 1173**, it has been held that the word " consider" means due application of mind.

11. Obligation to discharge the accused under Section 239 arises when the Magistrate considers the charge against the accused to be groundless. But no detailed evaluation of the materials or meticulous consideration of the possible defence need be undertaken at this stage. The real test for determining whether the charge should be considered groundless is that where the materials are such that even that unrebutted make out no case whatsoever.

12. Where there is prima facie material to frame charge against the accused, charge cannot be said to be groundless and accused cannot be discharged under Section 239. This is not the stage for weigh the pros and cons of all the materials and not for sifting the materials presented by the prosecution. The exercise at this stage should be confined to considering the police report and the documents to decide whether the allegations against the accused are " groundless" or whether "there is ground for presuming that the accused has committed the offence." At this stage the scanning and scrutinizing the evidence and materials produced by the prosecution is not permissible as held by Hon'ble the Apex Court in **State of U.P. vs. Uday Narain AIR 1999 Supreme Court 3845.**

13. Section 239 Cr.P.C. provides as under:-

"239. When accused shall be discharged. --If, upon considering the police report and the documents sent with it under section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so doing."

14. The accused persons have been charge-sheeted for the offences punishable under Sections 420, 467, 468, 471 I.P.C.

15. For constituting an offence under Section 420 I.P.C., the ingredients of cheating are required to be fulfilled. The cheating has been defined in Section 415 I.P.C. as under:-

"415. Cheating.-- Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not

do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat"."

16. Further for constituting an offence under Sections 467, 468 & 471 I.P.C., the ingredients of forgery must be satisfied. The offence of forgery has been defined in Section 463 I.P.C. which is as under:-

"463. Forgery.-- Whoever makes any false document or part of a document with intent to cause damage or injury, to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery."

17. Admittedly, the name of the complainant was recorded in the year 1999 and the sale deed in favour of revisionists was executed in the year 1997. It is also admitted fact that since 1962, four more registered sale deeds have been executed regarding the same land in dispute. It is also admitted position that the said five registered sale deeds have not been challenged before any court of law and they still hold good. It is also admitted position that the complainant/opposite party no.2 has also not challenged the registered sale deed executed in favour of revisionists in the year 1997. Section 239 Cr.P.C. provides that If, upon considering the police report and the documents sent with it under section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record its reasons for so doing. Accordingly for discharge, the Magistrate has come to a conclusion that the charges are groundless.

18. Learned counsel for the opposite party no.2 has relied upon **Sanghi Brothers (Indore) Pvt. Ltd. Vs. Sanjay Chaudhary and others, 2009 (64) ACC 454 (SC)**, in which Hon'ble the Apex Court has held as under:-

"Sections 227, 239 and 245 deal with discharge from criminal charge. In State of Karnataka Vs. L. Muniswamy, (1977 (2) SCC 699) it was noted that at the stage of framing the charge the court has to apply its mind to the question whether or not there is any ground for presuming the commission of offence by the accused. (Underlined for emphasis). The Court has to see while considering the question of framing the charge as to whether the material brought on record could reasonably connect the accused with the trial. Nothing more is required to be inquired into."

19. Accordingly, the Magistrate was required to see that the material on record was sufficient to connect the accused with the trial. But in the instant case, the complainant had no right, title or possession over the land in dispute prior to 1999 while the sale deed has been executed in the year 1997. It is also relevant to mention that it was the 5th registered sale deed since 1962 and none of the said sale deeds have been challenged before competent court of law. Apparently, the complainant had no right, title or interest over the land in dispute

prior to 1999, howsoever, that the legal proceedings were pending since long. It is also not alleged as to whether present revisionists were party to the said litigation. It is also not disputed that the land belonged to Panchaiti Gausala and the then Secretary of the Gausala had authorized one Basudeo to execute the sale deed in the year 1962 because the land in dispute had fallen within abadi and it was infructuous land. Since 1962 to 1997 five sale deeds have been executed. It is also relevant to mention that the total area of Gata No.320-Ka is a huge one and the complainant asserts his rights over 1600 square meter area which is also not identifiable because no boundaries have been mentioned. It is also not clear that whether the said 1600 square meter area falls within the boundary of the land purchased by the revisionists or not. It is also relevant to mention that the said sale deed was executed in the year 1997 and the name of the complainant was recorded in the year 1999 but the F.I.R. has been lodged in the year 2008 without any explanation as to why the complainant had not asserted his rights right from 1999 when his name was mutated in the revenue records. There is no explanation as to why the complainant remained silent for almost 10 years to assert his rights.

20. As the name of the complainant admittedly recorded in the year 1999 regarding which the proceedings are still pending in this Court and a stay has been granted, therefore, there was no restriction upon the seller i.e. Bhagwan Das to execute any sale deed with regard to the property in dispute in the year 1997. Moreover no intention of the purchasers is apparent from the records that they intended to cause any wrongful loss to the complainant because in the year 1997 there was no existence of the complainant as the owner of the land.

21. Learned counsel for the opposite party no.2 has further relied upon **Lalu Prasad @ Lalu Prasad Yadav Vs. State of Bihar through C.B.I. (A.H.D.), Patna, 2006 (Suppl.) ACC 69 (SC)**, in which Hon'ble the Apex Court has held as under:-

"In Kanti Bhadra Shah and Another Vs. State of West Bengal (2000 (1) SCC 722) again the question was examined. It was held that the moment the order of discharge is passed it is imperative to record the reasons. But for framing of charge the Court is required to form an opinion that there is ground for presuming that the accused has committed the offence. In case of discharge of the accused the use of the expression "reasons" has been inserted in Sections 227, 239 and 245 of the Code. At the stage of framing of a charge the expression used is "opinion". The reason is obvious. If the reasons are recorded in case of framing of charge, there is likelihood of prejudicing the case of the accused put on trial. It was inter alia held as follows:

"It is pertinent to note that this section required a Magistrate to record his reasons for discharging the accused but there is no such requirement if he forms the opinion that there is ground for presuming that the accused had committed the offence which he is competent to try. In such a situation he is only required to frame a charge in writing against the accused.

Even in cases instituted otherwise than on a police report the Magistrate is

required to write an order showing the reasons only if he is to discharge the accused. This is clear from Section 245. As per the first sub-section of Section 245, if a Magistrate, after taking all the evidence considers that no case against the accused has been made out which if unrebutted would warrant his conviction, he shall discharge the accused. As per sub-section (2) the Magistrate is empowered to discharge the accused at any previous stage of the case if he considers the charge to be groundless. Under both sub-sections he is obliged to record his reasons for doing so. In this context, it is pertinent to point out that even in a trial before a Court of Session, the Judge is required to record reasons only if he decides to discharge the accused (vide Section 227 of the Code). But if he is to frame the charge he may do so without recording his reasons for showing why he framed the charge."

22. In **Inder Mohan Goswami and another Vs. State of Uttaranchal and others 2008 (60) ACC 1** in which Hon'ble the Apex Court has held as under:-

"The veracity of the facts alleged by the appellants and the respondents can only be ascertained on the basis of evidence and documents by a Civil Court of competent jurisdiction. The dispute in question is purely of civil nature and respondent No. 3 has already instituted a civil suit in the court of Civil Judge. In the facts and circumstances of this case, initiating criminal proceedings by the respondents against the appellants is clearly an abuse of the process of the Court."

23. In **Hira Lal and others Vs. State of U.P. and others 2009 (66) ACC 28** in which Hon. the Apex Court has held:-

"The question as to whether the transactions are genuine or not would fall for consideration before the Civil Court as indisputably the respondent No. 3 has filed a civil suit in the Court of Civil Judge, Gautam Budh Nagar wherein allegedly an interim injunction has been granted. What was the share of the respective co-sharers is a question which is purely a civil dispute; a criminal court cannot determine the same."

24. In **Harshendra Kumar D. Vs. Rebatilata Kolley and others (2011) 3 SCC 351** in which Hon'ble the Supreme Court has held that in a criminal case where trial is yet to take place and the matter is at the stage of issuance of summons or taking cognizance, materials relied upon by the accused which are in the nature of public documents or the materials which are beyond suspicion or doubt, in no circumstances, can be looked into by the High Court In exercise of its jurisdiction under section 482 or for that matter in exercise of revisional jurisdiction under section 397 of the Code.

25. Hon'ble Apex Court has further held that it is clearly settled that while exercising inherent jurisdiction u/s 482 or revisional jurisdiction under section 397 of the Code in a criminal case where complaint is sought to be quashed, it is not proper for the High Court to consider the defence of the accused or embark upon an enquiry in respect of merits of the accusations.

26. In **Indian Oil Corporation Vs. NEPC India Ltd. and others (2006) 6 SCC 736** in which Hon'ble Apex Court considering the judgment of Hridaya Ranjan Prasad Verma has observed as follows:-

In Hridaya Ranjan Prasad Verma, this Court held :

"On a reading of the section it is manifest that in the definition there are set forth two separate classes of acts which the person deceived may be induced to do. In the first place he may be induced fraudulently or dishonestly to deliver any property to any person. The second class of acts set forth in the section is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases the inducing must be fraudulent or dishonest. In the second class of acts, the inducing must be intentional but not fraudulent or dishonest.

In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time to inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed."

27. In **Mohd. Ibrahim and others Vs. State of Bihar and another (2009) 8 SCC 751** the Hon. Apex Court has held that as under:-

"This Court has time and again drawn attention to the growing tendency of complainants attempting to give the cloak of a criminal offence to matters which are essentially and purely civil in nature, obviously either to apply pressure on the accused, or out of enmity towards the accused, or to subject the accused to harassment. Criminal courts should ensure that proceedings before it are not used for settling scores or to pressurise parties to settle civil disputes. But at the same, it should be noted that several disputes of a civil nature may also contain the ingredients of criminal offences and if so, will have to be tried as criminal offences, even if they also amount to civil disputes. [See: G. Sagar Suri v. State of U.P. [2000 (2) SCC 636] and Indian Oil Corporation Vs. NEPC India Ltd. [2006 (6) SCC 736]. Let us examine the matter keeping the said principles in mind.

Let us now examine whether the ingredients of an offence of cheating are made out. The essential ingredients of the offence of "cheating" are as follows: (i) deception of a person either by making a false or misleading representation or by dishonest concealment or by any other act or omission; (ii) fraudulent or dishonest inducement of that person to either deliver any property or to consent to the retention

thereof by any person or to intentionally induce that person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived; and (iii) such act or omission causing or is likely to cause damage or harm to that person in body, mind, reputation or property. To constitute an offence under section 420, there should not only be cheating, but as a consequence of such cheating, the accused should have dishonestly induced the person deceived (i) to deliver any property to any person, or (ii) to make, alter or destroy wholly or in part a valuable security (or anything signed or sealed and which is capable of being converted into a valuable security).

When a sale deed is executed conveying a property claiming ownership thereto, it may be possible for the purchaser under such sale deed, to allege that the vendor has cheated him by making a false representation of ownership and fraudulently induced him to part with the sale consideration. But in this case the complaint is not by the purchaser. On the other hand, the purchaser is made a co-accused. It is not the case of the complainant that any of the accused tried to deceive him either by making a false or misleading representation or by any other action or omission, nor is it his case that they offered him any fraudulent or dishonest inducement to deliver any property or to consent to the retention thereof by any person or to intentionally induce him to do or omit to do anything which he would not do or omit if he were not so deceived. Nor did the complainant allege that the first appellant pretended to be the complainant while executing the sale deeds. Therefore, it cannot be said that the first accused by the act of executing sale deeds in favour of the second accused or the second accused by reason of being the purchaser, or the third, fourth and fifth accused, by reason of being the witness, scribe and stamp vendor in regard to the sale deeds, deceived the complainant in any manner. As the ingredients of cheating as stated in section 415 are not found, it cannot be said that there was an offence punishable under sections 417, 418, 419 or 420 of the Code.

When we say that execution of a sale deed by a person, purporting to convey a property which is not his, as his property, is not making a false document and therefore not forgery, we should not be understood as holding that such an act can never be a criminal offence. If a person sells a property knowing that it does not belong to him, and thereby defrauds the person who purchased the property, the person defrauded, that is the purchaser, may complain that the vendor committed the fraudulent act of cheating. But a third party who is not the purchaser under the deed may not be able to make such complaint. The term `fraud' is not defined in the Code. The dictionary definition of `fraud' is "deliberate deception, treachery or cheating intended to gain advantage". Section 17 of the Contract Act, 1872 defines `fraud' with reference to a party to a contract. In Dr. Vimla Vs. Delhi Administration - AIR 1963 SC 1572, this Court explained the meaning of the expression `defraud' thus;

"The expression "defraud" involves two elements, namely, deceit and injury to the person deceived. Injury is something other than economic loss that is, deprivation of property, whether movable or immovable, or of money, and it will include any harm whatever caused to any person in body, mind, reputation or such others. In short, it is a non-economic or non-pecuniary loss. A benefit or

advantage to the deceiver will almost always cause loss or detriment to the deceived. Even in those rare cases where there is a benefit or advantage to the deceiver, but no corresponding loss to the deceived, the second condition is satisfied."

The above definition was in essence reiterated in State of UP vs. Ranjit Singh - 1999 (2) SCC 617.

28. In **Indian Oil Corporation Vs. NEPC India Ltd. (2006) 6 SCC 736**, Hon'ble Apex Court has held as under:-

"Any effort to settle civil disputes and claims which do not involve any criminal offence, by applying pressure through criminal prosecution, should be deprecated and discouraged."

29. As mentioned above, for constituting the offence under Section 420 I.P.C., the cheating has to be proved. In the present case, the complainant was not recorded as tenure holder of the land in dispute at the time of execution of the sale deed in the year 1997, therefore, there was absolutely no question to cheat the complainant. At the most, it could have been said that Bhagwan Das had committed cheating by executing a sale deed without any rights. It has been alleged in the F.I.R. that the accused persons knowingly that Bhagwan Das was not the owner of the land had got the sale deed in their favour. The rights and title of the parties regarding immovable property are also derived by documents. Admittedly, Bhagwan Das had purchased this land from Mohan Aanand Teerth in the year 1983 and he remained owner in possession of the land in dispute since 1983 to the date of execution of sale deed dated 17.4.1997. The rights, title and possession of Paramhansh Bhagwan Das was not challenged during this period. A bonafide purchaser of the immovable property is required to see the title of the seller. When Paramhansh Bhagwan Das was having sale deed in his favour since 1983 without any interruption, then nothing else was required to be seen by the subsequent purchasers i.e. the revisionists who had also purchased the said piece of land for a consideration by a registered sale deed. It has also not been mentioned in the F.I.R. that why Bhagwan Das was not the owner of the land in dispute. Merely saying that Bhagwan Das was not owner of the land in dispute is not sufficient. The best course for the complainant was to file a civil suit either for declaration or for cancellation of the sale deed in favour of Bhagwan Das but the said remedies have not been adopted. It appears that the complainant feared that in civil court he shall not be able to prove his title or to disprove the title of Bhagwan Das, therefore, he has adopted this short cut of lodging the F.I.R. It also appears that the Investigating Officer has also not taken pains in collecting the evidence that why Bhagwan Das was not the owner of the land in dispute since 1983. I fail to understand as to why no explanation has been given in the F.I.R. that since 1999 till 2008 why the complainant had not asserted his rights before the competent civil court. It appears that the Investigating Officer has submitted the charge-sheet either under some pressure or for extraneous consideration. The ingredients of cheating and forgery are not at all made out by the evidence on record.

30. For the facts and circumstances mentioned above, I am of the opinion that the charges against the revisionists are groundless and the findings of Chief Judicial Magistrate, Mathura that this question can be decided only after recording the evidence under Section 137, 154 and 146 of Indian Evidence Act are perverse. It is a dispute of purely civil nature which has been given the criminal colour just to pressurise the revisionists.

31. In the result, the revision is allowed. The impugned order dated 16.1.2010 is set-aside. The revisionists are discharged for the offences of Section 420, 467, 468 & 471 I.P.C. relating to Case Crime No.232 of 2008, P.S. Brindavan, District Mathura.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED:LUCKNOW 17.07.2013

BEFORE
THE HON'BLE SHABIHUL HASNAIN, J.

Service Single No. 1828 of 2008

Panchu ...Petitioner
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri D.K. Tripathi

Counsel for the Respondents:
C.S.C.

U.P. Civil Services Regulations-Regulation 370- Right to get pension-petitioner after completing 30 years service including work charge and regular service-retired on 31.08.2007-pensionary benefits denied as has not completed 10 years service in Regular establishment-shorttend by 1 year 2 month 26 days-held-as per law developed by Apex Court reported in 2010 AIR SCW Page 1670-Punjab State Electricity Board case service rendered in work charge established to be counted-accordingly direction issued to ensure payment of pension within 3 month.

Held: Para-6
Learned counsel for the petitioner has also relied upon a judgment given in special appeal defective No.2624 of 2013 (State of U.P. through Principal Secretary, Public Works Department, Lucknow and others Vs. Prem Chandra and others). In a bunch of special appeals their Lordships have dismissed the appeal of the State and upheld the validity of the orders of learned Single Judge wherein the benefit of work charged services have been given to the petitioner. In this case, their Lordships have relied upon a judgment of Hon'ble Apex Court reported in 2010 AIR SCW 1670 (Punjab State Electricity Board and another Vs. Narata Singh and another). Their Lordships have observed that provisions of regulation 370 of the U.P. Civil Services Regulation have to be read in line with judgment of Hon'ble Apex Court in the absence of challenge to the validity of the regulation in this petition or in any other petition earlier.

Case Law discussed:
2009(27) 1163; 2010 AIR SCW 1670.

(Delivered by Hon'ble Shabihul Hasnain, J.)

1. Heard Sri D. K. Tripathi, learned counsel for the petitioner as well as learned Standing counsel.

2. The petitioner has prayed for a writ of mandamus directing the opposite parties to provide the pension to the petitioner with effect from the date of his retirement i.e. 31.8.2007 with all consequential benefits counting entire service of the petitioner and the same be clubbed for computation of qualifying services.

3. The petitioner was initially appointed on the post of Beldar in the year 1978 as a muster roll employee and thereafter he was declared in the work charged establishment after completion of 8 years of satisfactory services on the said post on 1.4.1986 in the pay scale. Thereafter, the services of the petitioner were regularized on 27.11.1998. In all, the petitioner has worked in the department for almost thirty years. These facts are not disputed by the opposite parties. The petitioner retired on 31.8.2007 and since his services were regularized on 27.11.1998, he did not have ten years of regular services to his credit at the time of his retirement. Since there was deficiency of about one year, two months and 26 days, the opposite parties refused to grant pension to the petitioner on the ground that work charged/daily wage services can not be computed for the purposes of allowing pensionary benefits. This question has perturbed the Court every time the case is filed before the Court. There are a number of judgments and a lot of confusion has always been there in the minds of the executive whether or not to grant pension by computing the work charge periods of the employee.

4. Sri D. K. Tripathi has forcefully argued that thirty years is a pretty long time for a man which he has spent in the services of the department. After putting best years of his life if an employee is not given the pensionary benefits, the charm of working in a department will be lost on the incumbents. If a person spends his youth in the services of the department it is expected in a welfare State that he may be looked after when his bones are old. Keeping this philosophy in mind the pensionary schemes have been introduced in the government department.

5. It has been observed that regularization of services mostly depends on the sweet will of the officers. If a person has worked for thirty years it is hard to imagine that a post will not be there for regularization even after twenty years. If the officers are little careful, considerate, open minded little benevolent, they will see to it that an employee gets regularized at a time when he gets at least ten years of qualifying services. Often posts kept lying vacant, meetings are not held, advertisements are not issued, notices are not given and a careless attitude is adopted towards regularization, resulting in precious time being lost, which could have been computed in favour of the employee towards calculations for pensionary benefits. The said view was earlier taken by this Court in writ petition No.2637 (S/S) of 2009 (Mohd. Mustafa Vs. State of U.P. and others) reported in 2009 (27) LCD 1163. A Division Bench of this Court has upheld the said judgment in special appeal.

6. Learned counsel for the petitioner has also relied upon a judgment given in special appeal defective No.2624 of 2013 (State of U.P. through Principal Secretary, Public Works Department, Lucknow and others Vs. Prem Chandra and others). In a bunch of special appeals their Lordships have dismissed the appeal of the State and upheld the validity of the orders of learned Single Judge wherein the benefit of work charged services have been given to the petitioner. In this case, their Lordships have relied upon a judgment of Hon'ble Apex Court reported in 2010 AIR SCW 1670 (Punjab State Electricity Board and another Vs. Narata Singh and another). Their Lordships have observed that provisions of regulation 370 of the U.P. Civil Services

Regulation have to be read in line with judgment of Hon'ble Apex Court in the absence of challenge to the validity of the regulation in this petition or in any other petition earlier.

7. In view of what has been said above, the writ petition is allowed. The opposite parties are directed to count the services rendered by the petitioner in work charged establishment to the extent it is required for qualifying services of ten years. The opposite parties will give pensionary benefits to the petitioner treating him to be a regular employee for ten years.

8. The petitioner has retired in 2007. Five years have passed. He has become a senior citizen of this country. The opposite parties will be well advised and directed to complete the necessary formalities for payment of pensionary benefits, say within a maximum period of three months from the date a certified copy of this order is placed before them. The services of the work charged period shall only be counted for computing the qualifying services of ten years.

REVISIONAL JURISDICTION
CRIMINAL- SIDE
DATED: ALLAHABAD 09.07.2013

BEFORE
THE HON'BLE ADITYA NATH MITTAL, J.

Criminal Revision No. 2708 of 2010.
Smt. Jyoti Belur ...Petitioner
Versus
C.B.I. . ...Respondent

Counsel for the Petitioner:
Sri B.B. Suri, Sri A.K. Awasthi, Sri Manish Tiwari
Sri R.K. Awasthi, Sri Vimal Chandra Tiwari
Sri Anoop Trivedi

Counsel for the Respondent:
A.G.A., Sri G.S. Hajela, Sri Nazrul Islam Jafri.

Code of Criminal Procedure-Section-362-
Power to recall the judgment/order passed on merit-inherent power under section 482 can not be exercised-against the statutory provision-after signing judgment-except clerical error-no power to recall-application rejected.

Held: Para-18
Hon'ble the Apex Court has further held that even the inherent powers conferred under Section 482 Cr.P.C. have to be exercised sparingly, carefully and with caution. The legal position is clear that an inherent powers cannot be invoked for exercise of a power which is specifically prohibited by the Code. The matter has been considered by Hon'ble the Calcutta High Court in Harjeet Singh Vs. State of West Bengal (F.B.) (supra) and I agree with the view of Hon'ble the Calcutta High Court. With humble regards, I do not agree with the decisions in Criminal Revision No.163 of 2001 and Criminal Revision No.3629 of 2004 passed by Single Judges of this Court because the provisions of Section 362 Cr.P.C. are not helping the present revisionist and the law declared by Hon'ble the Apex Court in Hari Singh Mann (supra) and Harjeet Singh Vs. State of West Bengal (supra) makes it clear that a judgment of the High Court on appeal or revision cannot be reviewed or revised except in accordance with the provisions of the Cr.P.C. In the Code of Criminal Procedure, there is no provisions to recall an order passed on the merits.

Case Law discussed:
Crl. Revision No. 163 of 2001; 2001 SCCrR 129; 2005 Cr.L.J. 3286; AIR 1979(SC)87

(Delivered by Hon'ble Aditya Nath Mittal, J.)

1. This application has been filed to recall the order dated 9.4.2013 passed by this Court on merits in Criminal Revision

No.2708 of 2010 "Smt. Jyoti Belur Vs. C.B.I. through Inspector".

2. Learned counsel for the applicant-revisionist has submitted that the adjournment slip was sent by learned counsel for the applicant-revisionist and as such he was under a bonafide belief that the matter might have been adjourned. But subsequently he came to know that the criminal revision has been dismissed. It has also been submitted that this Court has the power to recall its order in which the opportunity of hearing has not been afforded to learned counsel for the applicant-revisionist.

3. Learned counsel appearing for opposite party has submitted that there is no provision in Code of Criminal Procedure to recall an order passed on merits.

4. Learned counsel for the applicant-revisionist has relied upon an order dated 20.8.2010 passed by Single Judge of this Court in **Criminal Revision No.163 of 2001 "Shri Aleemuddin & another Vs. State of U.P. & another**", in which the ground was taken that the counsel for the applicant was not present hence could not be heard on matter in issue.

5. Learned counsel for the applicant-revisionist has further relied upon a judgment of this Court passed by Single Judge in **Criminal Revision No.3629 of 2004 "Anil Kumar Garg and others Vs. State of U.P. and another"**, in which the ground was taken that due to mistake of clerk of the counsel, the revision could not be marked.

6. Learned counsel appearing for opposite party has relied upon **Hari Singh Mann Vs. Harbhajan Singh Bajwa and others, 2001 SCCrR 129**, in which Hon'ble the Apex Court has held as under:-

"Section 362 of the Code mandates that 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 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 disentitled to entertain a fresh prayer for the same 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 official order disposing of a case is signed. Such an order cannot be altered except to the extent of correcting a clerical or arithmetical error. The reliance of the respondent on Talab Haji Hussain's case (supra) is misconceived. Even in that case it was pointed that inherent powers conferred on High Courts under Section 561A (Section 482 of the new Code) has to be exercised sparingly, carefully and with caution and only where such exercise is justified by the tests specifically laid down in the section itself. It is not disputed that the petition filed under Section 482 of the Code had been finally disposed of by the High Court on 7.1.1999. The new Section 362 of the Code which was drafted keeping in view the recommendations of the 41st Report of the Law Commission and the Joint Select Committees appointed for the purpose, has extended the bar of review not only to the judgment but also to the final orders other than the judgment.

The impugned orders of the High Court dated 30.4.1999 and 21.7.1999

which is not referable to any statutory provisions having been passed apparently in a review petition in a criminal case is without jurisdiction and liable to be quashed. In view of what has been stated hereinabove, the appeals are allowed and the impugned order of the High Court dated 30.4.1999 and 21.7.1999 are set aside restoring its original order dated 7.1.1999."

7. Learned counsel appearing for opposite party has further relied upon **Harjeet Singh Vs. State of West Bengal, 2005 Cr.L.J. 3286**, in which the Calcutta High Court has held as under:-

"We have given our anxious consideration to the issue involved while striking a balance between the procedure to be followed, protecting the interest of justice in the light of the valuable right to property and the valuable right of audience we feel that in the light of the clear dictum of the law the Court cannot review or recall its final Order, even in cases where the parties may come up before it feeling that they have not been heard or they have left out something, which if placed before the Court, may have resulted in a different decision and that the decision arrived in their absence was an impaired finding. -Once the Court lifts its pen after signature it cannot put it once again; except of the situations like for the purpose of rectifying a clerical or arithmetical error.

We hold that in view of Section 362 of the said Code there is a clear bar for any Court, which includes the High Court, to either review or recall an Order or judgment passed even if it is found subsequently that it offends the principles of natural justice as this is the language of Section 362 of the said Code."

8. Reliance has further been placed on **State of Orissa Vs. Ram Chander Agarwala, AIR 1979 (SC) 87**, in which Hon'ble the Apex Court has held as under:-

"Before concluding we will very briefly refer to cases of this Court cited by counsel on both sides. 1958 S.C.R.1226 relates to the power of the High Court to cancel bail. The High Court took the view that under section 561A of the Code, it had inherent power to cancel the bail, and finding that on the material produced before the Court it would not be safe to permit the appellant to be at large cancelled the bail distinguishing the decision in 1945 Law Reports and 72 Indian Appeals (supra) and stated that the Privy Council was not called upon to consider the question about the inherent power of the High Court to cancel bail under section 561A. In Sankata Singh v. State of U.P.,(1) this Court held that section 360 read with section 424 of the Code of Criminal Procedure specifically prohibits the altering or reviewing of its order by a court. The accused applied before a succeeding Sessions Judge for re-hearing of all appeal. The learned Judge was of the view that the appellate court had no power to review or restore an appeal which has been disposed of. The Supreme Court agreed with the view that the appellate court had no power to review or restore an appeal. This court, expressing its opinion that the Sessions Court had no power to review or restore an appeal observed that a judgment. which does not comply with the requirements of section 369 of the Code, may be liable to be set aside by a superior court but will not give the

appellate court any power to. set it aside himself and rehear the appeal observing that "section 369 read with section 424 of the Code makes it clear that the appellate court is not to alter or review the judgment once signed, except for the purpose of correcting a clerical error. Reliance was placed on a decision of this Court in Superintendent and Remembrance of Legal Affairs W.B. v. Mohan Singh and others(2) by Mr. Patel, learned counsel for the respondent wherein it was held that rejection of a prior application for quashing is no bar for the High Court entertaining a subsequent application as quashing does not amount to review or revision. This decision instead of supporting the respondent clearly lays down, following Chopra's case (supra) that once a judgment has been pronounced by a High Court either in exercise of its appellate or its revisional jurisdiction, no review or revision can be entertained against that judgment as there are no provisions in the Criminal Procedure Code which would enable the High Court to review the same or to exercise revisional jurisdiction. This Court entertained the application for quashing the proceedings on the ground that a subsequent application to quash would not amount to review or revise an order made by the Court. The decision clearly lays down that a judgment of the High Court on appeal or revision cannot be reviewed or revised except in accordance with the provisions of the Criminal Procedure Code. The provisions of section 561A of the Code cannot be revoked for exercise of a power which is specifically prohibited by the Code."

9. Section 362 Cr.P.C. provides as under:-

"**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 judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error."

10. The present matter was filed in the year 2008 in which the stay order was granted. The matter was adjourned various times on the request of learned counsel for the revisionist. On 18.9.2012, the following order was passed:-

"A mention has been made on behalf of the revisionist to pass over the case for today. Record shows that revision has been listed time and again but hearing is being postponed on one ground or the other. On 30.07.2012, last opportunity was given to Mr. Awasthi to file rejoinder affidavit but so far as no such affidavit has been filed.

In the interest of justice, the case is passed over for today.

List peremptorily in the next cause list.

Till the next date of listing, interim order is extended.

It is made clear that if arguments are not advanced, interim order will not be extended on the next date."

11. Again on 6.2.2013, the following order was passed:-

"List has been revised. None present for the revisionist.

On 18.9.2012 it was directed that the case has been listed so many times but hearing is being postponed on one ground or the other. It was also made clear that if arguments are not advanced then interim order will not be extended on the next date.

Again the illness slip has been sent by learned counsel for the revisionist. It appears that the interim order is being misused by the revisionist, therefore, the interim order is vacated.

List on 5.3.2013, for hearing."

12. Even after aforesaid order, the case was again passed over on the illness slip of learned counsel for the revisionist and on 18.3.2013, the following order was passed:-

"Learned counsel for the revisionist has again prayed to pass over this case. The case is pending since long and so many adjournments have been taken by the counsel for the revisionist. The interim order has also been vacated on the ground that it is being misused. In the interest of justice one more opportunity is given to argue the matter.

List on 2.4.2013 peremptorily.

It is made clear that no further adjournment shall be granted on any ground whatsoever."

13. On 2.4.2013, the following order was passed:-

"Case called out in the revised list.

Learned counsel for the revisionist has sent mention slip today. The same be taken on record and be made part of the record.

List this matter in the next cause list.

As the revision pertains to years 2010 and the proceedings of the lower court are held-up on account of pendency of this revision, it is requested that learned counsel for the revisionist to positively argue the matter on the next date fixed."

14. Despite of the aforesaid strict orders, learned counsel for the revisionist again had not argued the matter and had sent the adjournment slip which was rejected with the following observations:-

"Learned counsel for the revisionist has again sent adjournment slip. From the perusal of the order sheet it reveals that the case is being adjourned on repeated illness slips of counsel for the revisionist. The interim order has also been vacated by order dated 6.2.2013. Again last opportunity was given by order dated 18.3.2013 and it was made clear that no further adjournment shall be granted on any ground whatsoever, even then the case was again adjourned on 2.4.2013. It is thus clear that the adjournment/illness slips are being misused, therefore, the adjournment slip is rejected."

15. After hearing learned A.G.A. and counsel for the opposite party, the aforesaid criminal revision was dismissed on merits by order dated 9.4.2013.

16. As far as the provisions of Section 362 Cr.P.C. are concerned, the Court including the High Court has no power to alter or review its judgment or final order disposing of a case except to correct a clerical or arithmetical error. In the present case, ample opportunities were afforded to the counsel for the revisionist to argue the matter but the matter was adjourned on one pretext or the other. This court was compelled to pass even strict order and had also requested learned counsel for the applicant to argue the matter but the request of the Court was not taken seriously. I have no hesitation to mention that the illness slips/adjournment slips have been grossly misused by learned counsel for the revisionist and no heed has been paid to comply with the directions of this Court. It is also relevant to mention that apart from

present counsel Sri Anoop Trivedi, there were other counsels for the revisionist namely Sri B.B. Suri, Sri A.K. Awasthi, Sri Manish Tiwary, Sri R.K. Awasthi. It cannot be presumed by any stretch of imagination that none of the counsel was available for argument, therefore, taking into consideration the background and the conduct of the revisionist, the adjournment slip was rejected. This Court while passing the final order has considered the grounds of revision and the merits of the case.

17. Hon'ble the Apex Court in Hari Singh Mann (supra) has clearly held that after signing of the judgment or the final order, disposing of a case, only the clerical or arithmetical error can be corrected and in absence of a specific statutory provisions, the court becomes functus officio.

18. Hon'ble the Apex Court has further held that even the inherent powers conferred under Section 482 Cr.P.C. have to be exercised sparingly, carefully and with caution. The legal position is clear that an inherent powers cannot be invoked for exercise of a power which is specifically prohibited by the Code. The matter has been considered by Hon'ble the Calcutta High Court in Harjeet Singh Vs. State of West Bengal (F.B.) (supra) and I agree with the view of Hon'ble the Calcutta High Court. With humble regards, I do not agree with the decisions in Criminal Revision No.163 of 2001 and Criminal Revision No.3629 of 2004 passed by Single Judges of this Court because the provisions of Section 362 Cr.P.C. are not helping the present revisionist and the law declared by Hon'ble the Apex Court in Hari Singh Mann (supra) and Harjeet Singh Vs. State of West Bengal (supra) makes it clear that a judgment of the High Court on appeal or revision cannot be reviewed or revised except in accordance with the provisions of the Cr.P.C. In the Code of Criminal Procedure, there is no provisions to recall an order passed on the merits.

19. For the facts and circumstances mentioned above, I do not find any merits in the submission of learned counsel for the revisionist to recall an order passed on merits. The recall application is rejected.

ORIGINAL JURISDICTION
CIVIL- SIDE
DATED: LUCKNOW 20.05.2013

BEFORE
THE HON'BLE ANIL KUMAR, J.

Service Single No. 2754 of 2010

Ram Autar Shukla ...Petitioner
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri Ramesh Kumar Srivastava

Counsel for the Respondents:
C.S.C.

Fundamental Rule-54(4)-Backwages-dismissal order-set-a-side without back wages-admittedly delay caused in disciplinary proceeding by the employer and not on part of petitioner- held-before dismissal no show cause notice given-entire exercise being contrary to provision of section 54(4)-order not sustainable.

Held: Para-40

In the instant matter, from the perusal of the impugned order dated 25.4.2009, the position which emerges out is that the competent authority/opposite party no.4 has set aside the order of dismissal taking a sympathetic view with a direction that the petitioner is not entitled for any pay and allowances for the said period, without issuing any notice and without affording any opportunity to the writ petitioner to make a representation, further the competent authority also did not consider

as to whether the said period of absence of duty preceding his termination can be converted into leave of any kind due or admissible to the writ petitioner as required under Sub-rule 4 or Rule 54 of the Fundamental Rules.

Case Law discussed:
2012(1)ADJ 183; (2011) 2 UPLBEC 1445; (2009) 2 UPLBEC 1864; (2007) 2 ALJ 527; (2007) 7 SCC 455; (2011) 1 JT 326; (2009) 2 SCC 592; (2009) 1 SCC 20; (1997) 3 SCC 636; (2005) 2 SCC 363; (2012) 3 UPLBEC 1881; 2012 (1) ADJ 183; (2011) 2 UPLBEC 1445; (2009) 2 UPLBEC 1864; (2008) SCC 664; (2007) 14 SCC 766; (2007) 2 SCC 433; (2003) 2 SCC 212; (1999) 6 SCC 664 58; 1962 Supp. (1) SCR 315; (1968) 1 SCR 355

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

1. Heard Shri Ramesh Kumar Srivastava, learned counsel for the petitioner, Shri Abhinav Narain Trivedi, learned Addl. Chief Standing Counsel and perused the record.

2. Facts in brief as submitted by learned counsel for the petitioner are that the petitioner who was working on the post of Collection Amin was placed under suspension in the year 1985. Thereafter, an enquiry proceeding was initiated against him and by an order dated 30.06.1986, he was dismissed from his services. Subsequently, he made a representation to the competent authority, but no heed was paid. So, approached this Court by filing Writ Petition No.6171 (SS) of 2002 "Ram Avtar Shukla vs. State of U.P. & Ors.", disposed of by order dated 2.2.2005, on reproduction reads as under:-

"Against the order impugned in the writ petition, the petitioner is said to have filed a departmental appeal before the opposite party no.3, which is pending and till date has not been decided.

It is hereby directed that the appeal preferred by the petitioner shall be decided by the said opposite party (Opposite Party No.3) within a period of three months from the date a certified copy of this order is served upon the said opposite party.

With the aforesaid direction, the writ petition is finally disposed of."

3. Accordingly, on 3.3.2005 petitioner made a representation to the District Magistrate, Hardoi for taking necessary action in compliance of the above said order.

4. By order dated 6.8.2005, the District Magistrate, Hardoi rejected the petitioner's representation and upheld the order dated 30.6.1986.

5. Aggrieved by the said order, petitioner filed Writ Petition No.7922 (SS) of 2006 "Ram Avtar vs. State of U.P. & Ors.", allowed by judgment and order dated 3.11.2008, the relevant portion is quoted herein below:-

"In the result, the writ petition is allowed and order dated 30.6.1986 (Annexure No.1) dismissing the service of the petitioner and the appellate order dated 6.8.2005 (Annexure No.2) are hereby quashed. It is further directed that the respondents shall proceed with the inquiry from the stage of issuance of charge sheet and the inquiry be proceeded with in accordance with law by observing the principles of natural justice and in accordance with law laid down by this Court, expeditiously, say, within a period of two months from the date of production of a certified copy of the order.

With the above terms, the writ petition stands allowed. Costs easy."

6. As per direction given by this Court by order dated 3.11.2008 in Writ Petition No.7922 (SS) of 2006, a charge sheet has been issued to the petitioner to which he submitted his reply and after completing the enquiry proceeding, enquiry officer/Tehsildar (Judicial) Sadar, Hardoi submitted an enquiry report dated 28.2.2009. The operative portion of the same is quoted herein below:-

"उपरोक्त वर्णित तथ्यों, मा.न्यायालय के आदेश व मा.विविध न्यायालयों द्वारा प्रोचरित की गयी व्यवस्थाओ के आलोक में अपचारी कार्मिक को दोषी ठहराना उचित नहीं है । यदि आरोपी को दोषी ठहरा भी दिया जाये तो संगत अभिलेखों के आभाव में उसको सिद्ध नहीं किया जा सकता है । अतः यह आरोप भी अपचारी कर्मचारी पर सिद्ध नहीं होता है ।

जांचाख्या सेवा में प्रेषित है ।"

7. Thereafter, Sub Divisional Officer, Tehsil Sadar, District-Hardoi has passed the impugned order dated 25.4.2009, the operative portion is quoted herein below:-

"उक्त परिस्थितियों में पत्रावली पर उपलब्ध संपूर्ण साक्ष्यो, माननीय सर्वोच्य न्यायालय की विधिक अवधारणाओ एवं मा.अपर मुख्य न्यायिक मजिस्ट्रेट /दितीय}हरदोई द्वारा पारित निर्णयादेश दिनांक १२.२.१९९९ एवं जांच अधिकारी के द्वारा प्रस्तुत जांच आख्या,जिला शासकीय अधिवक्ता {दीवानी}हरदोई द्वारा प्रस्तुत किया गया अभिमत पर समग्र विचार किया गया । आरोप संख्या.१ अल्प आशिक सिद्ध व आरोप संख्या.२ में अपचारी कर्मचारी की संधिग्ध पृष्ठ भूमिका के प्रकाश में मानवीय आधार पर अपचारी कर्मचारी को विभागीय कार्यवाही सेवा से अनुपस्थिति की संपूर्ण अवधि के बिना वेतन सेवा में बहाल किया जाता है एवं श्री रामऔतार शुक्ला संग्रह अमीन तहसील सदर,हरदोई के विरुद्ध प्रचलित कार्यवाही समाप्ति की जाती है ।"

8. Aggrieved by the order dated 25.4.2009 (Annexure No.1) passed by opposite party no.4/Sub Divisional Officer, Tehsil, Sadar, District-Hardoi, the present writ petition has been filed by the petitioner.

9. Shri Ramesh Kumar Srivastava, learned counsel for the petitioner while challenging the impugned order dated 25.4.2009 (Annexure No.1) passed by opposite party no.4/Sub Divisional Officer, Tehsil Sadar, District-Hardoi submits that once enquiry officer in his enquiry report dated 25.2.2009 has stated that on the basis of the material on record, the petitioner cannot be held guilty and the charges which have been imposed against him are not proved, so there is no justification or reason on the part of the opposite party no.4 to pass the impugned order dated 25.4.2009 thereby denying the back wages to the petitioner in view of the judgment of this Court in the case of **B. N. Nigam vs. Chairman, State Bank of India 2012 (1) ADJ 183, Kishori Lal vs. Chairman, Board of Director (2011) 2 UPLBEC 1445, Govind Lal Srivastava vs. State of U.P. (2009) 2 UPLBEC 1864**

and Brijendra Prakash Kulshresth vs. State of U.P. (2007) 2 ALJ 527, the impugned order dated 25.4.2009 passed by opposite party no.4 thereby denying the back wages to the petitioner is liable to be set aside. As the petitioner was not allowed to work and discharge his duties only due to the act of employer and it cannot be said that he was illegally or unauthorizedly absent from duty.

10. Shri Abhinav Narain Trivedi, learned Addl. Chief Standing Counsel appearing on behalf of the official respondents argued that the petitioner was placed under suspension in the year 1985 and by order dated 30.6.1986, he was dismissed from his service, on two charges (a) he was absent from duty without leave and (b) he had embezzled the Government money. Thereafter, he was acquitted by the competent criminal court in Crime Case No.3/94 by order dated 12.2.1999. So, he made a representation against the order of dismissal dated 30.6.1986. Subsequently, he filed Writ Petition No.6171 (SS) of 2002, disposed of by order dated 2.2.2005. In pursuance of the said direction, he made a representation to the authority concerned/District Magistrate, Hardoi, who rejected his representation by order dated 6.8.2005, challenged by the petitioner by filing Writ Petition No.7992 (SS) of 2009 "Ram Avtar Shukla vs. State of U.P. & Ors.", allowed by order dated 3.11.2008.

11. As per direction given by this Court, enquiry proceeding has been initiated against the petitioner by issuing of the charge sheet and after completing the disciplinary enquiry, the enquiry officer has submitted a report on the basis of the same, the impugned order dated 25.4.2009 has been passed, but taking a sympathetic view, he has been reinstated in service without any back wages. As the petitioner has not been fully exonerated from the charges imposed on him, he is not entitled for any back wages in view of the provisions as provided under Sub Rule (2) of Rule 54 of the U.P. Fundamental Rules Vol. 2 Part-2 Financial Hand Book reads as under:-

"Where the authority competent to order of reinstatement is of opinion that the Government servant who had been dismissed, removed or compulsorily retired, has been fully exonerated the Government shall subject to the provisions of sub-rule (6) be paid the full pay and allowances to which he would have been entitled, had he not been dismissed, removed or compulsorily retired or suspended prior to such dismissal, removal or compulsory retirement, as the case may be:

Provided that where such authority is of opinion that the termination of the proceedings instituted against the Government servant had been delayed due to reasons directly attributable to the Government servant, it may, after giving him an opportunity to make his representation, and after considering the representation, if any, submitted by him, direct, for reasons to be recorded in writing, that the Government servant shall, subject to the provisions of sub-rule (7) be paid for the period of such delay, only such amount (not being the whole) of such pay and allowances as it may determine.

12. After placing reliance of the aforesaid Rule and the facts on which the impugned order has been passed, learned

State Counsel submits that making payment of back wages on account of his reinstatement and payment of other service benefit like promotional pay scale would amount to putting a premium on his misconduct, and thus the intention of Legislature would never be to award an employee whose misconduct has been proved, although partially proved. Accordingly even if the words "fully exonerated" is not categorically mentioned in sub rule 4 of Rule 54 of the Fundamental Rules but by adopting the Rule of Harmonious Construction, the intention of the Legislature could not be misinterpreted so that a guilty employee (partially guilty) would be entitled for back wages for the period, for which, he was out of service, on the eventuality of his reinstatement as the Competent Authority has taken a lenient sympathetic view. It is further pertinent to mention that the word fully exonerated as appearing in sub rule 2 of Rule 54 cannot be made redundant merely on the ground that the same is not categorically mentioned in sub rule-4.

13. As, it is a settled principle of law that any order involving civil consequences which are detrimental to a persons' interest, adherence the principle of natural justice is a must. However, in terms of Rule 54 (4) a show cause notice to the Government servant would be required only if the Competent Authority is of the opinion that the some amount is payable to the government employee on account of his reinstatement and thus before ascertaining the quantum to be paid, a show cause notice would be required. However, as a general rule, if the Competent Authority is of the opinion that the government employee is not entitled for any back wages on the principle of no work and no pay, no such show cause notice is required, because the petitioner is not fully exonerated in respect of the charges which have been imposed against him. So keeping in view the said rules, there is no illegality or infirmity on the part of the opposite party no.4 thereby not giving the back wages to the petitioner by means of the impugned order that even otherwise, as petitioner was dismissed from service in the year 1986. Thereafter, he kept silent and after considerable delay when he was acquitted from criminal case in the year 1999 although on a different footing, for the first time he made a representation in the year 1999. Subsequently filed a writ petition in the year 2000 for redressal of his grievances. So, keeping in view the said fact, petitioner is not entitled for any relief as claimed by him in respect of the payment of back wages in view of the cases namely :-(a) Delhi Administration vs. Hira Lal (1999) 6 Supreme Court Cases 664 58, (b) A. P. SRTC & another vs. S. Narsagoud (2003) 2 Supreme Court Cases 212, (c) Chairman Food Corporation of India vs. Sudarsan Das (2007) 14 Supreme Court Cases 766, (d) State of Maharastra vs. Reshma Ramesh Meher & another (2008) 8 Supreme Court Cases 664 and (e) Bicco Lawries Limited, reported in (2009) 10 SCC 32 para 42. and writ petition is liable to be dismissed.

14. Shri Ramesh Kumar Srivastava, learned counsel for the petitioner, in rebuttal, submits that it is totally incorrect and wrong on the part of the Shri Abhinav Narain Trivedi, learned Addl. Chief Standing Counsel who states that the charges in which petitioner has been exonerated by the criminal court are different in nature are correct, so the position is the same on the basis of which

petitioner has been dismissed from service by order dated 30.6.1986. Accordingly, it is submitted by him that the impugned order dated 25.4.2009 (Annexure No.1) passed by opposite party no.4/Sub Divisional Officer, Tehsil Sadar, District-Hardoi is in contravention to the provisions as provided under Sub-rule 4 of Rule 54 of the Fundamental Rules, liable to be set aside.

15. I have heard learned counsel for the parties and gone through the records.

16. It is well settled principle of service jurisprudence that a person must be paid if he has worked and should not be paid if he has not. In other words, the doctrine of "no work no pay" is based on justice, equity and good conscience and in absence of valid reasons to the contrary, it should be applied. (See **Sukhdev Pandey vs. Union of India (2007) 7 SCC 455**)

17. The principle has been laid down keeping in view the public interest that a Government servant who does not discharge his duty is not allowed pay and arrears at the cost of public exchequer. It cannot be contended as an absolute proposition of law that no direction of payment of consequential benefits can be granted by a Court. Denial of salary on the ground of 'no work no pay' cannot be treated as a penalty (See State of U.P. vs. Madhav Prasad Sharma (2011) 1 JT 326) and mechanical application of normal Rule "no work no pay" may in some cases be found to be wholly unjust. No absolute proposition of law in this behalf can be laid down. (See **Somesh Tiwari v. Union of India (2009) 2 SCC 592)**

18. Further, on the order of termination of service of an employee being set aside, ordinarily the relief of reinstatement is available to the employee. However, the entitlement of an employee to get reinstatement does not necessarily result in payment of full or partial back wages, which is independent of reinstatement.

19. While dealing with the prayer for back wages, factual scenario, equity and good conscience and a number of other factors; like the manner of selection; the nature of appointment; the period for which the employee had worked with the employer, etc. have to be kept in mind. All these factors are illustrative and no precise formula can be laid down as to under what circumstances full or partial back wages should be awarded. It depends upon the facts and circumstances of each case. (See **Kanpur Electricity Supply Company Limited v. Shamim Mirza (2009) 1 SCC 20**).

20. Moreover, it would be deleterious to the maintenance of discipline if a person who was suspended on valid considerations is given full back wages as a matter of course, on his acquittal. The disciplinary authority has option either to enquire into the misconduct unless the selfsame conduct was subject-matter of the charge and on trial the acquitted was not based on benefit of doubt but on a positive finding that the accused did not commit the offence at all. The authority may also, on reinstatement, pass appropriate order including treating suspension period as not spent on duty, after following the principles of natural justice.

21. Hon'ble the Supreme Court in the case of **Kishnakant Raghunath Bibhavenkar v. State of Maharashtra**

(1997) 3 SCC 636 held that the employee was not entitled to consequential benefits on his reinstatement after acquittal. He was also not entitled to be treated as on duty from the date of suspension till the date of acquittal, for the purpose of computation of pensionary benefits.

22. The position, in nutshell, is that as to whether an employee is entitled for back wages or not after he has been reinstated in service, applying the principle of no work no pay can be summarized that payment of back wages having a discretionary element has to be dealt with in the fact and circumstances of each case and no straitjacket formula can be evolved and when the question of determining the entitlement of a person to back wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him and if he places materials in that regard, the employer can bring on record materials to rebut the claim. (See **Hindustan Motors Limited v. Tapan Kumar Bhattarharya (2002) 6 SCC 41 and Kendriya Vidyala Sangathan v. S.C. Sharma (2005) 2 SCC 363**).

23. Before adjudicating and deciding the controversy involved in the present case, I feel appropriate to go through the judgments cited by learned counsel for the parties.

24. This Court in the case of **Kailash Kumar Mishra vs. State Public Service Tribunal (2012) 3 UPLBEC 1881** in paragraph no.9 has held as under:-

"Taking into consideration the facts and circumstances of the case, in our considered view, the principle of "no work and no pay" appears to have wrongly been applied in the instant case. Once the enquiry was found to be vitiated; the charges not be proved; opportunity of cross examination of the witnesses not afforded to him; and the punishing authority not giving any reason for disagreeing with the findings of the inquiry officer nor any reason having been given by the punishing authority for his own findings, the petitioner alone cannot be made to suffer. Further, the principle " No work no pay" is to be applied as a punitive measure in those cases where the employee concerned had willingly not performed his duties or had absented himself from work without proper cause. Such is not the position in the present case. Here, the petitioner could not discharge his duties because of the enquiry proceedings and the punishment order which have ultimately been found to be vitiated on the aforesaid grounds. Since faults have been found on the part of the department also, in our view, the ends of justice would meet if 50 % of the salary and allowances is awarded to the petitioner from the date of his termination till his reinstatement."

25. In the case of **B. M. Nigam vs. Chairman, State Bank of India 2012 (1) ADJ 183**, this Court has held that the petitioner was illegally deprived of the working as officer of the bank and thus we direct that the petitioner be reinstated with 50% of the back wages, and all other consequential benefits. If the petitioner has retired, 50% wages upto date of retirement will be paid with further direction that he will be paid full pension as if he retired while serving will all consequential benefits.

26. In the case of **Kishori Lal vs. Chairman, Board of Director (2011) 2**

UPLBEC 1445, this Court has held as under:-

"58. Now coming to another important aspect about relief. It is not the case of respondents that petitioner was gainfully employed elsewhere during the period he was out of job. On the contrary, as a result of illegal order of dismissal, petitioner and his entire family must have suffered a social stigma as also financial hardships. It is quite conceivable that this ignominy is faced by the entire family of petitioner. No amount of money can compensate this social humiliation, illegal torture an outclassed attribute of neighbour and other difficulties.

59. Moreover the concept of gainful employment would be attracted provided employment is easily available. The Court cannot shut its eyes of extraordinary unemployment prevailing in the Country. The people having high qualifications are searching menial employment having limited employment avenues. In such circumstances to suggest that a dismissed employees could have got a gainful employment is nothing but a day dreaming.

60. This aspect can be looked into from another different angle. In these days of extraordinary unemployment it is inconceivable to think that dismissed or removed employee may get easily an alternative employment. Merely because he has been able to survive all through, it cannot be conceived that he was in gainful employment during all this periods. We do not know whether he survived at the charity or support extended by his relatives, friends, neighbour or by selling his household goods or spending his savings or losing ornaments of his wife or that he survive by incurring debt in the hope of getting success one day in the case challenging order of punishment and then to discharge debt liability.

63. It is in these facts and circumstances and considering the various aspects of the matter, this Court is of considered view that dismissal of petitioner from service having been found wholly illegal, and it is also having been seen that he was denied work on the post in question by employer in a wholly illegal manner, petitioner should be given relief of reinstatement with benefit of continuity of service with all consequential benefits including arrears of salary. This would be in consonance with the principle that an employee has no right to work but only right to claim salary. In absence of anything to show that employee himself was unwilling to work, principle of "No Work No Pay' ought not to be applied in such a case."

27. Lastly in the case of **Govind Lal Srivastava vs. State of U.P. (2009) 2 UPLBEC 1864**, this Court has held as under:-

"Similarly, with reference to the judgment in the case of Sunder v. Union of India and others, 2005 (4) AWC 3859-A and in the case of R. K. Singh v. Director/Appointing Authority and another (2001) 2 UPLBEC 1282 : 2001 (3) AWC 1964, the petitioner has contended that he is entitled to full back salary for the period he has been kept out of employment because of illegal order of the respondent authorities."

28. Hon'ble the Apex Court in the case of **Maharashtra vs. Reshma Ramesh Meher & another (2008) 8**

SCC 664 in paragraph no.24 held as under:-

"It is true that once the order of termination of service of an employee is set aside, ordinarily the relief of reinstatement is available to him. However, the entitlement of an employee to get reinstated does not necessarily result in payment of full or partial backwages, which is independent of reinstatement. While dealing with the prayer of back-wages, factual scenario, equity and good conscious, a number of other factors, like the manner of selection; nature of appointment; the period for which the employee has worked with the employer etc.; have to be kept in view. All these factors and circumstances are illustrative and no precise or abstract formula can be laid down as to under what circumstances full or partial back wages should be awarded. It depends upon the facts and circumstances of the each case."

29. Hon'ble the Surpreme Court in the case of **Chairman Food Corporation of India vs. Sudarsan Das (2007) 14 SCC 766** held that the relief for giving a back wages be granted to an employee after he has been re-instated in service and have claimed back wages after 13 years from the date of reinstatement.

30. Hon'ble the Supreme Court in the case of **J. K. Synthetics Ltd. vs. K. P. Agrawal & Another (2007) 2 SCC 433** in paragraph nos.15 to 18 held as under:-

" 15. But the manner in which 'back-wages' is viewed, has undergone a significant change in the last two decades. They are no longer considered to be an automatic or natural consequence of reinstatement. We may refer to the latest of a series of decisions on this question. In U.P. State Brassware Corpn. Ltd. vs Udai Narain Pandey [2006 (1) SCC 479], this Court following Allahabad Jal Sansthan vs. Daya Shankar Rai [2005 (5) SCC 124], and Kendriya Vidyalaya Sangathan vs. S. C. Sharma [2005 (2) SCC 363] held as follows :

"A person is not entitled to get something only because it would be lawful to do so. If that principle is applied, the functions of an Industrial Court shall lose much of their significance."

Although direction to pay full back wages on a declaration that the order of termination was invalid used to be the usual result, but now, with the passage of time, a pragmatic view of the matter is being taken by the courts realizing that an industry may not be compelled to pay to the workman for the period during which he apparently contributed little or nothing at all to it and/or for a period that was spent unproductively as a result whereof the employer would be compelled to go back to a situation which prevailed many years ago, namely, when the workman was retrenched. The changes (were) brought about by the subsequent decisions of the Supreme Court, probably having regard to the changes in the policy decisions of the Government in the wake of prevailing market economy, globalization, privatization and outsourcing, is evident.

No precise formula can be laid down as to under what circumstances payment of entire back wages should be allowed. Indisputably, it depends upon the facts

and circumstances of each case. It would, however, not be correct to contend that it is automatic. It should not be granted mechanically only because on technical grounds or otherwise an order of termination is found to be in contravention of the provisions of section 6- N of the U.P. Industrial Disputes Act. While granting relief, application of mind on the part of the Industrial Court is imperative. Payment of full back wages cannot therefore be the natural consequence. In General Manager, Haryana Roadways vs. Rudhan Singh [2005 (5) SCC 591], this Court observed :

"There is no rule of thumb that in every case where the Industrial Tribuanl gives a finding that the termination of service was in violation of Section 25-F of the Act, entire back wages should be awarded. A host of factors like the manner and method of selection and appointment i.e. whether after proper advertisement of the vacancy or inviting applications from the employment exchange, nature of appointment, namely, whether ad hoc, short term, daily wage, temporary or permanent in character, any special qualification required for the job and the like should be weighed and balanced in taking a decision regarding award of back wages. One of the important factors, which has to be taken into consideration, is the length of service, which the workman had rendered with the employer. If the workman has rendered a considerable period of service and his services are wrongfully terminated, he may be awarded full or partial back wages keeping in view the fact that at his age and the qualification possessed by him he may not be in a position to get another employment. However, where the total length of service rendered by a workman is very small, the award of back wages for the complete period i.e. from the date of termination till the date of the award, which our experience shows is often quite large, would be wholly inappropriate. Another important factor, which requires to be taken into consideration is the nature of employment. A regular service of permanent character cannot be compared to short or intermittent daily-wage employment though it may be for 240 days in a calendar year."

16. There has also been a noticeable shift in placing the burden of proof in regard to back wages. In Kendriya Vidyalaya Sangathan (supra), this Court held :

"When the question of determining the entitlement of a person to back wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim. In the instant case, the respondent had neither pleaded nor placed any material in that regard."

In **U.P. State Brassware Corpn. Ltd. (supra)**, this Court observed :

18. Coming back to back-wages, even if the court finds it necessary to award back-wages, the question will be whether back-wages should be awarded fully or only partially (and if so the percentage). That depends upon the facts and circumstances of each case. Any income received by the employee during the relevant period on account of alternative employment or business is a relevant factor to be taken note of while awarding backwages, in addition to the several factors mentioned in Rudhan Singh (supra) and Udai Narain Pandey

(supra). Therefore, it is necessary for the employee to plead that he was not gainfully employed from the date of his termination. While an employee cannot be asked to prove the negative, he has to at least assert on oath that he was neither employed nor engaged in any gainful business or venture and that he did not have any income. Then the burden will shift to the employer. But there is, however, no obligation on the terminated employee to search for or secure alternative employment. Be that as it may.

31. In the case of **A. P. SRTC & another vs. S. Narsagoud (2003) 2 SCC 212,** Hon'ble the Supreme Court while considering the matter in respect of the grant of back wages held that if it is found that when an employee remains unauthorizedly absent from duty, he cannot claim the relief and though he has been reinstated in service.

32. In the case of **Delhi Administration vs. Hira Lal (1999) 6 SCC 664 58,** Hon'ble the Supreme Court held that if a person approach for back wages after the considerable delay in the said matter from the date of reinstatement, he cannot claim the same at a belated stage.

33. After going through the various judgments cited at bar in respect of principal of "No Work No Pay", the admitted position which emerges out is that in none of the cases the effect of the provisions of Sub Rule (2) of Rule 54 or Sub Rule (4) of Rule 54 of the U.P. Fundamental Rules has been taken into consideration. Although, the said point has not been taken in pleadings by the parties in the instant matter, but as argument has been advanced in that regard, so I feel appropriate to adjudicate and decide the said issue.

34. Sub-rule 2 of Rule 54 of the Fundamental Rules provides that when the competent authority passes any order of reinstatement by setting aside the order of dismissal, removal or compulsory retirement by fully exonerating him from charges, the employee shall be entitled to full pay and allowances to which he would be entitled, had he not been dismissed, removed or compulsorily retired or suspended prior to such dismissal, removal or compulsory retirement as the case be, subject to the provisions of Sub-Rule 6 of Rule 54 provision to the said Sub-rule 2 also stipulate that if the proceedings instituted against the government servant is delayed due to reasons directly, attributable to the Government servant, the authority may pass an order after giving reasonable opportunity to the Government servant to make representation, determining the amount of such pay and allowances by taking into account the period of such delay.

35. Sub-rule 4 of Rule 54 of the Fundamental Rules provides that when the appellate or reviewing authority set aside the order of dismissal, removal or compulsory retirement of a Government servant solely on the ground of non-compliance with the requirements of Clause (1) or Clause (2) of Article 311 of the Constitution of India and no further inquiry is proposed to be held, the Government servant shall be paid such amount, not being the whole, of pay and allowances to which he would have been entitled, had he not been dismissed, removed or compulsory retired or suspended prior to such dismissal, removal or compulsory retirement, as the case may be, as the competent authority may determine after giving notice to the government servant of the

quantum proposed and after considering the representation, if any, submitted by the Government servant in that regard, subject to the provision of Sub-rule 5 and Sub-rule 7 of the said Rule.

36. In the instant case, the order of dismissal has been set aside taking a sympathetic view by the competent authority, so the provisions as provided under Sub Rule (2) of Rule 54 of the U.P. Fundamental Rules are not applicable, but the present case is governed by the provisions as provided under Sub-rule 4 of Rule 54 of the Fundamental Rules, the said sub rules is subject to the provisions of Sub-rule 5 and 7 of Rule 54.

37. Accordingly, the competent authority as per the said rule has to pass an order as to how the period of absence from duty to be treated for any specified purpose and in case the Government servant so desire, such authority may direct that the period of absence of duty preceding his dismissal from service shall be converted into leave of any kind due and admissible to the employee concerned because Sub-rule 5 of the Rule 54 also provides that in a case falling under Sub-rule 4, the period of absence from the duty preceding that dismissal from service shall not be treated as a period spent on duty, unless the competent authority passes a specific order as stated above.

38. In the case of **Devendra Pratap Narain Rai Sharma vs. State of U.P. and others 1962 Supp (1) SCR 315**, while considering the provisions as provided under Rule 54 of the Fundamental Rules as exits at the relevant point of time held as under:-

"The High Court in dealing with the appellant's claim to salary during the period of his suspension pending the earlier enquiry observed that there was no justification for "not granting the appellant his full pay" for the period after the date of the suit. But the counsel for the State of Uttar Pradesh asserted that it is open to the State, notwithstanding the direction, to award as remuneration to the appellant for the period for which he was under suspension any amount which on a reconsideration of the matter in the light of the relevant rules and after hearing the appellant the State Government considers just and proper. This power, counsel contends, arises by virtue of Rule 54 of the Fundamental Rules framed by the State Counsel says that it was because of this rule that the High Court directed the State Government to reconsider the matter in the light of the relevant rules."

39. And in the case of M. Gopalakrishna Naidu vs. State of Madhya Pradesh (1968) 1 SCR 355, Hon'nle Supreme Court in para 5 and 10 have held as under:-

"The first question which requires consideration is whether there was a duty on the competent authority to afford an opportunity to the appellant to show cause before that authority formed the opinion as to whether he was fully exonerated and whether his suspension was wholly justified. Under FR 54 where a government servant is reinstated, the authority has to consider and make a specific order (i) regarding pay and allowances payable to him for the period of his absence from duty and (ii) whether such period of absence should be treated as one spent on duty. The consideration of these questions depends on whether on the facts and circumstances of the case the government servant had been fully exonerated and in case of pension whether it was wholly unjustified. If the authority forms such an opinion the

government servant is entitled to full pay and allowances which he would have been entitled to had the order of dismissal, removal or suspension, as the case may be, not been passed. Where the authority cannot form such an opinion the government servant may be given such proportion of pay and allowances as the authority may prescribe. In the former case the period of absence from duty has to be treated as period spent on duty. But the authority has the power in suitable cases to direct that such period of absence shall be treated as period spent on duty in which case the government servant would be entitled to full pay and allowances.

"In our view, FR 54 contemplates a duty to act in accordance with the basic concept of justice and fair play. The authority therefore had to afford a reasonable opportunity to the appellant to show cause why clauses 3 and 5 should not be applied and that having not been done the order must be held to be invalid."

40. In the instant matter, from the perusal of the impugned order dated 25.4.2009, the position which emerges out is that the competent authority/opposite party no.4 has set aside the order of dismissal taking a sympathetic view with a direction that the petitioner is not entitled for any pay and allowances for the said period, without issuing any notice and without affording any opportunity to the writ petitioner to make a representation, further the competent authority also did not consider as to whether the said period of absence of duty preceding his termination can be converted into leave of any kind due or admissible to the writ petitioner as required under Sub-rule 4 or Rule 54 of the Fundamental Rules.

41. In view of the above said facts, the impugned order dated 25.4.2009 (Annexure No.1) passed by opposite party no.4/Sub Divisional Officer, Tehsil Sadar, District-Hardoi, so far as it directs that the writ petitioner is not entitled for any back wages while he re-instating him in service being contrary to the provisions of Sub-rule 4 of Rule 54 of the Fundamental Rules, thus, liable to be set aside.

42. For the foregoing reasons, impugned order dated 25.4.2009 (Annexure No.1) passed by opposite party no.4/Sub Divisional Officer, Tehsil Sadar, District-Hardoi is set aside and the matter is remanded back to the competent authority/opposite party no.3 to take fresh decision in the matter in accordance with the observations made herein above. The said exercise shall be completed by the said authority expeditiously, say, within a period of four months from the date of receiving a certified copy of this order.

With the above observation, the writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL- SIDE
DATED: ALLAHABAD 04.07.2013

BEFORE
THE HON'BLE S.C. AGARWAL, J.

Criminal Misc. Writ Petition No.3223 of 2013
along with
Application u/s 482 NO. 1020 of 2013
and
Criminal Misc. Writ Petition No. 6197 of 2013

Smt. Kalpana Gupta ...Petitioner
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri Dilip Gupta, Sri Krishna Agarwal

Counsel for the Respondents:
A.G.A., Sri S.N. Pandey, Sri Siddharth Singh
Sri Himanshu Pandey

Cr.P.C Section-401(2)- Revision before session Court-according to provision of section 399 provision of section 401(2) applicable-revision against order passed under section 203-rejecting complaint-before revision Court neither the accused persons impleaded nor any opportunity of hearing given-on remand-the Magistrate passed impugned summoning order-held-order of remand as well as summoning order set-a-side-with direction to session court after impleadment of petitioner on due notice decide revision-irrespective of facts whether writ or 482 application filed.

Held: Para-14
In the instant case, after dismissal of the complaint under section 203 Cr.P.C., the accused persons were neither impleaded in the revision nor any notice was given to them. They were not provided any opportunity of hearing by the revisional court and, therefore, revisional order dated 27.9.2012 is liable to be quashed. Since the revisional order ceases to exist, the subsequent summoning order dated 1.12.2012 passed by Chief Judicial Magistrate, Jhansi as well as order dated 3.4.2013 issuing non-bailable warrants do not survive and these orders are also liable to be quashed and the matter has to be remanded to the revisional court for a fresh decision in accordance with law after issuing notices to the accused persons.

Case Law discussed:
2009(1) JIC 419(SC); 2010(10) SCC 517.

(Delivered by Hon'ble S.C. Agarwal, J.)

1. Since all the three cases arise out of the same proceedings, as such, they are being disposed of by a common order.

2. For the sake of convenience, writ petition no.3223 of 2013 is treated as a leading case.

3. Heard Sri Dilip Kumar, learned counsel for the petitioners - Smt. Kalpana Gupta and Rakesh Gupta, Sri B.R.J. Pandey, learned counsel for the applicant - Anand Sharma in Application u/s 482 Cr.P.C., learned A.G.A. for the State as well as Sri Siddharth Singh, learned counsel for the complainant.

4. The aforesaid petitioners and the applicant are the accused in complaint case no. 9946 of 2010 under sections 420, 406, 409, 467, 477-A, 120-B IPC, P.S. Nawabad, District Jhansi (Vinay Bhushan Sood Vs. Rakesh Kumar Gupta and others) pending in the Court of Chief Judicial Magistrate, Jhansi. The allegations made in the complaint are not relevant for the disposal of the aforesaid three cases. Suffice it to say that the said complaint was dismissed under section 203 Cr.P.C. vide order dated 22.9.2011. Feeling aggrieved, the complaint - Vinay Bhushan Sood preferred criminal revision no.249 of 2011 before Sessions Judge, Jhansi, which was allowed vide judgment and order dated 27.9.2012 passed by Additional Sessions Judge / Special Judge (E.C. Act), Jhansi. The order dated 22.9.2011 passed by Chief Judicial Magistrate, Jhansi was set aside and the Magistrate was directed to reconsider the evidence available on record and to pass orders in accordance with law. The said revisional order dated 27.9.2012 is under challenge in writ petition no.3223 of 2013.

5. In pursuance of order dated 27.9.2012 passed by the revisional court, learned Chief Judicial Magistrate, Jhansi

vide order dated 1.12.2012 reconsidered the matter and summoned the accused Rakesh Kumar Gupta, Kalpana Gupta, Anand Sharma, N.S. Kushwaha and R.L. Garg to face trial under sections 420, 406, 409, 467, 477-A, 120-B IPC. The summoning order as well as the entire proceedings have been challenged by accused Anand Sharma by means of Application u/s 482 Cr.P.C. No.1020 of 2013.

6. The revisional order dated 27.9.2012 as well as summoning order dated 1.12.2012 along with order dated 3.4.2013 passed by Chief Judicial Magistrate, Jhansi issuing non-bailable warrant of arrest against accused persons have been challenged by accused Rakesh Kumar Gupta by means of writ petition no.6197 of 2013.

7. Learned counsel for the petitioners and the applicant submitted that after dismissal of the complaint under section 203 Cr.P.C., a valuable right accrued in favour of the petitioners and the applicant and revision was allowed by learned Additional Sessions Judge without issuing notices to the petitioners and the applicant and without giving them any opportunity of hearing. It was contended that the complainant had not even impleaded the petitioners and the applicant as opposite parties in the revision before the Sessions Judge and learned Additional Sessions Judge allowed the revision in violation of section 401 (2) Cr.P.C.

8. Learned A.G.A. as well as learned counsel for the complainant supported the impugned orders. It was submitted by learned counsel for the complainant that the petitioners as well as the applicant, in collusion with Bank officials, usurped the properties of the complainant. Since the accused persons were not summoned by the Magistrate, there was no necessity for impleading them as opposite parties in criminal revision no.249 of 2011, as they had no right of hearing and learned Addl. Sessions Judge rightly set aside the order passed by the Chief Judicial Magistrate, Jhansi dismissing the complaint under section 203 Cr.P.C. A preliminary objection was also raised that writ petition is not maintainable to challenge the summoning order passed by the Magistrate and the revisional order was challenged after 90 days without explaining the delay.

9. As far as the maintainability of the writ petitions is concerned, the revisional order has been challenged by the petitioners along with the consequential orders passed by the Magistrate. Writ petition is maintainable against the revisional order and, therefore, preliminary objection in this respect is not maintainable.

10. As far as question of delay is concerned, the petitioners had no knowledge regarding dismissal of the complaint as well as of the fact that revision filed by the complainant was allowed as no notice was issued to the petitioners and the applicant by the revisional court. The petitioners and the applicant came to know about the proceedings only after process was issued against them and, therefore, there is no question of any laches on the part of the petitioners and the applicant.

11. Section 401 (2) Cr.P.C. deals with the High Court's power of revision. Sub-section (2) provides that no order under this section shall be made to the prejudice of the accused or the other

person unless he has had an opportunity of being heard either by personally or by pleador in his defense. According to section 399 (2) Cr.P.C., provisions of section 402 Cr.P.C. shall apply to revisions before Sessions Judge also.

12. In **Raghu Raj Singh Rousha Vs. M/s. Shivam Sundaram Promoters Pvt. Ltd. & another, 2009 (1) JIC 419 (SC)**, the Apex Court held that once Magistrate had refused to exercise its jurisdiction under Section 156 (3) Cr.P.C., the opportunity of hearing is to be given to the accused in revisional proceedings by virtue to section 401 (2) Cr.P.C.

13. The aforesaid decision in **Raghu Raj Singh Rousha's** case again came into consideration of the Apex Court in **Manharibhai Muljibhai Kakadia & Another Vs. Shaileshbhai Mohanbhai Patel & Ors. 2012 (10) SCC 517** wherein the it was held that

"We are in complete agreement with the view expressed by this Court in P. Sundarrajan, Raghu Raj Singh Rousha and A. N. Santhanam. We hold, as it must be, that in a revision petition preferred by complainant before the High Court or the Sessions Judge challenging an order of the Magistrate dismissing the complaint under Section 203 of the Code at the stage under Section 200 or after following the process contemplated under Section 202 of the Code, the accused or a person who is suspected to have committed crime is entitled to hearing by the revisional court. In other words, where complaint has been dismissed by the Magistrate under Section 203 of the Code, upon challenge to the legality of the said order being laid by the complainant in a revision petition before the High Court or the Sessions Judge, the persons who are arraigned as accused in the complaint have a right to be heard in such revision petition. This is a plain requirement of Section 401(2) of the Code. If the revisional court overturns the order of the Magistrate dismissing the complaint and the complaint is restored to the file of the Magistrate and it is sent back for fresh consideration, the persons who are alleged in the complaint to have committed crime have, however, no right to participate in the proceedings nor they are entitled to any hearing of any sort whatsoever by the Magistrate until the consideration of the matter by the Magistrate for issuance of process. We answer the question accordingly. The judgments of the High Courts to the contrary are overruled."

14. In the instant case, after dismissal of the complaint under section 203 Cr.P.C., the accused persons were neither impleaded in the revision nor any notice was given to them. They were not provided any opportunity of hearing by the revisional court and, therefore, revisional order dated 27.9.2012 is liable to be quashed. Since the revisional order ceases to exist, the subsequent summoning order dated 1.12.2012 passed by Chief Judicial Magistrate, Jhansi as well as order dated 3.4.2013 issuing non-bailable warrants do not survive and these orders are also liable to be quashed and the matter has to be remanded to the revisional court for a fresh decision in accordance with law after issuing notices to the accused persons.

15. Both the writ petitions as well as the application u/s 482 Cr.P.C. are allowed.

16. Impugned orders dated 27.9.2012 passed by Additional Sessions

Judge Special Judge (E.C. Act), Jhansi in criminal revision no.249 of 2011, the consequential summoning order dated 1.12.2012 as well as order dated 3.4.2013 issuing non-bailable warrants against the accused persons passed by Chief Judicial Magistrate, Jhansi in complaint case no. 9946 of 2010 are quashed and the matter is remanded to learned Additional Sessions Judge / Special Judge (E.C. Act), Jhansi for a fresh decision. Learned Additional Sessions Judge shall direct the complainant to implead the accused persons in the revision and notices will be issued to them and the revision shall be disposed of in accordance with law after giving an opportunity of hearing to all the accused persons irrespective of the fact that they have filed writ petitions and application u/s 482 Cr.P.C. before this Court or not.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 12.07.2013

BEFORE
THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.

Service Single No. 4407 of 2008

Prabhu Dayal ...Petitioner
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri S.C. Verma, Sri Ajay Sharma
Sri Pradeep Singh

Counsel for the Respondents:
C.S.C., Sri Prashant Arora

U.P. Recognized & Basic School,(Junior High School)(Recruitment and Condition of Service of Ministerial Staff and Group 'D' Employees)Rules 1984- Rule 14 & 15- Payment of salary on post of junior clerk-admittedly no approval granted by Basic Education Officer as yet-hence no question of appointment-moreover as per Rule 14 selection Committee not properly constituted-in absence of export nominated by BEO-selection process and as well as appointment both illegal-petition dismissed-liberty to complete fresh selection process in accordance with law given within 3 month.

Held: Para-19 & 20

19. The presence of three members of the Selection Committee as envisaged under Rule 14 of the Service Rules is mandatory in nature. Presence or absence of either of the members of the Selection Committee may change the very colour of the selection, hence, I am of the considered opinion that in absence of specialist to be nominated by the District Basic Education Officer in the Selection Committee, any selection made by the such a Selection Committee cannot be termed to be legal and therefore, any recommendation made by such a Selection Committee cannot be legally permitted to be given effect to.

20. Further, any appointment based on the recommendation made by the Selection Committee can be made only once it is approved by the District Basic Education Officer as per requirement contained in Rule 15 (5) of the Service Rules. Appointment letter by the appointing authority can be issued under the direction of the District Basic Education Officer only once he accords his approval to the selection proceedings undertaken by the Selection Committee. Any deviation of the procedure laid down under Rule 15 of the Service Rules will not be in conformity with the requirement of the Rules, hence selection and appointment both will be vitiated.

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

1. Heard Sri Ajay Sharma, learned counsel for the petitioner, learned Standing Counsel for opposite party No.1 and Sri Prashant Arora, learned counsel appearing for District Basic Education Officer, Hardoi.

2. Under challenge in the instant writ petition is an order dated 31.10.2007, passed by the District Basic Education Officer, Hardoi whereby representation made by the petitioner for payment of salary on the post of clerk in Jan Shyogi Sardar Patel Junor High Court, Selapur, Hardoi (herein after referred to an 'Institution') has been rejected. The said order has been passed in compliance of the order dated 13.09.2007, passed in an earlier writ petition filed by the petitioner bearing Writ Petition No. 5478 (SS) of 2007, Prabhu Dayal Vs. State of U.P. and other.

3. Submission of learned counsel for the petitioner is that the petitioner's appointment on the post of clerk in the institution was made in accordance with rules and regarding the approval of his appointment, which was sought, the District Basic Education Officer sat tight over the matter and ultimately did not accord his approval, therefore, in terms of the provisions contained in Rule 15 (5) (iii) of the U.P. Recognised Basic Schools (Junior High Schools)(Recruitment & Conditions of Service of Ministerial Staff & Group 'D' Employees) Rules, 1984 (hereinafter referred to 'Service Rules'), it is a case of deemed approval of the selection and appointment of the petitioner, hence, he is entitled to be paid salary.

4. Learned counsel for the petitioner submits that on occurrence of substantive vacancy of clerk in the institution, the Management of the Institution made a request to the District Basic Education Officer by means of letter dated 16.2.2005 seeking his permission to publish advertisement for initiating selection process to fill up the said vacancy. The District Basic Education Officer in reply to the aforesaid letter 16.02.2005 appears to have intimated to the Management of the Institution that fresh appropriate proposal for filling up post in question be sent to him. Learned counsel for the petitioner thereafter submits that since no permission to advertise the post was being given and the work of the Institution was suffering as such, in the exigency of work, the Management of the Institution issued advertisement on 04.05.2006 inviting applications from eligible candidates to participate in the selection for the post of clerk and accordingly the selection was held on 13.06.2006 in which, as per evaluation made by the selection committee, name of the petitioner was kept at Sl. No. 3 in the order of merit. Learned counsel for the petitioner has submitted that a request was made to the District Basic Education Officer for according his approval to the appointment of the petitioner and for according financial sanction for payment of salary vide letter dated 19.06.2006. He further submits that on 09.08.2006, appointment order was issued pursuant to which petitioner submitted his joining in the Institution on 14.08.2006.

5. However, the District Basic Education Officer by means of order dated 05.09.2006 sent back the papers submitted by the Management of the Institution seeking approval of the selection/appointment of the petitioner stating therein the certain reasons.

6. Petitioner thereafter appears to have filed a writ petition bearing No. 5478 (SS) of 2007 which was finally disposed of by means of order dated 13.09.2007 directing the District Basic Education Officer, Hardoi to decide representation of the petitioner which was made by him in respect of his grievance pertaining to approval of his appointment and payment salary. In compliance of the aforesaid order of this Court dated 13.09.2007, the impugned order rejecting the claim of the petitioner has been passed by the District Basic Education Officer on 31.10.2007. It is this order dated 31.10.2007, passed by the District Basic Education Officer which has been assailed by the petitioner by way of filing instant writ petition.

7. As observed above, learned counsel for the petitioner has empathetically stated that it was a case of deemed approval as contemplated in Rule 15 (5) (iii) of the U.P. Recognised Basic Schools (Junior High Schools)(Recruitment & Conditions of Service of Ministerial Staff & Group 'D' Employees) Rules, 1984 and hence the rejection of claim of the peittioner by District Basic Education Officer is not justified.

8. Per contra, Sri Prashan Arora, learned counsel for District Basic Education Officer has categorically stated that the entire selection process adopted by the Management of the Institution was carried out in derogation and disregard of the provisions of the Service Rules in as much as the Selection Committee constituted for the purposes of making selection was not in terms of the provisions contained in Rule 14 of the Service Rules. Drawing attention of this Court to Rule 14 of the Service Rules, Sri Arora has stated that Selection Committee as contemplated under Rule 14 of the Service Rules is to consist of (1) Manager, (2) Head Master of the Institution concerned and (3) Specialist to be nominated by the District Basic Education Officer. He further stated that in the instant case Selection Committee, admittedly, did not have specialist nominated by the District Basic Education Officer as provided under Rule 14 of the Service Rules, hence any selection made by such a Selection Committee which admittedly was not constituted as per Service Rules cannot be permitted to be given effect to.

9. The aforesaid categorical assertion made by learned counsel for the District Basic Education Officer has not been denied by the learned cousnel for the petitioner. Thus, there is no dispute that Selection Committee which conducted the selection in which petitioner was recommended/appointed on the post in question did not consist of specialist to be nominated by the District Basic Education Officer.

10. Learned counsel for the petitioner, however, has stated that despite several requests made to the District Basic Education Officer specialist was not nominated by him and hence, Committee of Management of the Institution was left with no other option but to proceed with the selection in absence of specialist to be nominated by the District Basic Education Officer and hence in this view of the matter no fault can be found in the selection of the petitioner.

11. Having considered the respective arguments raised by the learned counsel appearing for the parties, two issues

which emerge for adjudication are that (a) as to whether in absence of specialist to be nominated by the District Basic Education Officer as member in the Selection Committee, selection in which the petitioner has been declared to be successful can be said to be lawful and (b) as to whether for the reason that decision of the District Basic Education Officer on the selection of the petitioner was not communicated within the time stipulated under the Rules, it was a case of deemed approval of the District Basic Education Officer and if so, whether the petitioner shall be entitled to be paid salary.

12. Service conditions including the appointment of non-teaching staff in a recognized Junior High School are governed by the Service Rules 1984. The Service Rules prescribes detailed procedure for selection and appointment. It further prescribes minimum qualification, eligibility of appointment, age, nationality, reservations and physical fitness etc. According to Rule 13 of the Service Rules, no vacancy can be filled in except after advertisement in at least one newspaper having adequate circulation in the locality and the intimation of such vacancy to the District Basic Education Officer.

13. Rule 14 of the Service Rules provides for constitution of Selection Committee which is as under:-

"**Selection Committee.-** The management shall constitute a selection committee consisting of :-

(1)Manager.

(2)Headmaster of the recognized school in which the appointment is to be made.

(3)A specialist nominated by the District Basic Education Officer who will be from amongst minority in respect of a school established and administered by a minority or from amongst Scheduled Castes in respect of any other school."

14. Rules 15, however, provides that Selection Committee shall, after interviewing such candidates, prepare a list containing the names of three candidates in order of preference who are found to be suitable for appointment and thereafter the list so prepared along with other relevant papers is required to be forwarded to the Committee of Management. The Management thereafter is required to send copy of select list to the District Basic Education Officer within one week from date of receipt of the papers from the Selection Committee.

15. Sub Rule (5) of Rule 15 of the Service Rules further provides that if the District Basic Education Officer is satisfied that the candidates recommended by the Selection Committee possess the minimum qualifications prescribed for the post and also that procedure laid down in the Service Rules for the selection has been followed, he is required to accord his approval to the recommendation made by the Selection Committee. Thereafter, the District Basic Education Officer is required to communicate his decision to the Management within two weeks from the date of receipt of the papers from the Management of the Institution. Thus, any selection in a recognized Junior High School on a clerical post or Group "D post can be given effect to only after approval of the District Basic Education Officer as per requirement of Sub-Rule (5) of Rule 15 of the Service Rules as mentioned above.

16. Rule 15 (5) (ii) of the Service Rules further provides that if the District Basic Education Officer is not satisfied , he shall return the papers to the Management with the direction that the matter shall be reconsidered by the Selection Committee. Rule 15 (5) (iii) of the Service Rules, hovever, further provides that in case District Basic Education Officer does not communicate his decision within one month from the date of receipt of the papers under Clause (4), he shall be deemed to have accorded approval to the recommendation made by the Selection Committee.

17. The first question for consideration is as to whether the Selection Committee, which conducted the selection in which petitioner has been declared successful, can be said to be appropriately or legally constituted.

18. From a perusal of the provisions contained in Rule 14 of the Service Rules quoted above, it is clear that Selection Committee is to consist of (1) Manager, (2) Headmaster and (3) Specialist to be nominated by the District Basic Education Officer. It may be noticed that Committee of Management may have in the instant case made request to the District Basic Education Officer to nominate specialist for the purposes of constitution of Selection Committee and the District Basic Education Officer may not have performed his obligation to nominate the specialist but in absence of specialist to be nominated by the District Basic Education Officer as a member of the Selection Committee, the constitution of the Selection Committee in the instant case cannot be said to be legal i.e. as per the provisions of Rule 14 of the Services Rules.

19. The presence of three members of the Selection Committee as envisaged under Rule 14 of the Service Rules is mandatory in nature. Presence or absence of either of the members of the Selection Committee may change the very colour of the selection, hence, I am of the considered opinion that in absence of specialist to be nominated by the District Basic Education Officer in the Selection Committee, any selection made by the such a Selection Committee cannot be termed to be legal and therefore, any recommendation made by such a Selection Committee cannot be legally permitted to be given effect to.

20. Further, any appointment based on the recommendation made by the Selection Committee can be made only once it is approved by the District Basic Education Officer as per requirement contained in Rule 15 (5) of the Service Rules. Appointment letter by the appointing authority can be issued under the direction of the District Basic Education Officer only once he accords his approval to the selection proceedings undertaken by the Selection Committee. Any deviation of the procedure laid down under Rule 15 of the Service Rules will not be in conformity with the requirement of the Rules, hence selection and appointment both will be vitiated.

21. In the instant case, there is no denial of the fact that District Basic Education Officer has not accorded his approval to the selection held by the Selection Committee and therefore, issuance of appointment letter in favour of petitioner on 09.08.2006 cannot be held to be lawful.

22. As far as the plea being taken by the learned counsel for the petitioner to

the effect that since the decision by the District Basic Education Officer on the papers sent by the Committee of Management relating to selection in which petitioner was declared successful, was not communicated to the Committee of Management of the Institution within one month from the date of receipt of papers by him, the selectee i.e. petitioner will be deemed to have been accorded approval by the District Basic Education Officer and as such the appointment of the petitioner cannot be faulted, it would suffice to say that aforesaid provision of deemed approval in case of non-communication of the decision of the District Basic Education Officer shall be applicable only once the selection has been held appropriately, lawfully and as per Rules.

23. Admittedly, in the instant case, the very constitution of the Selection Committee which held the selection in which petitioner was declared successful was not as per the provisions contained under Rule 14 of the Service Rules. Thus, the question to application of deeming fiction regarding deemed approval of the selection of the petitioner by District Basic Education Officer, in the instance case, does not arise at all.

24. In view of the aforesaid facts and circumstances of the case as also in light of the observations and discussions made above, the Court is of the considered opinion that selection and appointment of the petitioner cannot be held to be lawfull being in complete derogation of the provisions of the Service Rules. The writ petition, thus lacks merit and as such the same deserves to be dismissed.

25. Accordingly, writ petition is hereby dismissed.

26. However, it is directed that selection on the post of clerk in the Institution shall be held within a period of four months from the date a certified copy of this order is produced before the Committee of Management of the Institution as well as before the District Basic Education Officer, Hardoi. It is further directed that District Basic Education Officer shall nominate the specialist for the purposes of formation of Selection Committee as contemplated under Rule 14 of the U.P. Recognized Basic Schools (Junior High Schools)(Recruitment & Conditions of Service of Ministerial Staff & Group 'D' Employees) Rules 1984 within a period of one week from the date such a request is received by him from the Committee of Management. The Committee of Management shall advertise the post as per requirement of Rule 13 of the Services Rules simultaneously with moving its application to the District Basic Education Officer for nomination of the specialist for the purposes of formation of Selection Committee. After conclusion of formalities selection to the post in question will be completed within four months, as directed above.

27. At this juncture, Sri Prashant Arora, learned counsel for District Basis Education Officer has submitted that the State Government has issued a Government Order dated 15.03.2012 whereby fresh appointments have been prohibited.

28. A perusal of the Government Order dated 15.03.2012, however, reveals that such prohibition is not operative in case selection/appointment is to be made under the orders of this Court. Thus, so far as instant case is concerned, Government Order dated 15.03.2012 does not have any applicability.

ORIGINAL JURISDICTION
CIVIL- SIDE
DATED: ALLAHABAD 09.07.2013

BEFORE
THE HON'BLE KRISHNA MURARI, J.

Civil Misc. Contempt Application No.4930 of 2012

Vandhana Singh & Ors. ...Petitioner
Versus
Javed Usmani, Chief Secretary & Ors. ...Respondents

Counsel for the Petitioner:
Sri Subedar Mishra, Sri S.K. Mishra

Counsel for the Respondents:
Sri R.B. Pradhan(Addl. C.S.C.)

<u>Contempt of Court, 1971-Section12-</u> willful disobedience-petitioner working as project officer-after abolition of Scheme-on humanitarian ground-give appointment on post of L.T. Grade Teacher-writ petition decided by common judgment dated 05.04.2002-SLP against also dismissed-by further order government propose to give appointment on post of L.T. grade giving pay protection-objection that as per direction of Court pay protection as well status not given-held-if in compliance of judgment any order passed-can not be willful disobedience-validity of such order can be adjudged by writ court and not under contempt jurisdiction-application rejected.

<u>Held: Para-9</u>
In the present case, the direction issued by the Division Bench of this Court, affirmed by the Hon'ble Apex Court was to reconsider the feasibility of protection of pay and status of the applicants. On an analysis of the entire facts and circumstances as well as decision taken by the State Government in compliance of the order, this Court finds that the order passed by the Division Bench has been complied in letter and spirit and it cannot be said to be a merely eyewash in order to wriggle out of the contempt proceeding. In so far as the legality and merits of the order on various grounds urged on behalf of the applicants, it is not for this Court to enter into the same. Needless to say that in such a situation the remedy of the applicants lies by undertaking appropriate proceeding before appropriate forum.

(Delivered by Hon'ble Krishna Murari, J.)

1. Heard learned counsel for the applicants and learned Standing Counsel for the opposite parties.

2. This application under Section 12 of the Contempt of Courts Act has been filed alleging will disobedience of the judgment and order dated 5.4.2002 passed on writ petition no. 18619 of 2001 as well as leading writ petition no. 12879 of 2001 along with other connected writ petitions.

3. Undisputed facts are that a non-formal educational scheme was introduced by the Central Government in the year 1979-80 for imparting education to children in the age group 6 to 14 who either did not attend any school or left the studies before completing primary education. The scheme was implemented in the State of U.P. under the Director of Education (Basic), U.P. In order to successful run the scheme, certain posts including the post of Supervisor were created at various levels. Later on in the year 1987-88, the scheme was modified and it was given shape of a project and in order to meet the requirements of the project, which came to be known Non-formal Education Project, various posts including the post of Project Officer was created by the Government Order dated 30.3.1988. Since the project itself was temporary in nature, the Government Order visualized that all posts should be temporary and liable to be

abolished at any time without any prior information. The applicants claimed that they were selected and appointed on adhoc basis in 1989 under the pay scale 6500-10500. Subsequently, the scheme was not extended by the State Government and the applicants and various other similarly situated persons filed various writ petitions before this Court which were connected and decided vide judgment and order dated 5.4.2002 passed on leading writ petition no. 12879 of 2001. The writ petitions were allowed in part by passing the following order :

"Accordingly, the petitions succeed and are allowed in part. The impugned order 23.3.2001 is quashed. The matter is remitted to the State Government to reconsider the feasibility of protection of pay and status of the petitioners after taking into reckoning all the relevant factors stated in this judgement and if necessary to modify its order dated 24.3.2001 accordingly."

4. State Government went up in appeal before the Hon'ble Apex Court, which was registered as civil appeal no. 8658 of 2002. The appeal was dismissed by the Hon'ble Apex Court by making following observations :

"Having heard learned counsel for the parties and perused the impugned judgment, we are of the opinion that the direction by the High Court to the Government to consider the question of protection of pay and status of the writ petitioners in the light of the observations made in the impugned judgment, does not warrant our interference with the impugned judgment. Accordingly, the appeal is dismissed.

However, having regard to the fact that the issue is handing fire for over 10 years, we would request the authorities concerned to take a final decision in the matter, as expeditiously as practicable and in any case, not later than 6 months from the date of receipt of a copy of this order. "

5. After the dismissal of the appeal by the Hon'ble Apex Court, the applicants made representation to the opposite parties on 22.12.2011 and again sent a reminder on 16.7.2012. However, when no decision was taken they approached the Court by filing the instant contempt application under Section 12 of the Act. Vide order dated 29.10.2012 the opposite parties were put to notice giving an opportunity to comply with the order within a month, failing which they were required to appear personally before the Court.

6. Opposite party no. 3 Director of Education (Basic) filed an affidavit on 15.1.2013. In paragraph 7 of the affidavit, it has been stated that in compliance of the order a decision was taken at the level of the State Government on 27.9.2012 in consultation with the Finance Department, copy whereof has been annexed as annexure no. 1 to the affidavit. It has also been stated in paragraph 8 that representation made by the applicants was also disposed of by a separate order dated 4.12.2012 in the light of the decision already taken on 27.9.2012, copy of the said order has been annexed as annexure no. 2 to the affidavit. The decision taken on the representation by the opposite parties in the light of the judgment of this Court and affirmed by the Hon'ble Apex Court is as under :

" इस सम्बंध में शासन द्वारा माननीय उच्चतम न्यायालय में योजित की गयी विशेष अनुज्ञा याचिका संख्या 8658/2002 दिनांक 01 दिसम्बर, 20011 में दिए गये आदेशों के क्रम में पुर्नविचार करते हुए वित्त विभाग द्वारा की गयी टिप्पणी के प्रकाश में निम्नवत निर्णय लिया गया हैः–

परियोजना अधिकारी एवं सहायक परियोजना अधिकारी के पदो पर पदधारक क्रमशः वेतन रूपया 6500–10500 एवं 5000 से 8000 में तैनात थे। छठे वेतन आयोग के संदर्भ मेंइन वेतनमानों के समान्य पुनरीक्षण क्रमशः वेतन बैंड –2 रू0 9300 –34800 एवं ग्रेड वेतन रू0 4600 एवं वेतन बैंड –2 रू0 9300 –34800 एवं ग्रेड वेतन रू0 4200 होता है। इन पदधारको को क्रमशःवेतन बैड–2 9300–34800 एवं ग्रेड वेतन रूपया 4600 एवं वेतन बैड –2 रूपया 9300– 34800 ग्रेड वेतन रूपया 4200 के पदो पर तैनाती दिए जाने से उनके वेतन एवं एवं स्तर का संरक्षण (protection of pay and status) हो जाता है।"

7. A rejoinder affidavit has been filed stating that the decision taken by the State Government cannot be termed as compliance of the order of this Court as well as Hon'ble Apex Court in letter and spirit and the State Government has wrongly processed the matter and tried to create confusion. Certain judicial pronouncements have been referred in the rejoinder affidavit for the proposition of violation of the natural justice, concept of restitution and also the proposition that a conduct of a party assumes significance in moulding the reliefs and to do complete justice between the parties, all relevant aspect of the matter are to be considered. As a matter of fact, the averments in the rejoinder affidavit and thrust of the argument of the learned counsel for the applicants is to challenge the merits of decision taken by the State Government.

8. It is well settled that the legality and the merits of the order passed by an authority in compliance of the directions issued by the Court is not normally to be tested in contempt jurisdiction. It is only in the case where on the face of it, the compliance appears to be an eyewash and order passed by the court does not appear to be carried out in letter and spirit, the contempt court may test the order passed by the authority in order to satisfy itself whether there is actual compliance or it is merely an eyewash in order to avoid contempt proceeding.

9. In the present case, the direction issued by the Division Bench of this Court, affirmed by the Hon'ble Apex Court was to reconsider the feasibility of protection of pay and status of the applicants. On an analysis of the entire facts and circumstances as well as decision taken by the State Government in compliance of the order, this Court finds that the order passed by the Division Bench has been complied in letter and spirit and it cannot be said to be a merely eyewash in order to wriggle out of the contempt proceeding. In so far as the legality and merits of the order on various grounds urged on behalf of the applicants, it is not for this Court to enter into the same. Needless to say that in such a situation the remedy of the applicants lies by undertaking appropriate proceeding before appropriate forum.

10. Since the order passed by the Division Bench of this Court and affirmed by the Hon'ble Apex Court, in the opinion of the Court, stands complied with in letter and spirit, the contempt proceedings are not liable to be proceeded any further. Contempt notice accordingly stand discharged.

11. Let the contempt petition be consigned to record.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.05.2013

BEFORE
THE HON'BLE SAAED-UZ-ZAMAN SIDDIQI, J.

Service Single No.5189 of 1995

Jalaluddin Ansari ...Petitioner
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri S.K. Dixit, Sri Sanjay Kumar

Counsel for the Respondents:
C.S.C.

Constitution of India, Art. 226- Dismissal-after charge sheet-receiving reply-without fixing date-time and place for enquiry-without supplying enquiry report-without show cause notice-before inflicting major punishment-held clear violation of Natural Justice-considering already retirement direction issued to release 50% arrears of salary and other pensionery benefits-treating petitioner in continuous service.

Held: Para-16 & 17
16. In view of the above, I am of the considered opinion that the departmental enquiry conducted against the petitioner, on the basis of which, the punishment of dismissal from service was awarded, was not held in accordance with law as propounded by the Hon'ble Apex Court as well as this Court as discussed above. There is clear violation of rules of natural justice.

17. In view of the discussions made above writ petition is allowed. The dismissal of the petitioner is set aside. The petitioner was of the age of 49 years as mentioned in the writ petition when this writ petition was filed in the year 1995. He must have attained the age of superannuation about 9 years back. I do not find it proper case where liberty can be given for initiating fresh enquiry. I accordingly direct that the petitioner shall be paid all the retiral dues and 50 per cent salary for the period he remained dismissed from the service till the date of superannuation within 90 days from the date of production of a certified copy of this order. While holding so I rely upon the law laid down by the Hon'ble Apex Court in the case of Life Insurance Corporation of India and another v. Ram Pal Singh Bisen, (2010) 4 SCC 491 and a Division Bench of this Court in Ambika Prasad Srivastava v. State Public Services Tribunal, Lucknow and others [2004 (22) LCD 770].

Case Law discussed:
[2008(26) LCD 1522]; [2003 (21)LCD 610; (2006) 5 SCC 88; (2002) 7 SCC 142; 1983 (1) LCD 169; 1984 (2) LCD 396; (2001) 1 UPLBEC 331; 2003 (21) LCD 610; [2011 (29) LCD 832]; (2010) 4 SCC 491; [2004 (22) LCD 770]

(Delivered by Hon'ble Saeed-Uz-Zaman Siddiqi, J.)

1. By means of the instant writ petition under Article 226 of the Constitution of India, the petitioner has sought for a writ in the nature of certiorari quashing the order of dismissal dated 8.11.1995 and writ in the nature of mandamus commanding the opposite parties not to give effect to the impugned order and reinstate the petitioner in service with effect from 8.11.1995, pay him salary and all other consequential benefits together with 12 per cent interest.

2. Brief facts leading to filing of instant writ petition are that the petitioner was posted as Assistant Agricultural Inspector at Tarabganj, District Gonda in the year 1984 and he was on sanctioned leave with effect from 14.10.1984 till 21.10.1984. In the meantime, the petitioner was attached to the office and one Kameshwar Singh posted at his place who took charge of godown where fertilizer was stored. In the absence of the

petitioner stock was checked and found short and an FIR was lodged against the petitioner and criminal proceedings were initiated. The departmental proceedings were initiated on the ground of alleged embezzlement and the petitioner was placed under suspension by opposite party no.2. The petitioner filed writ petition no.3549 (SS) of 1986 which was finally disposed of vide order dated 2.6.1986 to the following effect:-

"APPLICATION FOR STAY
LUCKNOW DATED: 2.6.1986.
Hon'ble D.S.Bajpai, J.

Heard learned counsel for the petitioner. The learned Standing counsel, in pursuance to my order dated 26th May, 1986 has not been in a position to indicate or bring on record any thing to indicate the progress of the disciplinary proceedings in pursuance of the suspension order dated 13th November, 1984. In this view of the matter, the suspension order appears on the face of it to be a penal and cannot be sustained for a long time, serve in the instant case a period of about 18 months has passed. The order of suspension dated 13th November, 1984 is accordingly, suspended and it is directed that the petitioner shall be permitted to perform his duties and get his full salary. The Authorities concerned shall be at liberty to proceed with the disciplinary proceedings in case they feel that this is any material against the petitioner.

sd/-D.S.Bajpai,
2.6.1986."

3. Subsequently charge sheet was submitted by opposite party no.2 on 7.1.1986 to which reply was submitted by the petitioner on 8.8.1988, but the same was not considered by the opposite parties and a show cause notice was issued to the petitioner by which the alleged amount of embezzlement was increased from Rs.2,64,656.21 paise to Rs.3,29,998.99 paise, contained in Annexure No.13 to the writ petition. A supplementary charge sheet dated 29.09.1989 was also served upon the petitioner. The petitioner filed a writ petition, in which following order was passed on 19.11.1993:-

"Lucknow Dated:19.11.1993.

Hon'ble Mrs. Smt. Shobha Dikshit, J.

Learned Standing Counsel accepts notice and prays for time to seek instructions or file counter affidavit he is allowed ten days for the purpose. List on 6.12.1993 when the learned counsel will inform as to whether any final order have been passed or not as also the state of Criminal Trial pending against him."

sd/- Smt. S.Dikshit.
19.11.1993."

4. The opposite party no.2 passed dismissal order in an arbitrary manner, without application of mind and no opportunity was afforded to the petitioner to defend him with mala fide intention which is violative of Articles 14 and 16 of the Constitution of India and principles of natural justice. The copy of report of enquiry officer was not provided to the petitioner. The opposite parties did not permit the petitioner to cross examine the witnesses though several representations were moved which are still pending. Through amendment the petitioner added para nos.24 (a) to 24 (z) and para nos.24 (aa) to 24(j). Grounds and prayer clause were also amended. Pleadings have been exchanged.

5. Heard learned counsel for both the parties and perused the records.

6. Admittedly, the petitioner was employee of the opposite parties and during his absence the stock of fertilizer were checked and embezzlement as detected for which FIR was lodged against the petitioner and departmental enquiry was initiated. The petitioner was placed under suspension which was revoked after the indulgence of this court, as mentioned above. The order passed by opposite party no.2, contained as Annexure No.1 shows that the petitioner made requests to the enquiry officer for cross examination of witnesses but the petitioner did not submit the list of questions to be asked to the witnesses and, as such no evidence was taken by the enquiry officer during the course of enquiry.

7. It was argued by learned counsel for the petitioner Sri Sanjay Kumar that no evidence whatsoever was available with the enquiry officer to proceed with the enquiry to which learned Standing Counsel prayed for placing the file of enquiry report before this court which was ultimately placed and after perusal of the original file of the enquiry report learned Standing Counsel conceded that no evidence whatsoever was taken in this enquiry. The report of enquiry officer mentions that the petitioner was informed that he may submit a list of documents which he wants to peruse to which the petitioner sought 15 days time but he did not appear. Ultimately, the petitioner submitted his written statement to the charge sheet dated 8.8.1988 in which it was mentioned that the evidence upon which the charge is based have not been mentioned in the charge sheet and he wishes to cross-examine 14 officers/officials. This enquiry report also mentions that the relevant documents and evidence are deposited in the court where criminal case is pending and he may peruse the records in the learned Court concerned. The enquiry report also mentions that the petitioner was asked to furnish the addresses of 14 person to whom he wishes to cross-examine and submit the list of questions but the petitioner did not reply which shows that the petitioner is sticking to his earlier stand and he is delaying the disposal of enquiry on the pretext of cross-examining the witnesses. During the course of enquiry several enquiry officers were changed which finds place in the report itself, which also mentions that several other embezzlement were also considered by the enquiry officer. Again the petitioner moved an application dated 7.2.1990 for cross-examining 14 officers/officials but he did not submit list of questions and addresses of those employees. In view of these facts the petitioner was held guilty. The enquiry report is very exhaustive but no relevant fact in the eye of law as required by rules of natural justice has been mentioned in the enquiry report which is vertually consists of rigmarole.

8. The proved facts as set out are that the enquiry officer has held the petitioner guilty on the basis of charge sheet alone without perusing any evidence and without affording opportunity to the petitioner of being heard. The specific plea is that the petitioner was on sanctioned leave from 14.10.1984 to 21.10.1984. During the period of petitioner's absence why the stock was unlocked by breaking the lock, inventory was prepared have not been considered by

the enquiry officer, at all. Had there been any emergecy for breaking lock and checking the stock which was, as per opposite parties, in the custody of the petitioner, he should have been given a notice that the petitioner has to appear on such and such date for stock checking and in case of his default the locks could have been broken and material could have been checked. Mere filing of FIR and prosecution in a Court of law cannot be made basis of holding a government servant guilty. The enquiry officer has not at all considered as to why the lock was broken on 23.10.1984 in the presence of Magistrate and officers. It is well within the knowledge of the opposite parties as to who were present at the time of breaking the lock, preparing inventory etc. but in spite of this the opposite parties are persistently directing the petitioner to furnish the addresses of the employees to whom he wants to cross-examine. It was incumbent upon the enquiry officer to have cross-examine all the 14 employees who are witnesses to the episode and have got the inventory and all other documents prepared, proved legally and the petitioner should have been afforded opportunity to cross-examine them. Without any such evidence the petitioner has been held guilty which is violative of rules of rules of natural justice. This court is repeatedly pressing the legal position as settled by various Courts and Hon'ble Apex Court. It was obligatory on the part of the opposite parties to have proved the charges which were leveled against the petitioner but as no witness was examined by the department to prove the charges, the impugned dismissal order deserves to be quashed.

9. In **Parasu Ram Singh v. Secretary of Agriculture, U.P., Lucknow and Others, [2008 (26) LCD 1522],** Division Bench of this Court has held as under:-

"This Court has already held that after the charge sheet is given to a delinquent employee an oral enquiry is must, whether the employee requests for it or not. The record which has been produced before us reveals that after submission of reply to the charge sheet, no date or time was fixed by the Enquiry Officer for recording of evidence of the witnesses on behalf of the Department to prove the charges as also for the defence witnesses for holding the enquiry. We are of the view that the petitioner was not given proper opportunity of hearing and no oral enquiry as required by law was held."

10. The Hon'ble Apex Court in the case of **Radhey Kant Khare Vs. U.P. Cooperative Sugar Factories Federation Ltd. reported in [2003 (21) LCD 610]** has also held as under:-

"8. After a charge sheet is given to the employee an oral enquiry is a must, whether the employee requests for it or not. Hence a notice should be issued to him indicating him the date, time and place of the enquiry. On that date the oral and documentary evidence against the employee should first be led in his presence vide A.C.C. Ltd. v. Their Workmen (1963) II LLJ 396 (SC). Ordinarily, if the employee is examined first it is illegal vide Anand Joshi v. MSFC 1991 LIC 1666 Bom., S.D. Sharma v. Trade Fair Authority of India 1985 (II) LLJ 193, Central Railway v. Raghubir Saran 1983 (II) LLJ 26. No doubt in certain exceptional cases the employee may be asked to lead evidence first, vide Firestone Tyre and Rubber Co.

Ltd. v. Their Workmen AIR 1968 SC 236, but ordinarily the rule is that first the employer must adduce his evidence. The reason for this principle is that the charge sheeted employee should not only know the charges against him but should also know the evidence against him so that he can properly reply to the same. Where no witnesses were examined and no exhibit or record is made but straightaway the employee was asked to produce his evidence and documents in support of his case it is illegal vide P.C. Thomas v. Mutholi Co-operative Society Ltd. 1978 LIC 1428 Ker, and Meenglas Tea Estate v. Their Workmen AIR 1963 SC 1719."

In **Suresh Chandra Srivastava v. State of U.P. and Others, [2008 (26) LCD 461**], a **Division Bench of this Court has relied upon the law laid down by the Hon'ble Apex Court in M.V. Bijlani v. Union of India and Others (2006) 5 SCC 88, Sher Bahadur v. Union of India and Others (2002) 7 SCC 142, B.P. Chaurasia v. State of U.P and Others 1983 (1) LCD 169, Onkar Singh v. State of U.P. and Others 1984 (2) LCD 396, Hardwari Lal v. State of U.P. and Others (2001) 1 UPLBEC 331 and Radhey Kant Khare v. U.P. Cooperative Sugar Factories Federation Ltd. 2003 (21) LCD 610.** In Suresh Chandra's case this Court has held as under:-

"....it is evident that according to the law settled by Hon'ble the Apex Court, it is always incumbent upon the Enquiry Officer to record oral evidence with liberty to the delinquent employee to cross-examine such witnesses. After the evidence adducted by the Department to prove the charges, it is also necessary that the delinquent employee be given the opportunity to lead evidence in defence. In the case of Radhey Kant Khare (Supra) after considering various pronouncements of Hon'ble the Apex Court and this Court, a Division Bench of this Court has held that after charge sheet is given to an employee, oral enquiry is must. It is immaterial whether the employee makes request for it or not. Meaning thereby, whether an employee submits reply to the charge sheet or not, or even if an employee submits reply to the charge sheet, it is always incumbent upon the Enquiry Officer to record oral evidence in the presence of the delinquent employee. In case, the charged employee is not present or does not cooperate with the enquiry proceedings, even then it is necessary for the Enquiry Officer to record the statement of the witnesses orally by proceeding ex parte.

12. In **Abdul Salam v. State of U.P. and Others [2011 (29) LCD 832**], a Division Bench of this Court has relied upon the law as under:-

"1. 2010 (2) SCC, page 772, State of Uttar Pradesh & others Vs. Saroj Kumar Sinha and others.

2. 2009(1) SCC (L&S) page 394, Union of India & others Vs. Prakash Kumar Tandon and others.

3. 2009 (1) SCC (L&S) page 398, Roop Singh Negi Vs. Punjab National Bank.

4. 2009 LCD, page 990(D/B), Lucknow Kshetriya Grameen Bank Vs. Devendra Kumar Upadhyay and others.

5. 2008 LCD, page 1298 (D/B), Smt. Rajwati Sharma Versus U.P. State & others.

6. 2005 LCD page 495 (D/B), Govind Lal Srivastava versus State of U.P. and others.

7. 2004 LCD, page 770 (D/B), Ambika Prasad Srivastava Versus State Public Services Tribunal and others.

8. 2001 LCD, page 168 (D/B), Subodh Kumar Trivedi Versus State of U.P. and others."

and held as under:-

"Normally, the evidence by the department is required to be led first to prove the charges wherein the delinquent is also allowed to participate, who can cross-examine the witnesses, with opportunity of adducing the evidence either in rebuttal or for disproving the charges. It is thereafter that the enquiry officer has to submit its report either saying that any of the charges stand proved or not. There has to be corroborating evidence to prove the charge and without any material being placed by the department to substantiate the documentary evidence, the charge can not be found to be proved. There has to be a corroboration of facts from the documents on record and if any report is also being relied upon, the said report is also required to be authenticated by the person who has submitted the report, therefore, for this purpose the oral enquiry is required to be held for proving the charges."

13. In **State of Uttar Pradesh and others v. Saroj Kumar Sinha (supra)** the Hon'ble Apex Court has observed that under Rule 7 (x), it is provided as under:-

"(x) Where the charged Government servant does not appear on the date fixed in the inquiry or at any stage of the proceeding in spite of the service of the notice on him or having knowledge of the date, the Inquiry Officer shall proceed with the inquiry ex parte. In such a case the Inquiry Officer shall record the statement of witnesses mentioned in the charge- sheet in absence of the charged Government servant."

27. A bare perusal of the aforesaid sub-Rule shows that when the respondent had failed to submit the explanation to the charge sheet it was incumbent upon the inquiry officer to fix a date for his appearance in the inquiry. It is only in a case when the Government servant despite notice of the date fixed failed to appear that the enquiry officer can proceed with the inquiry ex parte. Even in such circumstances it is incumbent on the enquiry officer to record the statement of witnesses mentioned in the charge sheet. Since the Government servant is absent, he would clearly lose the benefit of cross examination of the witnesses. But nonetheless in order to establish the charges the department is required to produce the necessary evidence before the enquiry officer. This is so as to avoid the charge that the enquiry officer has acted as a prosecutor as well as a judge.

28. An enquiry officer acting as a quasi judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/disciplinary authority/ Government. His function is to examine the evidence presented by the department, even in the absence of the delinquent official to see as to whether the unrebutted evidence is sufficient to hold that the charges are proved. In the present case the aforesaid procedure has not been observed. Since no oral evidence has been examined the documents have not been proved, and could not have been taken into consideration to conclude that the charges have been proved against the respondents."

14. In **Abdul Salam's case (supra)** Division Bench of this court has also held as under:-

"15. The principles of natural justice demand that an application for summoning a witness by the delinquent officer should be considered by the enquiry officer. It was obligatory on the part of the enquiry officer to pass an order in the said application. He could not refuse to consider the same. It is not for the Railway Administration to contend that it is for them to consider as to whether any witness should be examined by it or not. It was for the enquiry officer to take a decision thereupon. A disciplinary proceeding must be fairly conducted. An enquiry officer is a quasi-judicial authority. He, therefore, must perform his functions fairly and reasonably which is even otherwise the requirement of the principles of natural justice."

In the case of Roop Singh Negi Versus Punjab National Bank, while emphasizing the importance of principles of natural justice in the matter of departmental enquiry, the Hon'ble Apex Court has observed as under:

"14. Indisputably, a departmental proceeding is a quasi judicial proceeding. The Enquiry Officer performs a quasi judicial function. The charges levelled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the Investigating Officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the Enquiry Officer on the FIR which could not have been treated as evidence.

15.We have noticed here-in-before that the only basic evidence whereupon reliance has been placed by the Enquiry Officer was the purported confession made by the appellant before the police. According to the appellant, he was forced to sign on the said confession, as he was tortured in the police station. Appellant being an employee of the bank, the said confession should have been proved. Some evidence should have been brought on record to show that he had indulged in stealing the bank draft book. Admittedly, there was no direct evidence. Even there was no indirect evidence. The tenor of the report demonstrates that the Enquiry Officer had made up his mind to find him guilty as otherwise he would not have proceeded on the basis that the offence was committed in such a manner that no evidence was left."

In the case of Smt. Rajwati Sharma Versus U.P. State and others, a Division Bench of this Court, in which one of us (Justice Pradeep Kant) was a member, while emphasizing the need to hold a full fledge departmental enquiry even in case where the charged employee had admitted in his statement the loss of certain files which were in his possession, observed as under:

"12.The employee in the instant case, only made a statement of fact, in his reply, about the loss of 14 files. Since the files were misplaced,there could not have been any denial of the said fact by any

person, including the charged employee. The question was, whether Shri Krishna was responsible for the loss of file or that he was guilty of any misconduct. It is also possible that in case, enquiry had been held, circumstances might have come to the fore, establishing, that even though the files were misplaced which were supposed to be in the custody of the deceased employee but even then there was some valid defence or mitigating circumstances for not awarding of major punishment or on finding that no fault could be attributed to him, he might have been exonerated.

In the case of Govind Lal Srivastava versus State of U.P. and others, a Division Bench of this Court, in which one of us (Justice Pradeep Kant) was a member, has observed as under:

"12. It is cardinal principle of law that in a domestic enquiry the charges levelled against the delinquent officer have to be proved by the department itself, that too from the material on record and if necessary, by adducing evidence. In doing so, it is obligatory on the enquiry officer to give opportunity to the delinquent officer to controvert, rebut such evidence or to adduce such evidence, which may falsify or belie the case of the department. In nutshell the delinquent officer has a right to demolish the case of the department or prove his innocence, but in no case the delinquent officer is required to disprove the charges before they are put to proof by the enquiry officer through agency of the department. The letter issued by the erstwhile enquiry officer only says that the petitioner if intends to have a personal hearing, may appear on 20.10.1992 before him. It is difficult to understand as to what the enquiry officer meant by saying personal hearing, whether it included the right to adduce evidence, right of cross-examination and whether it also indicated that any witness would be examined on that date or documentary evidence, which is on record or the record would be looked into and in what respect personal hearing would be done. It is always essential in any proceedings where right of defence or onus of establishing a charge is involved, clear orders and intimation about the date, time or place and the purpose for which the date has been fixed, should be given by the officer, who is holding the enquiry. The delinquent would be hardly knowing as to what reply and what additional facts, he should mention before the enquiry officer, when charges are not being said to be proved and even before the steps being taken for proving the charges. It is only when the charges are sought to be proved that the delinquent has a right to controvert and rebut the same.

13. The procedure of domestic enquiry need not be detailed by us, but it is established principle of law that an enquiry commences when a charge sheet is issued, a reply is required to be submitted by the delinquent officer, the delinquent is at liberty to ask for the documents in case the documents are mentioned in the charge sheet but the copies of the same have not been annexed with the charge sheet, or the documents, on which the charges are likely to be proved and in case copy of some documents can not be supplied then opportunity of inspection of such documents has to be provided. Opportunity of inspection of documents should be provided in a manner so that the charged officer has free access to the record and for which date, time and place

has to be fixed. It is only after the aforesaid stages are over, the reply is submitted by the delinquent officer and on receipt of the reply, if the enquiry officer finds that the charges are denied or in other words, they are not accepted, obligation lies upon the enquiry officer to proceed with the enquiry. Even mere non-submission of the reply to the charge sheet or not asking for opportunity of producing witness or evidence would not in itself be sufficient to hold that opportunity was not availed by the delinquent, though given. The enquiry officer, on the date, time and place which is to be fixed by him and intimated to the delinquent officer, has to proceed with the enquiry by first asking the department to prove the charges by adducing such evidence, which may be necessary for the purpose and reply upon the documents, which may be relevant and thereafter has to afford an opportunity to the delinquent to cross-examine the witnesses so adduced or to produce any witness or adduce any evidence in rebuttal. The delinquent officer also has a right to show to the enquiry officer that the evidence, which is sought to be relied upon, is either in admissible or hearsay or could not be relied upon for any other valid reason. Of course, if enquiry officer, after receipt of the reply fixes date, time and place and informs the same to the delinquent for appearing and participating in the enquiry but the delinquent even then does not appear, the enquiry can be proceeded in his absence, which may though be an ex-parte enquiry but would not be vitiated on the ground that opportunity was not given or if opportunity was given the same was not availed of, by the delinquent. In a case like this where ex-parte enquiry is to be conducted, the enquiry officer is not still absolved of getting the charges proved from the evidence/material on record.

In the case of Ambika Prasad Srivastava versus State Public Services Tribunal, Lucknow and others, the Division Bench of this Court, in which one of us (Justice Pradeep Kant) was a member, while emphasizing the importance of principles of natural justice in the departmental enquiry held as under:

"In view of the admitted fact that no opportunity was afforded to the petitioner to participate in the enquiry and he was not informed about the date, time and place for holding the enquiry nor was supplied the documents which were demanded by him, and the enquiry report was based simply on the reply submitted by the petitioner, we find that the view taken by the Tribunal otherwise, is palpably erroneous. The entire proceedings are vitiated for violation of principles of natural justice and not affording opportunity to the petitioner."

15. It is not such a case where no oral evidence was required as the guilt could not have been proved by relying upon the documents alone. If the witnesses were not required to be examined in support of the charges, even then it was incumbent upon the enquiry officer to have fixed the date, time and place after submission of the reply to the charge-sheet by the delinquent for holding oral enquiry in order to appreciate the evidences filed in support of the charges in presence of the delinquent employee and call upon the department to prove the alleged charges. There is no denial about the fact that such exercise was not done by the enquiry officer in the present case.

16. In view of the above, I am of the considered opinion that the departmental enquiry conducted against the petitioner, on the basis of which, the punishment of dismissal from service was awarded, was not held in accordance with law as propounded by the Hon'ble Apex Court as well as this Court as discussed above. There is clear violation of rules of natural justice.

17. In view of the discussions made above writ petition is allowed. The dismissal of the petitioner is set aside. The petitioner was of the age of 49 years as mentioned in the writ petition when this writ petition was filed in the year 1995. He must have attained the age of superannuation about 9 years back. I do not find it proper case where liberty can be given for initiating fresh enquiry. I accordingly direct that the petitioner shall be paid all the retiral dues and 50 per cent salary for the period he remained dismissed from the service till the date of superannuation within 90 days from the date of production of a certified copy of this order. While holding so I rely upon the law laid down by the Hon'ble Apex Court in the case of **Life Insurance Corporation of India and another v. Ram Pal Singh Bisen, (2010) 4 SCC 491** and a Division Bench of this Court in **Ambika Prasad Srivastava v. State Public Services Tribunal, Lucknow and others [2004 (22) LCD 770].**
