ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.01.2013

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

Celeing No. - 1 of 2013

Raj Kumar and another ...Petitioner
Versus
Additional Commissioner (Administration) Gonda and Ors. ...Respondents

Counsel for the Petitioner:
Sri A.P.Singh Vishen

Counsel for the Respondents:
C.S.C.

Constitution of India, Article 226-practice and procedure-order passed in ceiling appeal dated 20.12.1976 not compiled with by Revenue Authority-petition filed-direction issued to District Magistrate to find out the ulterior motives of concerned revenue authority-denying implementation of final order-held-hazardous for democracy-direction issued to take appropriate action against guilty officer-implement the final order within 15 days-inform the court by action taken.

Held: Para-6

If a judicial or administrative authority moves with a slow motion while implementing its own orders and ensuring that the orders passed by it are implemented, such authorities lack judicial sense, which is of divine nature. In this case the order of the year 1976, which has been reiterated vide order dated 30.09.2009 has yet not been implemented. When an aggrieved person has come to this Court, which is not easily approachable or assessable for ordinary fellow citizens, it goes on to show that he must have approached the concerned authorities, but in vain. The District Magistrate has to find out as to what were the ulterior motives of the revenue authorities concerned, who have denied implementation of the orders of the final Court under the Act and compelled the petitioner to approach this Court.

Case Law discussed:
1980 AIR 1575; AIR 2006 SC 1975

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

1. Heard learned counsel for the petitioner as well as learned standing counsel and perused the record.

2. By means of this writ petition, petitioners have sought for a writ in the nature of mandamus, commanding opposite party nos. 2 and 3 to get implemented the order dated 20.12.1976, passed by District Judge, Gonda as well as order dated 3.9.2009, passed by the Additional Commissioner, Devi Patan Mandal, Gonda.

3. Brief facts of the case are that the petitioners were served with the notice under Section 10 (2) of U.P. Imposition of Ceiling on Land Holdings Act, 1960 (hereinafter referred to as the "Act"), which was ultimately settled vide judgment and order dated 20.12.1976 passed in Revenue Appeal no.82 of 1976, by the then District Judge, Gonda. By the impugned order the notice under Section 10 (2) of the Act was discharged, but the order was not implemented. The aggrieved petitioners applied to the Commissioner (Administration), Devi Patan Mandal, Gonda under Section 13(1) of the Act which was decided vide judgment and order dated 3.9.2009, by which the Revenue Authorities of District Gonda were directed to implement the

order passed by the then District Judge on 20.12.1976, contained as Annexure no.2. Feeling aggrieved by the inaction on the part of the opposite parties, the petitioners have knocked the door of this Court.

4. Learned Standing Counsel is also surprised 'how the orders of the final appellate courts are not being implemented' by the Revenue Authorities. As per request made by learned counsels for the parties the writ petition is disposed of finally.

5. It is further made clear that implementation, execution and enforcement of orders passed by judicial or administrative authorities is the essential point, turning point and crossing point of the entire constitutional system otherwise, the constitution of India would be reduced to a holy book, which is perfect in a moral sense, pure in heart and associated with the spirit of nationalism but hollow, unsound, unreal and groove in existence. The nation cannot survive unless its aims and objects are being and held to by the administrative mechanism which are tools to keep a nation alive. India is a fine democracy, as ample laws by which it is being called a "welfare state". Each and every authority and public servants are bound to keep their fingers tight on the nerve of the society so as to converting the Indian Democracy into a ridicule, into mockery. It is really pathetic that administrative authorities keep their fingers of the right hand on the political masters and spare fingers only on the left hand of the society, which is eroding nationalism, majesty of the State and dignity of a public servant. A nation cannot survive by serving few people. For survival of the nation it is necessary that instrument of State machinery must be vigilant and active enough to ensure that this country remains a welfare State and flourishes.

6. If a judicial or administrative authority moves with a slow motion while implementing its own orders and ensuring that the orders passed by it are implemented, such authorities lack judicial sense, which is of divine nature. In this case the order of the year 1976, which has been reiterated vide order dated 30.09.2009 has yet not been implemented. When an aggrieved person has come to this Court, which is not easily approachable or assessable for ordinary fellow citizens, it goes on to show that he must have approached the concerned authorities, but in vain. The District Magistrate has to find out as to what were the ulterior motives of the revenue authorities concerned, who have denied implementation of the orders of the final Court under the Act and compelled the petitioner to approach this Court. The agony faced by the petitioner can well be gauged by the observations made by the Hon'ble Supreme Court in ***Vishnu Awatar etc. v. Shiv Autar and others, reported in 1980 AIR 1575,*** has held as under:-

"After all, our District Courts are easier of access for litigants, and the High Courts, especially in large States like Uttar Pradesh, are 'untouchable' and 'unapproachable' for agrestic populations and even urban middle classes. Nor is there ground to distrust the District Judges. A hierarchy of courts built upon a heritage of disbelief in inferiors has an imperial flavour. If we suspect a Munsif and put a District Judge over him for everything he does, if we distrust a district Judge and vest the High Court with pervasive supervision, if we be skeptical

about the High Courts and watch meticulously over all their orders, the System will break down as its morale will crack up. A psychic communicable disease of suspicion, skepticism and servility cannot make for the health of the judicial system. If the Supreme Court has a super-Supreme Court above it, it is doubtful whether many of its verdicts will survive, judging by the frequency with which it differs from itself."

7. Recently, in ***Gurdev Kaur & others v. Kaki & others, AIR 2006 SC 1975***, the Hon'ble Apex Court has given a note of caution to such orders which are stigmatic on the justice delivery system in the mind of the public at large and has held; "*Judges must administer law according to the provisions of law. It is the bounden duty of Judges to discern legislative intention in the process of adjudication. Justice administered according to individual's whim, desire inclination and notice of justice would lead to confusion, disorder and chaos."*

8. Accordingly, writ petition is disposed of with a direction to the opposite parties to implement the order passed in Revenue Appeal No.82 of 1976 by District Judge, Gonda dated 20.12.1976 with thirty days from the date of production of a certified copy of this order. Learned District Magistrate concerned is further directed to hold an enquiry and find out as to why the petitioners were compelled to knock the door of this Court and he shall take effective action against the guilty and shall report to this Court within thirty days from the receipt of the copy of this order. The District Magistrate shall be officially answerable and personally responsible to this court for implementation of this order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.01.2013

BEFORE
THE HON'BLE DEVI PRASAD SINGH, J.
THE HON'BLE DR. SATISH CHANDRA, J.

Service Bench No. - 66 of 2013

Mahaveer Prasad Verma ...Petitioner
Versus
Central Administrative Tribunal Lucknow and others ...Respondents

Counsel for the Petitioner:
Sri Anoop Srivastava Ii

Counsel for the Respondents:
A.S.G.

Constitution of India, Article 226-petition against the order passed by Central Administrative Tribunal on ground after transfer of the successor/contemnor-new authority not brought on record-contempt not maintainable-application to recall the order rejected on ground of absence of provisions for review-held-Tribunal committed great error apparent on the face of record itself-the purpose of contempt is to punish the contemnor at the same time ensure the compliance of the direction also-if contemnor transferred-can not be discharged but shall be triable simultaneously with new successor-held-order passed by Tribunal quashed-necessary direction issued to consider the contempt application according with law.

Held: Para-9

In view of the above, the order dated 10.1.2012, seems to suffer from substantial illegality. The observations made by the Tribunal that contempt

proceeding cannot proceed against the incumbent who has already been transferred, is not sustainable.

Case Law discussed:

AIR 1966 SC 641; 1988 (14) ALR 706; 1995 (26) ALR 627; 1979 (5) ALR 168; 1998 (33) ALR 456; 1997 (88) RD 562; AIR 1970 SC 1273; 1987 (13) ALR 680; AIR 1964 SC 436; AIR 1965 SC 1457; AIR 1971 SC 1447; AIR 1975 SC 2277; 1997 SCC (L&S) 88; AIR 1999 SC 449; (2002) 10 SCC 471; JT 2010 (4) SC 35; 2010 (4) SCC 785

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

1. Heard learned counsel for the petitioner Sri Anoop Srivastava, Sri I.H. Farooqui, learned counsel for Union of India.

2. Since pure question of law is involved, Sri I. H. Farooqui, does not intend to file counter affidavit. Hence with the consent of parties counsel, we proceed to decide the writ petition at the admission stage.

3. Instant writ petition under Article 226 of the Constitution of India, has been preferred against the impugned order passed by Central Administrative Tribunal, rejecting the petitioner's application for review/recall of order dated 10.1.2012, passed in Civil Contempt Petition No.22/2009.

4. By the order dated 10.1.2012, the contempt petition filed by the petitioner, was dismissed in his absence on the ground that the petitioner respondent has not moved any application to bring on record the successor since the contemner was transferred. Tribunal noted that an application for recall of an order passed in a contempt proceeding, is not maintainable. So far as the finding of Tribunal that recall/review application is not maintainable, seems to be correct. Virtually, recalling of the order dated 10.1.2012, will amount to review of earlier decision was was passed with the finding on merit to the extent that successor officer has not been brought on record. Review/recall or appeal are the statutory remedies, vide **AIR 1966 SC 641, Harbhajan Singh v. Karam Singh and others, 1988 (14) ALR 706, Vijai Bahadur Vs. State of U.P., 1995 (26) ALR 627, Ram Jiwan Singh and others Vs. The District Inspector of Schools, Kanpur and others, 1979 (5) ALR 168, 1998 (33) ALR 456, New India Assurance Co. Ltd. Vs. Smt. Bimla Devi and others, 1997 (88) RD 562, Smt. Shivraji and others Vs. Dy. Director of Consolidation, Allahabad and others, AIR 1970 SC 1273, Patel Narshi Thakershi and others Vs. Pradyumansinghji Arjunsinghji, 1987 (13) ALR 680, Dr. (Smt.) Kuntesh Gupta Vs. Mgt. of Hindu Kanya Mahavidyalaya, Sitapur etc., AIR 1964 SC 436, Laxman Purushottam Pimputkar Vs. The State of Bombay and others, and AIR 1965 SC 1457, Patel Chunibhai Dajibha etc. Vs. Narayanrao Khanderao Jambekar and another.** Unless provided under the Act, no application for review/recall may be moved. The contempt of Courts Act, 1971 does not contain any provision for review of a judgment. Hence the impugned order dated 13.9.2012 does not seem to suffer from any impropriety or illegality.

5. However, the original order dated 10.1.2012, seems to suffer from substantial illegality. The proceeding under the contempt of Courts Act, 1971 (in short the Act), deals with the individual liability with regard to compliance of court's order. A person is accountable for non-compliance of a court's order, may be punished under Section 12 of the Act. Section 2 (b) defines civil contempt and Section 2 (c) defines criminal contempt. For convenience, Section 2 (b) and 2 (c) of the Act, are reproduced as under:-

Section 2 (b) and (c) of the Act:-

(b) "civil contempt" means wilful disobedience to any judgement, decree, direction, order, writ or other process of a court or wilful breach of an undertaking given to a court;

(c) "criminal contempt" means the publication (whether by words, spoken or written, or by signs, or by visible representation, or otherwise) of any matter or the doing of any other act whatsoever which--

(i) scandalizes or tends to scandalise, or lowers or tends to lower the authority of, any court, or

(ii) prejudices, or interferes or tends to interfere with the due course of any judicial proceeding , or

(iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner."

6. For civil contempt, a person may be liable to be punished under Section 12 of the Act. For convenience, Section 12 of the Act is reproduced as under:-

"12. Punishment for contempt of court-

(1) Save as otherwise expressly provided in this Act or in any other law, a contempt of court may be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both;

Provided that the accused may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the court.

Explanation - An apology shall not be rejected merely on the ground that it is qualified or conditional if the accused makes it bona fide.

(2) Notwithstanding anything contained in any law for the time being in force, no court shall impose a sentence in excess of that specified in sub section for any contempt either in respect of itself or of a court subordinate to it.

(3) Notwithstanding anything contained in this section, where a person is found guilty of a civil contempt, the court, if it considers that a fine will not meet the ends of justice and that a sentence of imprisonment is necessary shall, instead of sentencing him to simple imprisonment, direct that the he be detained in a civil prison for such period not exceeding six months as it may think fit.

(4) Where the person found guilty of contempt of court in respect of any undertaking given to a court is a company, every person who, at the time the contempt was committed, was in charge of, and was responsible to, the company for the conduct of business of the company, as well as the company, shall be deemed to be guilty of the contempt and the punishment may be enforced, with the leave of the court, by the detention in civil prison of each such person.

Provided that nothing contained in this sub section shall render any such person liable to such punishment if he proves that the contempt was committed without his knowledge or that he exercised all due diligence to prevent its commission.

(5) Notwithstanding anything contained in sub section (4) where the contempt of

court referred to therein has been committed by a company and it is provided that the contempt has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manger, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the be contempt and the punishment may be enforced, with the leave of the court, by the detention in civil prison of such director, manager, secretary or other officer.

Explanation - For the purpose of sub sections (4) and (5)-

(a) "company "means any body corporate and includes a firm or other association of individuals, and

(b) "director" in relation to a firm, means a partner in the firm."

7. Legislature to their wisdom, has provided that accused may be punished or may be exonerated by the court subject to establishment of charges on tendering apology to the satisfaction of the court. The definition clause (supra) as well as provisions contained under Section 12 of the Act, indicate the initiation of proceeding against a person who may be held liable for contempt of courts. In case prima facie a case is made out, appropriate court may issue notice to contemner and may be summoned. In case a notice is issued, then contemner shall not be deemed to be discharged from the contempt proceeding unless, he or she is held to be not guilty or otherwise discharged. Merely because an officer has been transferred during the pendency of contempt proceeding, he or she shall not be deemed to be discharged under the Act. Accordingly, only because the contemner was transferred, he shall not be deemed to be discharged. In case successor officer has not been brought on record, the contempt petition shall not become infructuous. The court should proceed against the original contemner who has been summoned on account of violation of order of the court. In case the contemner is found guilty, he may be punished.

8. The successor officer or the officer who has joined in place of the contemner, may be summoned in case sufficient material is brought on record and it is pointed out by the aggrieved person that the order of the court was brought to the notice of the successor officer and he or she, has also not complied with the court's order. Mere joining at the place of contemner, shall not prima facie make out a case to summon an officer. As held, in case attention of the successor officer is brought to the order passed by the court and he or she fails to comply with it, then court may summon and prosecute for contempt of court. In any case, the successor officer shall not substitute the original contemner but he or she shall be additionally tried under the Act for committing contempt of court along with original contemner.

9. In view of the above, the order dated 10.1.2012, seems to suffer from substantial illegality. The observations made by the Tribunal that contempt proceeding cannot proceed against the incumbent who has already been transferred, is not sustainable.

10. It is further added that while adjudicating the controversy under the Act, ordinarily, court has to look into the matter keeping in view the letter and spirit of the order which a litigant had prayed for compliance. In case court feels that order has been complied with, then while deciding a contempt proceeding, the finding should be recorded as to how and in what manner the contemner has complied with the order

passed by the court. Mere a statement that the order has been complied with substantially or otherwise, shall not be sufficient to fulfil the obligation under the Act. The order must the speaking and reasoned and not vague and non-speaking. From the order, litigant must understand as to how and on what ground, the court has dropped the contempt proceeding. The observations made by the Tribunal that the order has been sufficiently complied with, seems to be not sufficient being vague in nature.

11. Now, it is well settled principle of law that every order passed by quasi-judicial authority, must be speaking and reasoned vide, **K.R. Deb Vs. The Collector of Central Excise, Shillong, AIR 1971 SC 1447; State of Assam & Anr. Vs. J.N. Roy Biswas, AIR 1975 SC 2277; State of Punjab Vs. Kashmir Singh, 1997 SCC (L&S) 88; Union of India & Ors. Vs. P. Thayagarajan, AIR 1999 SC 449; and Union of India Vs. K.D. Pandey & Anr., (2002) 10 SCC 471; (JT 2010(4) SC 35, Assistant Commissioner, Commercial, Tax Department, Works, Contract and Leasing, Quota Vs. Shukla and Brothers, 2010 (4) SCC 785, CCT Vs. Shukla and Brothers.**

12. In the case of Shukla and Brothers (supra), their lordships held that the reason is the very life of law. When the reason of a law once ceases, the law itself generally ceases. Such is the significance of reasoning in any rule of law. Giving reasons furthers the cause of justice as well as avoids uncertainty, to quote:-

"Reasons are the soul of orders. Non-recording of reasons could lead to dual infirmities; firstly, it may cause prejudice to the affected party and secondly, more particularly, hamper the proper administration of justice. These principle are not only applicable to administrative or executive actions, but they apply with equal force and, in fact, with a greater degree of precision to judicial pronouncements."

The concept of reasoned judgement has become an indispensable part of the basic rule of law ans , in fact, is a mandatory requirement of the procedural law."

13. In one other case, reported in **JT (2010 (4) SC 35: Assistant Commissioner, Commercial, Tax Department, Works, Contract and Leasing, Quota. Vs. Shukla and Brothers,** their lordships of Hon'ble Supreme Court held that it shall be obligatory on the part of the judicial or quasi judicial authority to pass a reasoned order while exercising statutory jurisdiction. Relevant portion from the judgment of Assistant Commissioner (supra) is reproduced as under:-

"The principle of natural justice has twin ingredients; firstly, the person who is likely to be adversely affected by the action of the authorities should be given notice to show cause thereof and granted an opportunity of hearing and secondly, the orders so passed by the authorities should give reason for arriving at any conclusion showing proper application of mind. Violation of either of them could in the given facts and circumstances of the case, vitiate the order itself. Such rule being applicable to the administrative authorities certainly requires that the judgment of the Court should meet with this requirement with high degree of satisfaction. **The order of an administrative authority may not provide reasons like a judgment but the order must be supported by the reasons of rationality**. The distinction between passing

of an order by an administrative or quasi-judicial authority has practically extinguished and both are required to pass reasoned orders."

14. Thus, it is well settled proposition of law that not only judicial or quasi-judicial order but even the administrative order affecting the civil rights of the citizens, should be reasoned one to cope with the requirement of Article 14 of the Constitution. Unreasoned order creates unstability and distrust in people's mind towards the administration or the authority who has passed such order. In democratic polity, there is no scope to pass an order affecting civil rights of the citizens which may be unreasoned. It is constitutional obligation and right of the citizens to know the reasons in the decision making process affecting their right or cause.

15. Accordingly, the writ petition is partly allowed. A writ in the nature of certiorari is issued quashing the impugned order dated 10.1.2012, passed by the Central Administrative Tribunal in Civil Contempt Petition No.22/2009 with consequential benefit. Tribunal is further commanded to restore the Civil Contempt Petition No.22/2009 to its original number and decide the same afresh. In case any application is moved to bring on record the successor officer and case is made out against him, then Tribunal shall consider such application in accordance with law.

No order as to costs.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.01.2013

BEFORE
THE HON'BLE VIJAY PRAKASH PATHAK, J.

Application U/S 482 No. - 183 of 2013

Dinesh Kumar Gupta ...Applicant
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri Ashok Kumar Rai
Sri Ravindra Nath Rai

Counsel for the Respondents:
A.G.A.

Criminal Procedure Code, Section 482-cognizance taken without application of mind-without going through the charge sheet as well as the case diary-held-such order can not be sustained-quashed-application allowed.

Held: Para-8

A perusal of the aforesaid order it is revealed that the learned Magistrate has no where mentioned in the order that he has perused the charge sheet and material filed in support thereof nor he disclosed the fact that the materials were sufficient to proceed with the case. The manner in which the learned Magistrate has passed the order impugned cannot be said that he had applied his mind to the facts contained in the charge sheet and other materials filed in support thereof. Therefore, the aforesaid order cannot be described as an order "taking of cognizance of the offences" disclosed in the charge sheet against the petitioner,hence the order dated 3.10.2012 cannot be sustained.

Case Law discussed:
[2012 (76) ACC 103]; 2009 (64) ACC 774

(Delivered by Hon'ble Vijay Prakash Pathak, J.)

1. The present petition has been filed with the prayer to quash the charge sheet submitted in case Crime No. 554/12(Case No. 308 of 2012) u/s 498A IPC and 3/4 D.P.Act P.S. Karimuddinpur District Ghazipur in which cognizance has been taken by the learned Magistrate vide order dated 3.10.2012.

2. Heard learned counsel for the applicant as well as learned AGA for the State.

3. Learned counsel for the applicant has mainly contended that the learned Magistrate has taken cognizance in the case without perusing the case diary and applying his mind. It is submitted that according to the order impugned dated 3.10.2012, the charge sheet was received from the office of C.O., cognizance taken, court is vacant. Let the case be registered and summons be issued against the accused and the file was sent to prepare the copies. It is submitted that the learned Magistrate has not perused the charge sheet and other materials including case diary of the case. Hence the order of taking cognizance and issuing summons is against the legal procedure. In support of his contention he placed reliance upon the decision of this court given in Akash Garg Vs. State of U.P. and others[2012(76) ACC 103].

4. I have considered the said argument as well as the decision of this Court given in **Akash Garg Vs. State of U.P. and others(Supra).** In the said decision, this court has also considered the judgment of the Apex Court in the case of **Fakruddin Ahmad V. State of Uttaranchal and another reported in 2009(64) ACC 774**. The Hon'ble Apex Court in the aforesaid verdict in paragraph 15 has held as under:

"15. Nevertheless, it is well settled that before a Magistrate can be said to have taken cognizance of an offence, it is imperative that he must have taken notice of the accusations and applied his mind to the allegations made in the complaint or in the police report or the information received from a source other than a police report, as the case may be, and the material filed therewith. It needs little emphasis that it is only when the Magistrate applies his mind and is satisfied that the allegations, if proved, would constitute an offence and decides to initiate proceedings against the alleged offender, that it can be positively stated that he has taken cognizance of the offence. Cognizance is in regard to the offence and not the offender."

It is well settled that the Magistrate is not bound by the conclusion of the Investigating Officer. He is competent under law to form his own independent opinion on the basis of the materials collected during the investigation. The Magistrate may or may not agree with the conclusion of the Investigating Officer. If the Investigating Officer submits charge-sheet, in that eventuality the Magistrate may differ from the charge-sheet and refuse to take cognizance by holding that no case is made out. In a case where the final report lis submitted the Magistrate may on perusal of the materials placed in support of the final report opine that the conclusion of the Investigating Officer is not correct and the offence is made out. In that eventuality, the Magistrate may reject the final report and take cognizance of the offence.

5. In the aforesaid decision **Akash Garg Vs. State of U.P.** (Supra)the

following principle has been laid down in para 6 and 12 has held as under:

"6- It is well settled that the Magistrate is not bound by the conclusion of the Investigating Officer. He is competent under law to form his own independent opinion on the basis of the materials collected during the investigation. The Magistrate may or may not agree with the conclusion of the Investigating Officer. If the Investigating Officer submits charge-sheet, in that eventuality the Magistrate may differ from the charge-sheet and refuse to take cognizance by holding that no case is made out. In a case where the final report lis submitted the Magistrate may on perusal of the materials placed in support of the final report opine that the conclusion of the Investigating Officer is not correct and the offence is made out. In that eventuality, the Magistrate may reject the final report and take cognizance of the offence.

"12. It is also well settled that at the stage of taking cognizance of an□ offence, the Magistrate is not required to examine thoroughly the merits and demerits of the case and to record a final verdict. At that stage he is not required to record even reasons, as expression of reasons in support of the cognizance may result in causing prejudice to the rights of the poarties(complainant or accused) and may also in due course result in prejudicing the trial. However, the order of the Magistrate must reflect that he has applied his mind to the facts of the case. In other words at the stage of taking cognizance what is required from the Magistrate is to apply his mind to the facts of the case including the evidence collected during the investigation and to see whether or not there is sufficient ground(prima facie case) to proceed with the case. The law does not require the Magistrate to record reasons for taking cognizance of an offence."

6. The present case needs to be examined in the light of aforesaid settled principles given by Hon'ble Apex Court in the case of **Fakruddin Vs. State of Uttaranchal and another(Supra)** and this court in the case **Akash Garg Versus State of U.P.(Supra).**

7. The cognizance order dated 3.10.2012 in the present case has been passed in the following manner:

''3.10.12 आज यह आरोप पत्र सी0ओ0 कार्यालय से प्राप्त हुआ। प्रसंज्ञान लिया जाता है। न्या0 रिक्त है।

आदेश

दर्ज रजिस्टर हो। अभि0गण के विरूद्व सम्मन जारी हो।

पत्रावली दिनांक 5–1–13 को वास्ते नकल के पेश हो। मूल कागजात नकल में भेजा जाये।

ह0 जे0एम0 द्वितीय''

8. A perusal of the aforesaid order it is revealed that the learned Magistrate has no where mentioned in the order that he has perused the charge sheet and material filed in support thereof nor he disclosed the fact that the materials were sufficient to proceed with the case. The manner in which the learned Magistrate has passed the order impugned cannot be said that he had applied his mind to the facts contained in the charge sheet and other materials filed in support thereof. Therefore, the aforesaid order cannot be described as an order "taking of cognizance of the offences" disclosed in the charge sheet against the

petitioner,hence the order dated 3.10.2012 cannot be sustained.

9. In view of the aforesaid considerations this petition is allowed. The order dated 3.10.2012 is hereby set aside. The learned Magistrate is directed to reconsider the charge sheet in the light of the relevant material and observations made above and pass appropriate order afresh on the charge sheet in accordance with law.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 24.01.2013

BEFORE
THE HON'BLE VISHNU CHANDRA GUPTA, J.

Criminal Misc. Case No. 232 of 2011

Bhupendra Singh ...Petitioner
Versus
State of U.P. and another
...Opposite Parties

Criminal Procedure Code-Section 401(2)-Right of hearing-against rejection of petition under section 156(3)-Criminal Revision allowed without opportunity of hearing taking view that as accused/applicants not summoned-he has no right to heard-held-the view taken by revisional court is contrary to mandate of Section 401(2)-order without jurisdiction-even in case of dismissal of complaint-proposed accused is necessary party-order set-a-side-with direction to decide the matter as fresh after hearing the proposed accused.

Held: Para-11

The Apex Court held that even at pre cognizance stage when learned Magistrate declined to take any action under section 156 (3) Cr.P.C. and proceeded to treat the petition as complaint case and directed examination of the complainant and his witness, it will amount to closing of police investigation and if set aside in revision and the Magistrate was directed to reconsider the matter in light of section 156 (3) Cr.P.C. without giving an opportunity of being heard to the person against whom FIR was intended to be lodged, it will amount to violation of mandatory provisions contained in sub section 2 of section 401 Cr.P.C.

Case Law discussed:
(2009) 1 SCC (Cri) 801; (2008) 2 SCC 409

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

1. Heard learned counsel for the petitioner and the learned AGA.

2. Learned counsel for the respondent no. 2 is not present despite filing power on his behalf, whereas he has filed counter affidavit, which is on record.

3. In this petition under section 482 Cr.P.C. the question raised for consideration is whether the court of revision may set aside the order passed by the learned Magistrate rejecting the petition under section 156(3) of Code of Criminal Procedure (for short Cr.P.C) without giving opportunity of being heard to the proposed accused and the FIR sought to be lodged in pursuance of section 156(3) Cr.P.C.

4. While deciding this petition the entire facts need not be discussed in view of the limited controversy involved in this case. The relevant facts necessary to decide this petition are as follows:-

5. Respondent no. 2 Ajit Singh moved the application under section 156(3) Cr.P.C. against the petitioner for taking electricity connection on the basis

of false affidavit and requested that this matter be investigated after lodging FIR.

6. The copy of petition under section 156(3) Cr.P.C. has been filed as Annexure no.2 to this petition. The petition under section 156(3) Cr.P.C. filed by Ajit Singh (respondent no. 2) has been rejected by the Chief Judicial Magistrate, Bahariach vide order dated 28.7.2010 with the finding that no cognizable offence is made out against the petitioner Bhupendra Singh, copy of which has been annexed as Annexure No. 3 to this petition.

7. Being aggrieved by the said order respondent no. 2 preferred criminal revision bearing no. 400 of 2010 before Session Judge, Bahriach, who allowed the same vide order dated 24.12.2010 and remanded the matter to the Magistrate concerned for a fresh decision in pursuance of the direction issued by the Session Judge, copy of which has been annexed as annuxure no. 1 to this petition. Copy of the memo of the revision has also been annexed as Annexure no. 4 to this petition, which shows that in revision only State of U.P. was arrayed as opposite party and the proposed accused (present petitioner in this petition) was not arrayed as opposite party therein. It shows that without issuing notice to the petitioner and without giving opportunity of being heard to him the revision was allowed. On this ground, the order of revisional court has been challenged by the present petitioner through this petition.

8. Controversy in question is not res integra and is squarely covered by the judgment of Apex court reported in **(2009) 1 SCC (Cri) 801` Raghu Raj Singh Rousha Vs. Shivam Sunderam Promoters Private Limited and another,** wherein relying upon the judgment rendered in **(2008) 2 SCC 409 Sakiri Vasu Vs. State of U.P.**, the Hon'ble Supreme Court held that revisional court has violated the mandate of section 401 (2) Cr.P.C. which provides that no order under this section shall be passed to the prejudice of accused or other person unless he has been given an opportunity of being heard either personally or by pleader in his defence.

9. Respondent no. 2 has filed counter affidavit. In para 23 of counter affidavit it has been averred that petitioner was neither summoned nor any adverse finding has been given against him, as such, he is not entitled to file present petition as he is not an aggrieved person. It has been further averred that right accrues only when notices/summons are issued to the petitioner, then he can approach this Court otherwise filing of the present petition at this stage is premature, as such, the present petition is liable to be dismissed.

10. This controversy was set at rest in **Raghu Raj Singh Rousa's case (Supra).** The relevant paras 22 and 23 of this case are reproduced hereinbelow:-

22. "Here, however, the leaned Magistrate had taken cognizance. He had applied his mind. He refused to exercise his jurisdiction under section 156 (3) of the Code. He arrived at a conclusion that the dispute is a private dispute in relation to an immovable property and, thus, police investigation is not necessary. It was only with that intent in view, he

directed examination of the complainant and his witnesses so as to initiate and complete the procedure laid down under Chapter XV of the Code.

23. We therefore, are of the opinion that the impugned judgment cannot be sustained and is set aside accordingly. The High court shall implead the appellant as a party in the criminal revision application, hear the matter afresh and pass an appropriate order."

11. The Apex Court held that even at pre cognizance stage when learned Magistrate declined to take any action under section 156 (3) Cr.P.C. and proceeded to treat the petition as complaint case and directed examination of the complainant and his witness, it will amount to closing of police investigation and if set aside in revision and the Magistrate was directed to reconsider the matter in light of section 156 (3) Cr.P.C. without giving an opportunity of being heard to the person against whom FIR was intended to be lodged, it will amount to violation of mandatory provisions contained in sub section 2 of section 401 Cr.P.C. The Apex Court further held that it make no difference whether any notices/summons were issued to the proposed accused/suspect because the order passed not to investigate the matter is an order in favour of proposed accused and the same cannot be set aside without giving an opportunity of being heard to the proposed accused.

12. Similar view has been propounded by this Court in the judgment reported in **(2011) ADJ 9 Karan Singh and others Vs. State of U.P. And another.**

13. In the recent judgment reported in **(2012) 10 SCC 517 Maniharibhai Muljibhai Kakadia and another Vs. Shailesh bhai Mohan Bhai Patel and others** the Apex Court held that even in the case of dismissal of complaint proposed accused/suspect held are necessary parties to whom an opportunity of hearing should be accorded as especially provided in section 401(2)Cr.P.C. notwithstanding that order impugned in revision was passed without participation of respondent no.2 (in the present petition).

14. In view of the aforesaid legal proposition the petition is liable to be allowed.

15. Accordingly this petition is allowed.

16. The impugned order dated 24.12.2010 passed by the Session Judge, Bahraich in Criminal Revision No. 400 of 2010 is set aside. The matter is remanded back to the revisional court with direction that court shall direct the revisionist-respondent no. 2 to implead the proposed accused/suspect (petitioner) against whom the petition under section 156 (3) Cr.P.C. was moved and decide the matter afresh on merit after providing an opportunity of being heard to him.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 24.01.2013

BEFORE
THE HON'BLE VISHNU CHANDRA GUPTA, J.

Criminal Misc Case No. - 235 of 2013 (U/s 482 Cr.P.C.)

Loknath ...Petitioner
Versus
State of U.P. and another
...Opposite Party

Counsel for the Petitioner:
Sri Narvind Kumar Singh

Counsel for the Respondents:
Govt. Advocate

Code of Criminal Procedure, Section 482- application against conditional bail order-offence under section 135 Electricity Act punishable with 7 years rigorous imprisonment-does not fall within the ambit of Section 437 (3)- condition to deposit Rs. 50,000-held- without jurisdiction-technical objection for taking recourse of section 439 (b)- not sustainable-order passed-without jurisdiction-can be interfered by exercising power under Section 482.

Held: Para-11

In view of Section 437 (3) Cr.P.C., the imposition of condition of deposit of money in cases of those offences which are punishable less than 7 years of imprisonment would not be permissible. Hence, the condition of deposit of Rs. 50,000/- while granting the bail to the petitioner would be improper. As the matter relates to jurisdictional error in passing the impugned order, so there shall be no impediment in passing the order by this Court in exercise of its jurisdiction under Section 482 Cr.P.C. for correcting the error.

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

1. Heard learned counsel for the petitioners, learned counsel for Power Corporation who appeared on the request made by the Court and learned AGA.

2. In the present case accused petitioner moved an application for bail in an offence under Section 135 of Electricity Act (for short the Act). The bail was granted by the Special Court imposing a condition that an amount of Rs. 50,000/- shall be deposited within two months from the date of order passed by the Court. The accused in pursuance thereof submitted a bond filed under taking to deposit the aforesaid amount to the court. In terms of the bail order petitioner was released on bail. Now petitioner moved this petition under Section 482 Cr.P.C. to quash the condition imposed in the bail order.

3. A preliminary objection has been raised by learned AGA that petition under Section 482 Cr.P.C. is not maintainable for modification in order granting bail by subordinate court because for this purpose there is specific provision contained in Section 439 (b) Cr.P.C. and the remedy is available to the petitioner under the said provision.

4. I have gone through the provision contained under Section 439 (a) and (b) Cr.P.C. and is reproduce hereinbelow:-

"439. Special powers of High Court or Court of Session regarding bail.-

(1) A High Court or Court of Session may direct-

(a) That any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in sub-section (3) of section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section;

(b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified:

5. Clause (a) of Sub Section 1 of Section 439 Cr.P.C. provides that if any person accused of an offence and is in custody be released on bail, and if offence is of the nature specified in sub section (3) of Section 437, may impose any condition which it consider necessary for the purpose mentioned in sub section.

Section 437 (3) is reproduce hereinbelow for ready reference:-

"(3) When a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI or Chapter XVII or the Indian Penal Code (45 of 1860) or abetement of, or conspiracy or attempt to commit, any such offence, is released on bail under Seb-section (1), [the Court shall impose the conditions,-

(a) that such person shall attend in accordance with the conditions of the bond executed under the Chapter,

(b) that such person shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected, and

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

and may also impose, in the interests of justice, such other conditions as it considers necessary.]"

6. Sub section (3) of Section 437 provides that when accused commit an offence punishable within imprisonment which may extend to 7 years or more or of an offence under chapter VI, XVI and XVII of the Indian Penal Code or abatement or conspiracy for attempt to commit any such offence the court while releasing him on bail shall impose any condition as mentioned in sub clause (a), (b) and (c) of Section 3 of Sub-section 437.

7. Section 135 of the Act provides the maximum punishment for imprisonment for a period of 3 years with fine.

8. Admittedly, the offence under Section 135 of the Act does not fall within the ambit of Section 437 (3) Cr.P.C. Hence, the condition imposed would be without jurisdiction. Moreover, there is nothing in special enactment, the Electricity Act 2003, that while releasing the accused condition may be imposed regarding deposit of the amount or any amount determined under Section 135 (1A) of the Act.

9. The amendment inserted in the Act in the year 2007 provides that in case of detection of theft of electricity, disconnection of supply of electricity shall immediately follow. It was also provided that officer of licencee or supplier duly

authorized shall also lodge a complaint in writing of the commission of such offence in police station having jurisdiction within 24 hours. It is also provided that the accused may compound the offence after depositing the amount as mentioned in last proviso of sub section (1) of Section 135 (1A). Section 154 of the Act provides the procedure to be adopted by the Special Court and also confer powers upon the Special Court dealing with the trial of offence under Electricity Act (Section 135 to 140 and 150 of the Act). Sub section 4 of Section 154 of the Act provides that Special Court shall determine the civil liability against the consumer or a person in term of money for the theft of energy. The amount of civil liability so determine shall be recovered as if it were a decree of civil court. Sub section 6 of Section 154 of the Act provides that while determining the civil liability by Special Court finally the amount if any deposited by the consumer will subject to adjustment.

10. It is true that in this case the charge sheet has been submitted before the Special Court but determination of civil liability by special court has not yet been finalised.

11. In view of Section 437 (3) Cr.P.C., the imposition of condition of deposit of money in cases of those offences which are punishable less than 7 years of imprisonment would not be permissible. Hence, the condition of deposit of Rs. 50,000/- while granting the bail to the petitioner would be improper. As the matter relates to jurisdictional error in passing the impugned order, so there shall be no impediment in passing the order by this Court in exercise of its jurisdiction under Section 482 Cr.P.C. for correcting the error.

12. Even if provisions to challenge the condition imposed by special court is available to the petitioner in view of Section 439 Cr.P.C. that would also not create any impediment in setting aside the condition of deposit of Rs. 50,000/- imposed in bail order because the petitioner may seek relief under Section 439 Cr.P.C. from the High Court. In view of above, if a petition has been filed under Section 482 Cr.P.C. then the court is not precluded to pass the order keping in view the provision contained in Section 439 Cr.P.C. When matter relates to illegal exercise of jurisdiction by any subordinate court, it would be the duty of the High Court to exercise power of superintendence to ensure that cases should properly be disposed of by the courts keeping in view of the statutory provision contained in any enactment.

13. This Court has inherent power to make such orders necessary to prevent abuse of process of any court or otherwise to secure the ends of justice. In this case, if condition imposed of depositing Rs. 50,000/- is not lifted, it will not only adversely effect the statutory rights of petitioner but it also amounts to failure on part of this Court to correct the wrong committed by subordinate court.

14. In view of above facts and circumstances of the case and keeping in view of legal aspect of the matter,, this petition deserves to be allowed.

15. Consequently, the petition is **allowed.** The condition imposed by the special court regarding deposit of Rs. 50,000/- as condition for grant of bail to the petitioner included in the impugned order of bail is set aside. The accused will remain on bail even without deposit of the aforesaid amount during trial.

16. It is also provided that this order will not create any impediment in deciding the civil liability by the special court under Section 154, sub clause 5 of the Act and to recover the same from the petitioner in accordance with law.

17. There shall be no order as to costs.

APPELLATE JURISDICTION
CIVILSIDE
DATED: LUCKNOW 29.01.2013

BEFORE
THE HON'BLE DEVI PRASAD SINGH, J.
THE HON'BLE ARVIND KUMAR TRIPATHI-II, J.

First Appeal From Order No. 465 Of 2004

National Insurance Co. Limited, through Regional Manager, Regional Office, LIC Building, Nawal Kishore Road, Lucknow ...Appellant

Versus

Smt. Sahidul Nisha and others ...Respondents

Motor Vehicle Act 1988, Section 173-appeal against award by accident tribunal-appeal by insurance company on ground the vehicle being driven by such driver having no valid driving license-before the tribunal the owner of vehicle categorically stated that he has no knowledge about possessing no valid driving license by the driver-insurance company not adduced any evidence controverting this fact-held-tribunal rightly shifted the burden upon the insurance company-no interference called for-appeal dismissed.

Held: Para-19

The Learned Tribunal has held that Insurance Company has not given any evidence to show that truck owner was having knowledge that the driver was not having a valid and effective driving licence. In view of this, the Tribunal has rightly held that the compensation amount is to be paid by the opposite party no.3, National Insurance Company(appellant).

Case Law discussed:
2004 (3) Supreme Court Cases page 297

(Delivered by Hon'ble Arvind Kumar Tripathi-II, J.)

1. Heard Alka Verma, learned counsel for the appellant and Shri M.C.Shukla, learned counsel for the respondents.

2. The present first appeal from order has been filed by National Insurance Company Ltd, against the award dated 11.5.2004 passed in Claim Petition No. 192 of 2001 by Motor Accident Claims Tribunal/Additional District Judge, Court No.2 Sultanpur, by which learned claims tribunal has awarded compensation of Rs. 1,26,235/-(one lakh twenty six thousand two hundred thirty five) as compensation for the injuries received by Smt. Sahidul Nisha in a Motor Accident.

3. The claim petition was filed on the ground that claimant had gone to Ajmersharif from Village Nizam Patti Kasba, Sultanpur on Bus No.UHU 9172. When the bus reached in District-Alwar (Rajsthan) near Hotel Shiva Overseas Dakhim Kejil in Bahroad on 1.10.2000 at about 4.30 a.m. truck No. H.R.38/A-8565 which was being driven rashly and negligently by its driver hit the bus from the rear side and due to which the bus turned turtle and several passengers in the bus including the claimant received serious injuries. First Information Report was lodged by owner of the bus Sri Ramraj Verma on 1.10.2000 at about 5.00 a.m. in Police Station-Bahroad, District-Alwar which was registered as Crime No. 460 of 2000. The claimant was taken to District

Hospital from where she was shifted from Jaipur and later on in Delhi.

4. The opposite party nos. 1, 2, 4 and 5, owner of Truck No. HR 38/A8565 driver of the truck, owner of Bus No. UHU-9172 and the driver of the bus UHU-9172 have not filed their written statement so the claim petition proceeded ex parte against them.

5. Opposite Part No.3 has mentioned in its written statement that they have no information regarding the accident since registration certificate of the vehicle, insurance & fitness, permit and driving licence of the driver has not been filed. Hence, they are unable to say as to whether Truck No.HR 38/A8565 was insured with them or not, whenever the papers will be filed, they may file additional written statement. Since, the matter is of collision of two vehicles and the proper and necessary parties have not been impleaded, the claim petition is bad for non-joinder of parties. It was also mentioned in the written statement that they are entitled to get benefit of Section 64 BB Insurance Act, 1939 and Section 149 and 170 Motor Vehicle Act.

6. Opposite party no.6 has filed its written statement alleging that the bus no. UHU 9172 was not insured by their company, the insurance papers are forged and registration certificate is also forged.

7. On the basis of pleading of the parties following issues were framed by the Motor Claims Tribunal:

(i)Whether Smt. Sahidul Nisha received injuries due to rash and negligent driving of vehicle No.HR 38/8565 on 1.10.2000 at about 4.30 a.m. in place Bahroad, P.S. Bahroad, District-Alwar(Rajsthan) ? If so its effect?

(ii)Whether the vehicle No.HR38/8565 was insured with National Insurance Company Ltd.? If so its effect ?

(iii)Whether, the vehicle in question was not being driven as per Insurance Policy ? If so its effect?

(iv)Whether there was contributory negligence on the part of the vehicle UHU 9172 ? If, so its effect?

(v)To what compensation if any claimant is entitled to ? If so its effect and from whom ?

8. Claimant's has examined herself as P.W.1 Sri Mahmood Khan as P.W.2 and opposite party has examined Sri A.K. Nirman as D.W. No.1. Apart from that several papers have been filed which shall be discussed later on as and when necessary.

9. Learned Claims Tribunal after going through the record and hearing the arguments held that the claimant is entitled to Rs.1, 26, 235/-(Rupees one lakh twenty six thousand two hundred thirty five) from National Insurance Company Ltd. along with 8% simple interest per annum from the date of presentation of the claim petition.

10. Feeling aggrieved this claim petition has been filed by National Insurance Company.

11. It was argued that the offending vehicle was being driven in violation of Motor Vehicle Rules and in contravention of policy. Truck bearing no. HR38/A8565 was not being driven by the driver having valid and effective driving licence. In the event of breach of policy conditions by the owner of the Truck, appellant is not liable to

indemnify the claimant and Claim Tribunal has also not properly appreciated the record/documents/evidence adduced by the appellant and has awarded excessive amount which is not supported by the evidence.

12. From the argument advanced by learned counsel for the appellant it transpires that the main thrust of the argument is that truck no.HR-38 A8565 was not being driven by a driver having valid and effective driving licence and also that there was breach of conditions of the Insurance Policy. Hence, the liability should not have been fastened on the insurer instead of owner.

13. From the above, it is clear that the appellant has not challenged the factum of accident. A counter affidavit was also filed from the side of the claimant and along with counter affidavit, medical report and the statement of the witnesses as Annexures 2, 3 and 4 of the affidavit was also filed.

14. While deciding issue no.1 Learned Claims Tribunal has on the basis of evidence of the claimants P.W.1Smt. Sahidul Nisha, Sri Mahmood Khan P.W.2 has held that Bus was parked on the correct side of the road and the truck hit from the rear side due to which the accident occurred, while deciding issue no.2 the Tribunal has held that photo copy of insurance papers have been filed in the claim petition, the Insurance Company has not adduced any evidence to rebut it so it is clear that the truck was insured by National Insurance Company.

15. So far as, argument of the Insurance Company is that the truck was not being driven by a driver having valid and effective driving licence and also the truck was not being plied with valid papers, the Tribunal has dealt with this, in issue no.3 Learned Tribunal below relied upon the case of ***National Insurance Company Ltd. Vs. Swaran Singh and Ors. reported in 2004(3) Supreme Court Cases page 297***; and held that if the owner of the vehicle knowingly permits any driver of its vehicle who has no valid driving licence then the Insurance Company is not liable, but if he was under impression that the driver was having valid and effective driving licence then the Insurance Company will be liable to pay. Learned Tribunal has held that there is no evidence on record to show that the owner had knowledge that driver was not having valid and effective driving licence. In view of this, despite the vehicle been driven by the driver who has no valid driving licence then too Insurance Company will be liable to pay compensation and indemnify the owner.

16. We have carefully gone through the decision relied upon by the Tribunal.

17. The Apex Court has while summarizing the various decisions and provisions regarding licence as held that;

"110. The summary of our findings to the various issues as raised in these petitions are as follows:

(i) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object.

(ii) An insurer is entitled to raise a defence in a claim petition filed under Section 163 A or Section 166 of the Motor Vehicles Act, 1988 inter alia in terms of Section 149(2)(a)(ii) of the said Act.

(iii) The breach of policy condition e.g., disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies are, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefor would be on them.

(v) The court cannot lay down any criteria as to how said burden would be discharged, inasmuch as the same would depend upon the facts and circumstance of each case.

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/ are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under section 149(2) of the Act.

(vii) The question as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver, (a fake one or otherwise), does not fulfil the requirements of law or not will have to be determined in each case.

(viii) If a vehicle at the time of accident was driven by a person having a learner's licence, the insurance companies would be liable to satisfy the decree.

(ix) The claims tribunal constituted under Section 165 read with Section 168 is empowered to adjudicate all claims in respect of the accidents involving death or of bodily injury or damage to property of third party arising in use of motor vehicle. The said power of the tribunal is not restricted to decide the claims inter se between claimant or claimants on one side and insured, insurer and driver on the other. In the course of adjudicating the claim for compensation and to decide the availability of defence or defences to the insurer, the Tribunal has necessarily the power and jurisdiction to decide disputes inter se between insurer and the insured. The decision rendered on the claims and disputes inter se between the insurer and insured in the course of adjudication of claim for compensation by the claimants and the award made thereon is enforceable

and executable in the same manner as provided in Section 174 of the Act for enforcement and execution of the award in favour of the claimants.

(x) Where on adjudication of the claim under the Act the tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of section 149(2) read with sub-section (7), as interpreted by this Court above, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the tribunal. Such determination of claim by the Tribunal will be enforceable and the money found due to the insurer from the insured will be recoverable on a certificate issued by the tribunal to the Collector in the same manner under Section 174 of the Act as arrears of land revenue. The certificate will be issued for the recovery as arrears of land revenue only if, as required by sub-section (3) of Section 168 of the Act the insured fails to deposit the amount awarded in favour of the insurer within thirty days from the date of announcement of the award by the tribunal.

(xi) The provisions contained in sub-section (4) with proviso thereunder and sub-section (5) which are intended to cover specified contingencies mentioned therein to enable the insurer to recover amount paid under the contract of insurance on behalf of the insured can be taken recourse of by the Tribunal and be extended to claims and defences of insurer against insured by relegating them to the remedy before regular court in cases where on given facts and circumstances adjudication of their claims inter se might delay the adjudication of the claims of the victims."

18. From the above, it is clear that insurer has to prove its defence that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time. The insurance companies are, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefor would be on them.

19. The Learned Tribunal has held that Insurance Company has not given any evidence to show that truck owner was having knowledge that the driver was not having a valid and effective driving licence. In view of this, the Tribunal has rightly held that the compensation amount is to be paid by the opposite party no.3, National Insurance Company(appellant).

20. In view of above, the present first appeal from order is liable to be dismissed and is hereby dismissed.

21. The statutory deposit or any other deposit in this court shall be sent back by the registry of this court to the tribunal expeditiously.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.01.2013

BEFORE
THE HON'BLE VINEET SARAN, J.
THE HON'BLE VIRENDRA VIKRAM SINGH, J.

Civil Misc. Writ Petition No. 555 of 2013

Smt. Meera Pandey ...Petitioner
Versus
State of U.P and others ...Respondents

Counsel for the Petitioner:
Sri Rajiv Dwivedi

Counsel for the Respondents:
C.S.C.
Sri Anuj Kumar (Addl.S.C.)

Constitution of India, Article 226- appointment of dealer to run fair price shop on compassionate ground-rejected by S.D.M. it should be appointed from Schedule Caste (S.C.) category village Pradhan-held-in view of provision under para 10 (Jha) of G.O. No. 17.08.2002-no question of fresh appointment-hence para 10 (Jha) being special rule of reservation for dependent of the dealer to be considered-order impugned not sustainable-quashed.

Held: Para-6

We are thus of the view that appointment under paragraph 10 (Jha) of the Government Order dated 17.08.2002 would not be covered by the Rule of reservation as it is a special appointment on compassionate ground and only condition which has to be considered is that the deceased-fair price shop dealer had a good reputation and the applicant is the dependant of such deceased-dealer.

(Delivered by Hon'ble Vineet Saran, J.)

1. Heard learned counsel for the petitioner as well as learned Standing Counsel appearing for the respondents and perused the record.

2. Time was granted to learned Standing Counsel to obtain instructions which he states that he has received. With the consent of learned counsel for the parties, this writ petition is being finally disposed of at this stage.

3. The case of the petitioner is that on the death of her husband, who was the fair price shop dealer, the petitioner moved an application for appointment as a dealer on compassionate ground. Provision of law for the compassionate appointment has been made in paragraph 10 (Jha) of the Government Order dated 17.08.2002. The said paragraph 10 (Jha) of the Government Order provides that in case, the fair price shop dealer had a good reputation, then the dependent of such dealer may be considered for appointment as fair price shop dealer. The dependent has been defined as wife, son and un-married daughter of the deceased dealer. The petitioner being the widow of fair price shop dealer, had applied for appointment as a dealer under the said provision.

4. By means of the impugned order dated 5th December, 2012 passed by respondent No. 2-Sub Divisional Magistrate, the application of the petitioner for appointment on compassionate ground has been rejected merely for the reason that the dealership of the village in question would be reserved for Scheduled Caste Category, for which category the post of Pradhan is reserved.

5. At this juncture, the question arises as to what should be the position where the deceased dealer was of the category other than that for which reservation of a particular class/category of society for a fresh dealer has been provided for. In our opinion, the policy of reservation for appointment as dealer will be considered only when a regular appointment is to be made and not otherwise. Where the vacancy of any dealership of a fair price shop has occurred because of the death of the dealer and the conditions provided in the Government Order for appointment on compassionate basis stand fulfilled, the appointment on compassionate ground is to be considered first under paragraph 10 (Jha) of the Government Order dated 17.08.2002. If any other interpretation than this is given to the above Government order, the provision of the Government order shall become a nullity and the same can be availed by the dependents of the deceased dealer only in a case where the dealer was of the category for which the reservation is provided and not otherwise. Such can not be the purpose as obviously para 10 (Jha) of the Government order has been inserted to safeguard the interest of the dependents of the deceased dealer. As such without considering the position of reservation which has not been provided for his case of compassionate appointment, the concerned authority shall look to the welfare of the dependents of the deceased dealer, otherwise the entire purpose of providing for such appointment would be frustrated.The interpretation which has been given by the impugned order is opposed to the public policy of safeguarding the interests of the dependents of the deceased-dealer.

6. We are thus of the view that appointment under paragraph 10 (Jha) of the Government Order dated 17.08.2002 would not be covered by the Rule of reservation as it is a special appointment on compassionate ground and only condition which has to be considered is that the deceased-fair price shop dealer had a good reputation and the applicant is the dependant of such deceased-dealer.

7. In view of the aforesaid, the impugned order dated 5th December, 2012 passed by the Sub-Divisional Magistrate rejecting the application of the petitioner deserves to be quashed.

8. The writ petition stands allowed and the order dated 05.12.2012 is quashed. The respondent No. 2 is directed to take fresh decision on the application of the petitioner in the light of the observations made here-in-above, as expeditiously as possible, preferably within two months from the date of filing of certified copy of this order before respondent No. 2.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 30.01.2013

BEFORE
THE HON'BLE ANURAG KUMAR, J.

Criminal Appeal No. 611 of 2005.

State of U.P. ...Petitioner
Versus
Anil Kumar Rathore ...Respondents

Counsel for the Petitioner:
Govt.Advocate

Counsel for the Respondents:
Dr.Manoj Dubey
Sri Rakesh Kumar Tripathi
Sri Sanjay Kr. Singh

Criminal Procedure Code-Criminal Appeal-Government Appeal against acquittal for offence under section 272/284 I.P.C. On ground-no proper

opportunity to examine the witness given-held-finding of Trail Court can be reversed either on compelling reason or decision based on erroneous view of law or likely to result gave mis-courage of justice-in absence of these circumstances order of acquittal can not be interfered.

Held: Para-12

It is clear from the above, that in appeal against acquittal the trial court's finding can only be interfered and reversed on compelling reasons and when conclusion with regard to the fact is palpably wrong and the decision was based on erroneous view of law and judgment is likely to result grave miscarriage of justice.

Case Law discussed:
(1978) 1 SCC 228; (2008) 10 SCC 450

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

1. This appeal has been preferred by State against judgment and order dated 04.04.2001 passed by Xth Additional District and Sessions Judge, Sitapur, in S.T. No. 207 of 1998, under Sections 272 and 284 I.P.C., P.S. Kotwali, Sitapur acquitting the accused/respondent Anil Kumar Rathore.

2. The brief facts of the case are that the complainant Dhananjay Kumar Santoshi wrote a letter to Director Medical Health stating that he has purchased two tin Mustard oil from Anil Kumar Rathore in the 2nd week of June. From the use of that mustard oil, his entire family got serious ailment. He has to admit his mother Smt. Sarla Devi on 02.08.1994 in District Hispital Sitapur and on 02.09.1994 his sister Upasana Saxena to P.G.I. Lucknow. His younger brother Angdhwaj Santoshi also got dysentery and diarrhea due to use of that oil. On 06.09.1994, he came to know that due to use of this oil his mother, sister and brother fell seriously ill. No action by District Health Officer and C.M.O. was taken and after several complaints on 12.10.1994, Food Inspector took the sample of pure mustered oil and not that mustard oil due to use of which all the persons got serious ailment. On this application, an F.I.R. was registered against respondent Anil Kumar Rathore under Sections 272 and 284 I.P.C. After investigation, charge sheet was submitted against accused Anil Kumar Rathore under Sections 272 and 284 I.P.C. and 7/14 Prevention of Food Adulteration Act. The case was committed to Sessions Court and Ninth Additional Sessions Judge on 21.01.1994 framed charges against the respondent Anil Kumar Rathore under Sections 272 and 284 I.P.C. Prosecution examined P.W.-1 Rakesh Kumar. No other witness was examined by prosecution inspite of several opportunities. Formal proof of prosecution papers were admitted by accused and typed application was marked as Ext. Ka-1, F.I.R. as Ext. Ka-2, Copy of G.D. as Ext. Ka-3, site plan as Ext. K-4 and charge sheet as Ext. Ka-5. The learned trial judge Xth Additional District and Sessions Judge, Sitapur passed impugned judgment dated 04.04.2001 acquitting the accused respondent Anil Kumar Rathore of the charges under Sections 272 and 284 I.P.C.

3. Aggrieved by the said judgment, State preferred this appeal mainly on the ground that the judgment of the trial court is against the facts and circumstances of the case. The judgment was based on wrong interpretation of the evidence available on record. The prosecution evidence produced by prosecution in the trial court is sufficient to prove the guilt of the accused. Even after service of summon, the trial court court did not provide proper opportunity to prosecution to examine those witnesses and

thus committed grave illegality. The appeal is liable to be allowed and the trial court's judgment is liable to be set aside.

4. Heard learned A.G.A. for State and Mr. Rakesh Kumar Tripathi for respondent accused Anil Kumar Rathore.

5. Learned A.G.A. submitted that proper opportunity was not awarded to prosecution to produce his entire evidence. Summons were served. Even after service of summon on witness, no opportunity was provided for their examination. The genuineness of documents was accepted by the accused, hence prosecution fully proved his case against the accused and the appeal is liable to be allowed.

6. Learned counsel for the respondent opposed the contention of learned A.G.A. and submitted that the trial court's judgment is fully based on the evidence on record. Prosecution totally fails to examine any witness except P.W.-1 Rakesh Kumar. It is the duty of the prosecution to examine all the witnesses, but in spite of several opportunities awarded by the trial court, prosecution totally failed to examine the witnesses. There is no illegality or irregularity in the judgment of the trial court. The appeal has got no force and is liable to be rejected.

7. After giving the thoughtful consideration to the submission of both side and going through the record, it is clear that prosecution examined only one witness P.W.-1 Rakesh Kumar and no other witness was examined by prosecution. P.W.-1 Rakesh Kumar is witness of the fact that the complainant purchased two tin of mustard oil from the shop of accused, but P.W.-1 Rakesh Kumar did not support the prosecution version. He denied that the complainant ever purchased any mustard oil tin before him from respondent. This witness was declared hostile and the evidence of P.W.-1 Rakesh Kumar did not support the prosecution case in any way. Except P.W.-1, no other witness was examined. The complainant and other witnesses of fact who are his family member i.e. mother, brother and sister were not found at the given address as per report on the summon issued. It was reported that they have left the said place after selling it. Prosecution totally failed to examine any witness except P.W.-1, who did not support the prosecution version.

8. The next submission of learned A.G.A. is that as the prosecution accepted the genuineness and dispense the formal proof of typed complaint/F.I.R., the case of prosecution was fully proved. I find no force in his submission because if defence dispenses the formal proof of any document, the result of it is that document is not to be proved by prosecution. Formal proof of documents if dispense then documents ought to be read in evidence only. From lodging the F.I.R. or submitting written report does not prove any case against the accused person. It only shows that there is a complaint against accused regarding committing of an offence. Until and unless from the entire evidence committing of any offence is not proved an accused person cannot be held guilty of that offence. It is the duty of the prosecution to prove his case beyond reasonable doubt against accused, in which he totally failed.

9. In an appeal against acquittal, the High Court would be justified in reversing the acquittal only when very substantial question and compelling reasons are present.

10. Hon'ble Apex Court in **Umedbhai Jadavbhai v. The State of Gujarat (1978) 1 SCC 228**, observed as under:-

" In an appeal against acquittal, the High Court would not ordinarily interfere with the Trial Court's conclusion unless there are compelling reasons to do so inter alia on account of manifest erros of law or of fact resulting in miscarriage of justice."

11. And Hon'ble Apex Court in **Ghurey Lal v. State of U.P. (2008) 10 SCC 450**, summarized the legal position as follows in para 69:

"69. The following principles emerges from the cases above:

1. The appellate court may review the evidence in appeals against acuqittal under Sections 378 and 386 of the Criminal Procedure Code, 1973. Its power of reviewing evidence is wide and the appellate court can reappreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law.

2. The accused is presumed innocent until proven guilty. The accused possessed this presumption when he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent.

3. Due or proper weight and consideration must be given to the trial court's decision. This is especially true when a witness' credibility is at issue. It is not enough for the High Court to take a different view of the evidence. There must also be substantial and compelling reasons for holding that the trial court was wrong.

12. It is clear from the above, that in appeal against acquittal the trial court's finding can only be interfered and reversed on compelling reasons and when conclusion with regard to the fact is palpably wrong and the decision was based on erroneous view of law and judgment is likely to result grave miscarriage of justice.

13. From the above discussion, it is clear that in the present case no such circumstances are there to support prosecution version and from the evidence on record, there is nothing which supports his version for setting aside the order of acquittal. I find no force in present appeal and the present appeal is liable to be dismissed. Accordingly, this appeal is dismissed.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.01.2013

BEFORE
THE HON'BLE V.P.PATHAK, J

Criminal Revision No. - 789 of 2007

Iqbal ...Revisionist
Versus
State of U.P. ...Opposite Party

Counsel for the Petitioner:
Sri Gajraj Singh Pal
Sri G.R.S. Prasad
Sri Preet Pal Singh Rathore

Counsel for the Respondents:
A.G.A.

Juvenile Justice (Care and Protection of Children) Act 2000 Section 2 (k) and 2(l)-word "Juvenile" explained who has not obtained 18 year age-incidence took place on 19.05.1997-C.M.O. Opinioned 18.12.1997 as seventeen year age-admittedly when the amended provision

enforced-revisionist being seventeen years age falls within Juvenile-non consideration of this aspect-held-not proper-order quashed-direction for fresh consideration remain

Held: Para 15

While applying the ratio of the aforesaid verdicts of Hon'ble Apex Court referred to above, in the present matter, it is apparent that the incident is of 19.5.1997 and according to earlier opinion of the Chief Medical Officer which was given on 18.12.1997, the age of the revisionist was opined to be about 17 years. Hence it is clear that at the time of incident, the revisionist was below 18 years. According to the amended Act and in view of the aforesaid verdicts, the applicant is entitled to the benefit of the age of juvenility given in the new Act as in view of Sections 2(k) and 2(l) " juvenile" or " child" means a person who has not completed eighteenth year of age and " juvenile in conflict with law" means a juvenile who is alleged to have committed an offence and has not completed eighteenth year of age as on the date of commission of such offence.

(Delivered by Hon'ble V.P.Pathak, J)

1. Heard learned counsel for the revisionist as well as learned AGA.

2. Present revision has been preferred against the order dated 9/2/2007 passed by the Special Judge, (E.C.Act), Badaun in ST No.1132/1997, under Section 302 IPC, PS Kotwali, District Badaun by which the application 60 Kha moved by the revisionist for declaring him juvenile has been rejected.

3. The brief facts of the case are that on 19.5.97, an FIR has been got lodged by one Ishrat Ulla Khan @ Mintu against the revisionist Iqbal about the incident of the same day, which was registered as Case Crime No.316/1997, under Section 302 IPC, PS Kotwali, District Badaun. After investigation, the charge sheet was submitted against the revisionist and thereafter trial of ST No.1132/1997 started and was proceeding against him before the court of Special Judge, (E.C.Act)/Addl. Sessions Judge, Badaun. During the pendency of the trial, an application 5 Kha was moved on behalf of the revisionist for declaring him juvenile on account of the fact that at the time of the incident, he was about 14 years of age. On the said application a report was called for from the Chief Medical Officer concerned. The CMO submitted his report on 18.12.1997 in which it was opined that the revisionist was about 17 years of age. After the said report of the CMO, learned trial court considered the matter of juvenility of the revisionist and rejected the said application 5 Kha moved by him on 23.12.1997 on the ground that the date of occurrence was 19.5.1997 and the report of the CMO was dated 18.12.1997 in which the age of the revisionist was opined to be about 17 years, hence he was not below 16 years of age.

4. It appears that in the meantime the juvenile Justice (Care and Protection of Children) Act,2000, hereinafter referred to as Act of 2000, was introduced by which the earlier Juvenile Justice Act,1986 was repealed. The Act of 2000 was also amended by the Juvenile Justice (Care and Protection of Children) Amendment Act, 2006, hereinafter referred to as new Act, and several provisions have been introduced. According to the said new Act, the definitions of the words " juvenile or child" and " juvenile in conflict with law"

are defined in Sections 2(k) and 2(l), which reads as under:-

"2(k) "juvenile" or "child" means a person who has not completed eighteenth year of age;

(l) "juvenile in conflict with law" means a juvenile who is alleged to have committed an offence and has not completed eighteenth year of age as on the date of commission of such offence.

5. After the new Act came into effect, the revisionist moved an application dated 19.12.2006 before the trial court to declare him juvenile on the ground that the date of birth of the elder sister of the revisionist Sugufta was 7.3.1982 from the school certificate and the applicant was one and half year young,.hence at the time of incident, he was aged below 14 years only.

6 The learned court below after considering the said application has rejected the same vide the order impugned dated 9.2.2007 referred to above on the ground that earlier the question of juvenility had already been considered on the application moved by the revisionist in that regard and the same was rejected on 23.12.1997. While rejecting the said application, it was observed that there was no change of circumstance as the date of incident as well as the report of the Chief Medical Officer was the same. Hence there was no new ground.

7. Learned counsel for the revisionist has mainly contended that subsequently the report of the Chief Medical Officer was again called for and the Chief Medical Officer gave his report on 9.5.2012 in which the age of the revisionist has been opined to be 23 years and according to his birth certificate issued from Nagar Palika Parishad, Badaun, the date of birth of the revisionist is shown to be 18.09.1983. Hence considering from the date of incident i.e. 19.5.1997, the applicant's age would be below 15 years. It is also submitted that even if the earlier report of the Chief Medical Officer dated 18.12.1997 in which the age of the revisionist is opined to be about 17 years is taken into consideration, then also in view of amended Act, the applicant would be juvenile at the time of incident.

8. He placed reliance upon the two verdicts of the Hon'ble Apex Court given in **Daya Nand Vs. State of Haryana[2011(73) ACC 971] and Amit Singh Vs. State of Mahatrshtra [2011 (74) ACC 887.**

9. I have considered the said arguments and perused the verdicts of Hon'ble Apex Court as well as the relevant provisions of the Act as amended by Act No.33 of 2006 and the Rules framed thereunder, along with all materials available on record.

10. Now coming to consider the verdict of Hon'ble Apex Court in Daya Nand Vs. State of Harnaya (supra) the Hon'ble Apex Court in paragraph 10 has been pleased to hold as follows:-

" In the Juvenile Justice Act, 1986, a 'juvenile' was defined under Section 2(h) to mean a boy who has not attained the age of 16 years or a girl who has not attained the age of 18 years."

11. The Hon'ble Apex Court in para 11 has further held as follows:-

" The Juvenile Justice Act, 1986 was replaced by the Juvenile Justice (Care and Protection of Children Act), 2000 that came into force on April 1,2001. The 2000 Act defined ' juvenile or child' in Section 2(k) to mean a person who has not completed eighteenth years of age. Section 69 of 2000 Act repealed the Juvenile Justice Act, 1986.The 2000 Act, in Section 20 also contained a provision in regard to cases that were pending when it came into force and in which the accused at the time of commission of offence was below 18 years of age but above sixteen years of age (and hence, not a juvenile under the 1986 Act) and consequently who was being tried not before a juvenile Court but a regular Court. Section 20 (prior to its amendment in 2006) provided as follows:-

" 20. ***Special provision in respect of pending cases***- Notwithstanding anything contained in this Act, all proceedings in respect of a juvenile pending in any Court in any area on the date on which this Act comes into force in that area, shall be continued in that Court as if this Act had not been passed and if the Court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, forward the juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the provisions of this Act as if it had been satisfied on inquiry under this Act that a juvenile has committed the offence."

12. The Hon'ble Apex Court has further held in para 12 as follows:-

"The above quoted provision came up for consideration before a Constitution Bench of this Court in Pratap Singh Vs. State of Jharkhand and another 2005(28) AIC 640(SC). In Pratap Singh, this Court held that Section 20 of the 2000 Act would apply only to cases in which the accused was below 18 years of age on April 1,2001, the date on which the 2000 Act came into force but it would have no application in case the accused had crossed the age of 18 years on the date of coming into force of the 2000 Act."

13. The Hon'ble Apex Court in para 13 has further made the following observations:-

" After this Court's decision in Pratap Singh (and presumably as a result of that decision) a number of amendments of a very basic nature were introduced in the 2000 Act w.e.f August 22,2006 by Act 33 of 2006. Some of the provisions incorporated in the 2000 Act by the 2006 amendment in so far as relevant for the present are reproduced below:-

" 1 (4) Notwithstanding anything contained in any other law for the time being in force, the provisions of this Act shall apply to all cases involving detention, prosecution, penalty or sentence of imprisonment of juveniles in conflict with law under any such law.

2 (1)"juvenile in conflict with law" means a juvenile who is alleged to have committed an offence and has not completed eighteenth years of age as on the date of commission of such offence;

7-A. ***Procedure to be followed when claim of juvenility is raised before any Court--***(1) Whenever a claim of juvenility is raised before any Court or a Court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the Court shall make an enquiry,

take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:

Provided that a claim of juvenility may be raised before any Court and it shall be recognized at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.

(2) If the Court finds a person to be a juvenile on the date of commission of the offence under sub-section(1), it shall forward the juvenile to the Board for passing appropriate orders and the sentence, if any, passed by a Court shall be deemed to have no effect."

"The effect of the amendments in the 2000 Act were considered by this Court in Hari Ram Vs. State of Rajasthan and another 2010(86) AIC 97 (SC). In Hari Ram, this Court held that the Constitution Bench decision in Pratap Singh's case was no longer relevant since it was rendered under the unamended Act. In Hari Ram this Court held and observed as follows:-

"59. The law as now crystallized on a conjoint reading of Sections 2(k), 2(l),7-A,20 and 49, read with Rules 12 and 98, places beyond all doubt that all persons who were below the age of 18 years on the date of commission of the offence even prior to 1.4.2001, would be treated as juveniles, even if the claim of juvenility was raised after they had attained the age of 18 years on or before the date of commencement of the Act and were undergoing sentence upon being convicted."

14. In para 68, Hon'ble Apex Court has further held as follows:-

" Accordingly, a juvenile who had not completed eighteenth year on the date of commission of the offence was also entitled to the benefits of the Juvenile Justice Act,2000, as if the provisions of Section 2(k) had always been in existence even during the operation of the 1986 Act."

Now coming to consider the another verdict given by the Hon'ble Apex Court in Amit Singh Vs. State of Maharashtra[2011 (74) ACC 887, the same principle has been followed and it has been held in para 10 as follows:-

" It is clear from the above provisions, namely, Section 7-A, the claim of juvenility to be raised before any Court at any stage, even after final disposal of the case and sets out the procedure which the Court is required to adopt, when such claim of juvenility is raised. Apart from the aforesaid provisions of the Act as amended, and the Juvenile Justice (Care and Protection of Children) Rules, 2007,(in short ' the rules'), Rule 98, in particular, has to be read along with Section 20 of the Act as amended by the Amendment Act,2006 which provides that even after disposal of cases of juveniles in conflict with law, the State Government or the Board could , either suo motu or on an application made for the purpose, review the case of juvenile, determine the juveniltity and pass an appropriate order under Section 64 of the Act for immediate release of the juvenile whose period of detention had exceeded the maximum

period provided in Section 15 of the Act i .e 3 years. All the above relevant provisions, including the amended provisions of the Act and the Rules have been elaborately considered by this Court in Hari Ram (supra)"

15. While applying the ratio of the aforesaid verdicts of Hon'ble Apex Court referred to above, in the present matter, it is apparent that the incident is of 19.5.1997 and according to earlier opinion of the Chief Medical Officer which was given on 18.12.1997, the age of the revisionist was opined to be about 17 years. Hence it is clear that at the time of incident, the revisionist was below 18 years. According to the amended Act and in view of the aforesaid verdicts, the applicant is entitled to the benefit of the age of juvenility given in the new Act as in view of Sections 2(k) and 2(l) " juvenile" or " child" means a person who has not completed eighteenth year of age and " juvenile in conflict with law" means a juvenile who is alleged to have committed an offence and has not completed eighteenth year of age as on the date of commission of such offence.

16. The learned court below should have considered the application of the revisionist for declaring him juvenile in its proper perspective in accordance with the provisions of the amended Act but instead vide the impugned order dated 9.2.2007, it rejected the same only on the basis that his earlier application had already been rejected on 23.12.1997. Having not done so, the order impugned passed by the learned court below is erroneous and is not sustainable in the eye of law.

17. In view of the aforesaid considerations, this revision is allowed. The impugned order dated 9.2.2007 is hereby set aside and the matter is remanded back to the learned trial court to decide the matter of juvenility of the revisionist afresh in accordance with law, in the light of the observations made above and thereafter proceed further in accordance with law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.12.2012

BEFORE
THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.

MISC. SINGLE No. - 925 of 1995

Imaduddeen & others ...Petitioner
Versus
Najib Ullah and others ...Respondents

Counsel for the Petitioner:
Sri Shafiq Mirza

Counsel for the Respondents:
C S C.
Sri Mohd Arif Khan
Sri Perwaiz Wahab Khan
Sri Syed Wajid Irfan

Civil Procedure Code Order 41 Rule 27- Additional evidence at appellate stage- on ground certain document amounts to admission on part of respondent-and also could enable to pronounce the judgement by arriving at just decision- rejected by the appellate court without advertising the above fact-held finding by the court below wholly anonymous- vitiated.

Held: Para-18

In view of what has been held by Hon'ble Apex Court in the case of K. R. Mohan Reddy (supra), it is concluded that the submission made by the learned counsel for the petitioners carries weight. As discussed above, though the application

moved by the petitioners before the learned appellate court below contained two grounds, however, no finding has been returned by the court below as regards the issue raised by the petitioners in their application that since the documents sought to be furnished as evidence contained certain admission on the part of the respondents, as such, in case the said evidence is permitted to be taken on record, the same would enable the court to pronounce the judgment by arriving at a just decision. In absence of the aforesaid finding, learned appellate court below has clearly erred in law which renders the impugned order dated 05.04.1995 vitiated.

Casea law discussed:

[2010 (28) LCD 1345]; [2003 (21) LCD 219]; [2001 (44) ALR 737]; [(2007) 14 SCC 257]

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

1. This writ petition assails the validity of an order dated 05.04.1995, whereby the application moved by the petitioners, who were appellants before the learned appellate court below, under Order 41 Rule 27 of the Code of Civil Procedure for adducing additional evidence has been rejected.

2. Heard Sri S. A. Jamal, Advocate holding brief of Sri Shafiq Mirza, learned counsel for the petitioners and Sri Mohd. Arif Khan, Senior Advocate, assisted by Sri Mohd. Moinuddin Khan and Sri Mohd. Aslam Khan, Advocates for respondents no. 1 to 3.

3. The facts which are relevant for the purposes of resolving the dispute engaging attention of this Court in the instant writ petition are that a Suit bearing No. 124 of 1981 was filed before the learned trial court by the respondents wherein the petitioners were the defendants. The suit was filed with the prayer for decree for demolition of the construction raised by the petitioners. Subsequently another suit was filed by the petitioner no.6 against the respondents no.1 to 3 which was registered as Regular Suit No.134 of 1981 wherein the decree for permanent injunction was sought for restraining the defendants i.e. respondents no. 1 to 3 in the instant writ petition from raising any construction on the land in dispute.

4. Out of the aforesaid two regular suits, Suit No.134 of 1981 was later on dismissed in default on 13.08.1985 whereas the Suit No.124 of 1981 was decreed by the trial court by means of judgment and order dated 28.09.1991.

5. Being aggrieved against the decree passed in Suit No.124 of 1981, an appeal was preferred by the petitioners before the learned appellate court below. During pendency of appeal, an application was preferred before the learned appellate court below by the petitioners on 24.03.1995 praying therein that certain documents annexed with the application may be taken on record. The said application was moved by the petitioners invoking the provision of Order 41 Rule 27 of the Code of Civil Procedure. The application was, however, rejected by the learned appellate court below by means of order dated 05.04.1995 which is under challenge in the instant writ petition.

6. The sole contention of the learned counsel appearing for the petitioners is that the impugned order dated 05.04.1995 passed by the learned appellate court below is erroneous for the reason that contrary to the provision of Order 41 Rule 27(1)(b) of the Code of Civil Procedure, no finding has been returned by the learned appellate court below on the issue as to whether the documents which were sought to be filed along with

application moved by the petitioners were required by the appellate court to enable it to pronounce the judgment. Sri Jamal, learned counsel for the petitioners citing two judgments reported in **[2010 (28) LCD 1345]; Shalimar Chemical Works Ltd. vs. Surendra Oil & Dal Mills (Refineries) and others and [2003 (21)LCD 219]; M/s. Gupta National Radios and Electric House vs. Sagarmal Arora and another**, has very emphatically submitted that in absence of finding recorded by the learned appellate court below in terms of the provision of Order 41 Rule 27(1)(b) of the Code of Civil Procedure, the impugned order passed by the learned appellate court below cannot be permitted to be sustained.

7. Strongly opposing the arguments raised by the learned counsel for the petitioners, Sri Mohd. Arif Khan, learned Senior Advocate has submitted that in the wake of distinct finding by the learned appellate court below that evidence, which was sought to be adduced by means of application moved by the petitioners before the learned appellate court below, had all along been in the knowledge of petitioners since in the year 1981 itself and, as such, at this belated stage in the year 1995 appellants cannot be permitted to adduce the evidence, hence, there is no illegality or irregularity of any kind which can be seen by this Court in the order passed by the learned appellate court below. In his support, he has strongly relied upon the judgment of Apex Court reported in **[2001 (44) ALR 737]; N.Kamalam (dead) and another vs. Ayyasamy and another. Sri Mohd. Arif Khan,** learned Senior Advocate citing paragraph 17 and 18 of the aforesaid judgment of Hon'ble Apex Court has submitted that since in the instant case also the application to adduce additional evidence was moved after a very long time and since there is a finding by the court below that petitioners were in the knowledge of evidence which they wanted to adduce at the appellate stage since the very beginning, hence the application has rightly been rejected by the court below. He has further drawn attention of this Court to para 18 of the judgment of the Apex Court in the case of **N. Kamalam (dead) and another (supra)** and has submitted strenuously that at the belated stage no fresh evidence can be led by the petitioners keeping in view the fact that the evidence which they wanted to lead by way of filing application in March, 1995 has all along been available to them and in their knowledge.

8. Having given thoughtful consideration to the arguments advanced by the learned counsel appearing for the respective parties and also going through the material available on record, it is clear that application moved by the petitioners before the learned appellate court below for adducing additional evidence contained two grounds, namely, (1) the documents which were sought to be furnished before the appellate court contained admission of the respondents, therefore, the said documents would facilitate the appellate court to pronounce the judgment in the matter; and (2) the documents which were sought to be furnished were not in the knowledge of the petitioners.

9. Admittedly, the application moved by the petitioners contained the aforesaid two grounds which is clear from a perusal of Annexure-1 appended to the writ petition, which is a true copy of the application moved before the learned appellate court below for adducing additional evidence. A bare reading of the said application establishes that a specific plea was taken by the petitioners while moving the application

for adducing the additional evidence that since the documents sought to be filed contained admission of the respondents, as such, the evidence was such that it would enable the appellate court to pronounce the judgment.

10. The other ground, of course, was that the said documents were in the knowledge of the petitioners.

11. From a bare perusal of the impugned order dated 05.04.1995, it is abundantly clear that though the learned appellate court below has given a finding to the effect that documents which were sought to be filed as additional evidence before the appellate court below have all along been in the knowledge of the petitioners since 1981, however, the court below has not recorded any finding on the other issue raised and the ground taken by the petitioners in their application to the effect that since the evidence being sought to be adduced contains admission on the part of the respondents, as such, this would facilitate the appellate court to arrive at a just decision and to pronounce the judgment accordingly.

12. So far as the submission made by Sri Mohd. Arif Khan, learned Senior Advocate in respect of broad principles emanating from the provision of Order 41 Rule 27 of the Code of Civil Procedure to the effect that this provision should be applied very sparingly and only in case ingredients given in sub rule 1 of Rule 27 are fulfilled is concerned, there cannot be any quarrel to this legal proposition. However, what needs to be seen is as to whether despite raising a specific plea and taking specific ground that the documents sought to be furnished by moving application under Order 41 Rule 27 of the Code of Civil Procedure before the appellate court were such which would enable the appellate court to arrive at a just decision, the court below ought to have given specific finding on the said issue or not. Further, in case no such finding has been given then as to whether it will vitiate the impugned order dated 05.04.1995.

13. The provision of Order 41 Rule 27 of the Code of Civil Procedure reads as follows:

"Order 41 Rule 27:- Production of additional evidence in Appellate Court.- (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if-

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

[(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or]

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission."

14. There is no doubt that the provision of Order 41 Rule 27 of the Code of Civil Procedure should be permitted to be invoked not so very often but only in case application so moved under the said provision fulfills the basic ingredients given in Clauses (a), (aa) & (b) of sub-rule 1 of Rule 27, Order 41. A party making an application under Order 41 Rule 27 can take either all the grounds enumerated in sub-rule (1) of Rule 27 or can take two of the three grounds enumerated therein or it can take only one of the three grounds envisaged in Rule 27(1) of the Code of Civil Procedure. There is also no doubt as to the legal proposition that for exercising the authority to permit a party to an appeal to produce additional evidence, it is the discretion of the appellate court which has to be exercised by it. However, the discretion so vested in the appellate court has to be exercised judiciously.

15. It is also noteworthy that conditions precedent for application of clause (aa) are different from those of clause (b). In case clause (aa) is to be applied in a particular case, it would be seen by the court concerned that conditions precedent mentioned in clause (aa) are fulfilled. In case a party takes recourse to clause (b) to sub-rule (1) of Rule 27 of Order 41 of the Code of Civil Procedure, then it is for the appellate court to consider the evidence on record and then give a finding as to whether additional evidence which is sought to be adduced will be necessary for arriving at a just decision.

16. To emphasize that in case a party, by moving application under Order 41 Rule 27 of the Code of Civil Procedure, takes a plea as envisaged in sub clause (b) of sub rule (1) of Rule 27 of Order 41 of the Code of Civil Procedure then finding needs to be returned on the said issue, regard may be had to the decision of the Apex Court in the case of **K. R. Mohan Reddy vs. Net Work INC, represented through M.D**, reported in **[(2007) 14 SCC 257].** To appreciate the nature of discretion vested in the appellate court to allow a party to lead additional evidence for the purposes of facilitating pronouncement of the judgment in a just manner, paragraph 17 of the judgment of the Apex Court in the case of **K. R. Mohan Reddy (supra)** is worth noticing, which runs as under:

" 17. It is now a trite law that the conditions precedent for application of clause (aa) of sub-rule (1) of Rule 27 of Order 41 is different from that of clause (b). In the event the former is to be applied, it would be for the applicant to show that the ingredients or conditions precedent mentioned therein are satisfied. On the other hand if clause (b) to sub-rule (1) of Rule 27 of Order 41 CPC is to be taken recourse to, the appellate court is bound to consider the entire evidence on record and come to an independent finding for arriving at a just decision; adduction of additional evidence as has been prayed by the appellant was necessary. The fact that the High Court failed to do so, in our opinion, amounts to misdirection in law. Furthermore, if the High Court is correct in its view that the respondent-plaintiff had proceeded on the basis that the suit is entirely based on a cheque, wherefor, it was not necessary for it to file the books of accounts before the trial court, finding contrary thereto could not have been arrived at that the same was in fact required to be proved so as to enable the appellate court to arrive at a just conclusion".

(Emphasis supplied by the court)

17. In the aforesaid quoted judgment, Hon'ble Apex Court has clearly stated that

the appellate court is bound to consider the entire evidence on record and come to an independent finding that adduction of additional evidence is necessary for arriving at a just decision.

18. In view of what has been held by Hon'ble Apex Court in the case of **K. R. Mohan Reddy (supra),** it is concluded that the submission made by the learned counsel for the petitioners carries weight. As discussed above, though the application moved by the petitioners before the learned appellate court below contained two grounds, however, no finding has been returned by the court below as regards the issue raised by the petitioners in their application that since the documents sought to be furnished as evidence contained certain admission on the part of the respondents, as such, in case the said evidence is permitted to be taken on record, the same would enable the court to pronounce the judgment by arriving at a just decision. In absence of the aforesaid finding, learned appellate court below has clearly erred in law which renders the impugned order dated 05.04.1995 vitiated.

19. In the result, the writ petition deserves to be allowed. Accordingly, it is allowed. The impugned order dated 05.04.1995, passed by the Additional Civil Judge, Bahraich in Civil Appeal No.34 of 1991; Imamuddeen and others vs. Mujibullah and others is hereby quashed. Further, a direction is issued to the learned appellate court below to decide the application Ka-48 moved by the petitioners afresh keeping in view the observations made hereinabove in the judgment.

20. Sri Mohd. Arif Khan, learned Senior Advocate appearing for the respondents has also submitted that the application moved by the petitioners seeking production of the additional evidence was nothing but a dilatory measure adopted by the petitioners. Keeping in view the fact that the appeal is pending since 1991, the learned appellate court below is also directed to decide the entire appeal itself within a period of three months from the date a certified copy of this judgment is produced before it.

21. In the circumstances of the case, however, there will be no order as to cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.12.2012

BEFORE
THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.

Civil Misc. Writ Petition No. 1647 of 2008

Raj Kumar Singh ...Petitioner
Versus
District Inspector of Schools and others ...Respondents

Counsel for the Petitioner:
Sri Ravi Agrawal
Sri Pankaj Lal
Sri P.K. Chaurasia
Sri G.K. Dwivedi

Counsel for the Respondents:
C.S.C.
Sri Gireesh Chandra Dwivedi

Constitution of India, Article 226- payment of salary-dismissal of petitioner set-a-side-subject to outcome of criminal proceeding-even after acquittal in criminal case-management decided not to initiate disciplinary proceeding-considering charges to be non serious in nature-inspite of reinstatement could not join as the person being appointed during intervening period got interim order concealing material facts-D.I.O.S. Also not bring correct position inspite of

direction of show cause-held-petitioner entitled for salary from the date of reinstatement and not from date of judgment-Government to recover the amount of salary from erring officer-principle of "No Work No Pay" not applicable.

Held: Para-25

After bearing in the mind the principles culled out from the aforementioned judgments of the Supreme Court as well as of this Court in facts of the present case a direction may be issued upon the District Inspector of Schools, Bulandshahr to make the payment of the petitioner from the date of his reinstatement i.e. 26.8.1988 and not from the date of acquittal. Petitioner is entitled for the salary from his joining upto 2003. As regards payment made to Kunwarpal Singh it was a sheer negligence/connivance of the office of the District Inspector of Schools. Therefore the State Government is at liberty to fix the responsibility for the illegal payment made to Kunwarpal Singh and recover the said amount from the Officer who is found to guilty of negligence or connivance with the Kunwarpal Singh.

Case Law discussed:

1997 (5) SCC 772; 2006 (5) SCC 446; 1999 (3) SCC 679; 2004 (1) SCC 121; AIR 1964 SC 787; AIR (1984) 626; 1979 (2) SCC 80; 1980 (4) SCC 443; 1981 (3) SCC 225; 2005 (5) SCC 124; 2006 (1) SCC 479; 2005 (2) SCC 363; 2007 (2) SCC 433; 1979 (2) SCC 80; 2009 (1) UPLBEC 321

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

1. The petitioner who is a Clerk in an Intermediate College preferred this writ petition for issuance of a writ of certiorari to quash the order dated 5.12.2007 whereby his representation for payment of his salary from May, 1990 to 9.11.2003 was rejected by the respondent no.1, the District Inspector of Schools, Bulandshahar.

2. A brief reference to the factual aspect would suffice.

3. The Janta Intermediate College (for short Institution), Panchgai, district Bulandshahr is a recognized institution. A Society registered under the provisions of the Societies Registration Act, 1860 has established this institution. The institution is administered by the Committee of Management. It receives the aid from the State fund, at the level of the High School. The affairs of the institution, its teachers and employees are governed by the U.P. Intermediate Education Act, 1921; the regulations framed thereunder and U.P. Secondary Education Service Selection Board Act, 1982.

4. The petitioner was initially appointed in the year 1976. He was suspended on 29.10.1980 as he was made accused in a criminal case. On the said ground his services were terminated by the Committee of Management on 30.11.1980. The Committee of Management sent the papers to the District Inspector of Schools for the approval. The District Inspector of Schools accorded the approval for his termination. Aggrieved by the said order the petitioner filed an Appeal before the Deputy Director of Education who set aside the order of termination and approval of the District Inspector of Schools vide order dated 11.2.1999. He directed that the petitioner would be placed under suspension and his termination would be subject to the outcome of the criminal proceedings. In the meantime the Committee of Management appointed one Kunwarpal

Singh on 18.11.1981 on temporary basis. The District Inspector of Schools approved his appointment on 2.2.1982 and he started functioning as Assistant Clerk and he was paid salary.

5. In criminal case no. 299 of 1980 the petitioner was acquitted of all the charges by order dated 24.7.1987 passed by the court of II Additional Munsif Magistrate, Khurja, Bulandshahar. The petitioner submitted the copy of the judgment of the trial court to the Committee of Management and on 26th August, 1988 it took a resolution to reinstate the petitioner and by the same order the salary of Kunwarpal Singh was stopped. Aggrieved by the said order Kunwarpal Singh preferred Writ Petition No. 1281 of 1990 in which on 16.1.1990 interim mandamus was issued by this Court to respondent no.1 to pay the salary of the petitioner therein (Kunwarpal Singh) or show cause. Copy of the said order of this Court is placed on record as Annexure-7 to the writ petition. The order of the Division bench is extracted hereunder for the sake of convenience:-

"Issue notice.

An interim mandamus is issued to the respondent no.1 to pay the salary to the petitioner from July, 1988 to December, 1989 and in future within a period of one month from the date a certified copy of this order is produced before ***him or show cause within the said period."***

6. It appears that the authorities concerned for the reasons best known to them did not show cause and they failed to bring the correct fact to the notice of this Court that the petitioner's termination was disapproved by the Deputy Director of Education by order dated 22.1.1983 and the petitioner stood acquitted by the trial court on 24.7.1987 and in compliance of the order of the Deputy Director of Education the Committee of Management had passed a resolution to reinstate the petitioner. Without showing cause the concerned authorities preferred to comply the interim mandamus by order dated 20.7.1992 and issued an order for payment of salary to Kunwarpal Singh. The writ petition remained pending for thirteen years and ultimately it came to be dismissed on merit in the year 2003. Feeling aggrieved by the order of the learned Single Judge dated 10.11.2003 a Special Appeal No. 1301 of 2003 was filed by Kunwarpal Singh which was dismissed by order dated 3.12.2003, copy of the said order is placed on record as Annexure-8 to the writ petition. Aggrieved by the said order he filed Special Leave Petition (SLP) in the Supreme Court and his Special Leave Petition was also dismissed on 1.10.2004, copy of which is Annexure-9 to the writ petition.

7. Petitioner also preferred Writ Petition No. 23506 of 1991 for payment of his salary. This Court directed the District Inspector of Schools to decide his representation by a reasoned and speaking order in accordance with law within two months. Copy of the order of the learned Single Judge dated 24.7.2007 is placed on record as Annexure-10 to the writ petition. In compliance thereof the District Inspector of Schools has passed the impugned order whereby he has rejected the representation of the petitioner for the payment of his salary from May, 1990 to 9.11.2003, only on the ground that during that period the Committee of Management had appointed

Kunwarpal Singh who was working on the strength of the interim order dated 16.1.1990.

8. Sri Pankaj Lal, learned counsel for the petitioner submits that there was no fault of the petitioner. His appeal against termination order was allowed by the Deputy Director of Education and in criminal case he was also acquitted. The Committee of Management has made illegal appointment of Kunwarpal Singh and the petitioner is entitled for his salary in terms of the order of the Deputy Director of Education dated 22.1.1983 whereby he had issued a direction that the petitioner will remain under suspension subject to the decision of the criminal court. After the acquittal on 24.7.1987 he was entitled to continue on his post.

9. Learned Standing Counsel submits that the petitioner did not work from May, 1990 to 9.11.2003 and as such he is not entitled for his salary during that period on the principle of no work and no pay. He further urged that Kunwarpal Singh was allowed to continue in compliance of the interim order and as such for the same period salary to two employees cannot be made.

10. I have heard learned counsel for the respective parties and perused the record.

11. The petitioner was appointed as a Clerk in the year 1976, he was implicated in a criminal case. In the said criminal case he stood acquitted on 24.7.1987. The committee of management had terminated his services which was ultimately dis-approved by the Deputy Director of Education with a direction that he would be under suspension and his continuance shall be subject to the decision of the criminal case. In the meantime the Committee of Management had appointed one Kunwarpal Singh who had worked as Assistant Clerk in the institution.

12. However, after the petitioner's acquittal in criminal case the Committee of Management resolved in the year 1988 to reinstate him and terminate the services of Kunwarpal Singh. Aggrieved by the order of the Committee of Management terminating Kunwarpal Singh services and permitting the petitioner to join his post after acquittal from the criminal court, Kunwarpal Singh preferred a writ petition. In the said writ petition on 16.1.1990 an interim mandamus was issued to pay his salary or show cause. The then District Inspector of Schools ought to have filed a reply/show cause by way of counter affidavit bringing the facts to the notice of this Court the order of the Deputy Director of Education whereby the petitioner was reinstated subject to the decision of the criminal court and his subsequent acquittal on 24.7.1987, by which he was entitle for reinstatement and the Committee of Management has rightly reinstated him. However, for the reasons best known to the then District Inspector of Schools this important fact was not brought on the record of this Court, and he also preferred not to file reply/show cause to the interim mandamus dated 16.1.1990 and preferred to comply interim mandamus by issuing an order for payment of salary of Kunwarpal Singh. The order of the District Inspector of Schools for payment of salary to Kunwarpal Singh is placed on record as Annexure-CA-7 to the counter affidavit filed on behalf of respondent no.1. After the dismissal of Writ Petition Kunwarpal

Singh preferred Special Appeal before this Court and SLP before Supreme Court which came to dismissed on dates mentioned above.

13. The only question which falls for determination by this Court is as to whether the petitioner is entitle for the full salary and other benefits or not. Indisputably, the petitioner's termination order was set aside by the Deputy Director of Education in the appeal filed by the petitioner and a direction was issued that his suspension order shall be subject to the order of the criminal proceedings. In the criminal proceedings he was acquitted. After the acquittal of the petitioner the committee of management passed a resolution on 28.6.1988 that the petitioner may be reinstated as thee is no serious allegations against him and it was also resolved for payment of his salary. The said resolution was unanimously passed. A copy of the minutes of the said resolution has been placed as Annexure-4 to the writ petition. This fact establishes that against the petitioner there was no serious charge of any kind of mis-conduct as after his acquittal the committee of management did not take a decision to initiate any disciplinary proceedings against him on the same charge of misconduct.

14. The Principal of the College the respondent no.3 has filed a counter affidavit. The stand taken in the counter affidavit is that that the petitioner joined his services on 1.7.1988. The relevant part of the paragraph 8 of the counter affidavit is extracted as under :-

"the respondent no.1 has malafidely and arbitrarily rejected the representation of the petitioner without application of mind and evidence on record i.e. attendance register, service book etc. given by the deponent regarding the petitioner's regularly working as a Clerk in the College after his reinstatement since 1.7.1988. the deponent again wrote a letter to the respondent no.2 on 9.12.07 seeking the similar query as aforesaid."

15. From the aforesaid averments and some of the communication which has been attached with the counter affidavit filed by the respondent, it is evident that the petitioner was permitted to join the Institution in pursuance of the resolution passed by the committee of management on 1.7.1988.

16. In case interim order is vacated ,it is the duty of the Court to put the parties to the same term. The Supreme Court in the case of Kanodia Chemicals & Industries Ltd. and others v. U.P.Electricity Board and others reported 1997 (5) SCC 772 held that an order of stay granted pending disposal of a writ petition/suit or other proceedings, comes to an end with the dismissal of the substantive proceedings and it is the duty of the Court in such a case to put the parties in the same position they would have been but for the interim orders of the Court.

17. In the present case on account of connivance/negligence of the office of the District Inspector of Schools, Kunwarpal Singh continued to receive his salary in pursuance of an interim order from the year 1990 to 2003 when his writ petition, special appeal and SLP were dismissed. During this period from 1998 onwards the petitioner was permitted to join his duty and in his Writ Petition No. 23506 of 1991 interim mandamus was issued on

22.8.1991. Copy of which is placed on record as Annexure-CA-5 to the counter affidavit field by the District Inspector of Schools the respondent no.1 herein.

18. In case an employee is acquitted in a criminal case there are two options before the employer if the charges of the criminal case and the departmental proceedings are identical and same then in the case of acquittal from the criminal trial the departmental proceedings can be dropped and the employee can be reinstated . The second option before the employer is to continue the departmental proceedings as scope of the departmental proceedings and the criminal proceedings are different.

19. Reference may be made to the following judgment of the Supreme Court G.M.Tank v. State of Gujrat and others reported 2006 (5) SCC 446; Captain M.Pal Anthony v. Bharat Gold Mines Ltd. reported 1999 (3) SCC 679 ; Union of India v. Jai Pal Singh reported 2004(1) SCC 121; R.P.Kapoor v. Union of India reported AIR 1964 SC 787; Corpn. of the City of Nagpur v. Ram Chandra reported AIR (1984) 626.

20. In the case on hand the committee of management, the employer itself has found that charges against the petitioner were not serious enough and as such it did not take any decision to initiate domestic inquiry on those charges against the petitioner.

21. The only question remains to answer is whether the petitioner is entitle for the full salary ? In case where the order of dismissal or removal are set aside the reinstatement is automatic with full back wages is no more *res integra* . The earlier view of the Supreme Court was that if the dismissal/removal/termination order is set aside the reinstatement with the full back wages is a normal rule as held by the Supreme Court in the case of Hindustan Tin Works (P) Ltd. v, Employees reported 1979 (2) SCC 80. This view was followed in Surendra Kumar Verma v. Central Govt. Industrial Tribunal/Labour court reported 1980 (4) SCC 443 and Mohan Lal vs. Bharat Electronics Ltd. reported 1981 (3) SCC 225.

22. But the recent trend is not automatic reinstatement with full back wages. Reference may be made to some of the recent judgment of the Supreme Court where the reinstatement and full back wages has not been held to be automatic, as held in Allahabad Jal Sansthan v. Daya Shanker Rai reported 2005 (5) SCC 124, U.P.State Brassware Corporation Ltd. v. Udai Narain Pandey reported 2006 (1) SCC 479; Kendriya Vidyalaya Sangathan v. S.C.Sharma reported 2005 (2) SCC 363. However, the Supreme Court in the case of J.K.Synthetics Ltd. v. K.P.Agarwal and another reported 2007 (2) SCC 433 after noticing the recent trend that the reinstatement and full back wages is not automatic held that there are two exceptions. The Supreme Court while carving out the exceptions observed as under :-

"But there are two exceptions. The first is where the court sets aside the termination as a consequence of employee being exonerated or being found not guilty of the misconduct. Second is where the court reaches a conclusion that the inquiry was held in respect of a frivolous issue or petty misconduct, as a camouflage to get rid of the employee or victimise him, and the disproportionately excessive

punishment is a result of such scheme or intention. In such cases, the principles relating to back wages, etc. will be the same as those applied in the cases of an illegal termination."

23. The aforesaid exceptions can be applied safely in the present case as the petitioner was acquitted in the criminal case and no disciplinary proceeding under the regulations of Intermediate Act was conducted by the appointing authority albeit it decided to reinstate the petitioner as it found that there was no serious charges against the petitioner. Therefore the law laid down by the Supreme Court in Hindustan Tin Works (P) Ltd. v, Employees reported 1979 (2) SCC 80 (supra) would be applicable in the present case and the principle of no work and no pay would not be applicable in the facts of this case.

24. This Court has also followed the same law in the case of Tasneem Fatma v. State of U.P. Thru Secy./Director Secondary Education and Ors. Reported 2009 (1) UPLBEC 321. The relevant part is extracted here under below:-

"64. In view of the discussion made herein above, I am of the view that the order impugned in this writ petition is not sustainable. The petitioner is entitled for reinstatement with all consequential benefits for the reason that she has been made to suffer on account of wholly illegal act of the respondents. Here is not a case where the petitioner should be denied benefit of back wages. The circumstances which would justify denial of back wages and where the employee must be allowed full back wages or partly, are discussed in detail by this court in Brijendra Prakash Kulshrestha vs. Director of Education, U.P. and others 2007 (3) ADJ 1, where it was held that in the kind of a case as in hand, where the termination of the employee was wholly attributable to the arbitrary and illegal case of the employer, the employee cannot be made to suffer. If the petitioner here is not allowed arrears of salary, it would cause prejudice to her without any fault on her part."

25. After bearing in the mind the principles culled out from the aforementioned judgments of the Supreme Court as well as of this Court in facts of the present case a direction may be issued upon the District Inspector of Schools, Bulandshahr to make the payment of the petitioner from the date of his reinstatement i.e. 26.8.1988 and not from the date of acquittal. Petitioner is entitled for the salary from his joining upto 2003. As regards payment made to Kunwarpal Singh it was a sheer negligence/connivance of the office of the District Inspector of Schools. Therefore the State Government is at liberty to fix the responsibility for the illegal payment made to Kunwarpal Singh and recover the said amount from the Officer who is found to guilty of negligence or connivance with the Kunwarpal Singh.

26. For the aforestated reasons the impugned order dated 5.12.2007 passed by the District Inspector of Schools, the respondent no.1 is liable to be quashed. Accordingly, it is quashed.

27. The petitioner shall be paid his salary from the year 1998 to 2003 within three months from the date of communication of this order.

28. The writ petition is allowed.

29. No order as to cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 08.01.2013

BEFORE
THE HON'BLE ANIL KUMAR, J.

MISC. SINGLE No. - 1673 of 2001

U.P.Cooperative Federation Limited ...Petitioner

Versus

M/S K.S.M. Bashir Mohammad & Sons & Another ...Respondents

Counsel for the Petitioner:
Sri P.K. Khare
Sri S.K.Pandey
Sri Shrish Kumar

Counsel for the Respondents:
C.S.C.
Sri N.K. Seth

Arbitration and Reconciliation Act 1996- execution of interim award given by the arbitrator-execution-proceeding initiated before Civil Judge (Senior Division)- order passed therein challenged on the ground of jurisdiction-according to definition of Section 2(1) (c) Court means the "Principle Civil Court" of Original Jurisdiction i.e. District Judge- hence order passed by Civil Judge-held- without jurisdiction-set-a-side.

Held: Para-12

In view of the facts stated above as well as the law as laid down by this Court in the case of I.T.I. Ltd, Allahabad (Supra) , opposite party no.2 has got no jurisdiction to entertain the application for execution proceedings in the matter in question hence the order dated 22.5.2001 is without jurisdiction , liable to be set aside.

Case Law discussed:
AIR 1998 Allahabad 313; 2005 (1) RAJ 209

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

1. Heard Sri P.K. Khare and Sri Shirish Kumar ,learned counsel for the petitioner, Sri Nirmal Seth , learned Senior Counsel assisted by Sri Sachin Garg Advocate for opposite party no.1 as well as learned Standing Counsel and perused the record.

2. Facts, in brief, of the present case are that for construction of commercial Complex at 6 , Cooper Road , Lucknow, petitioner/ M/S U.P. Cooperative Federation Limited entered into an agreement on 20.12.1995 with M/S K.S.M. Bashir Mohammad & Sons (hereinafter referred to as 'Contractor') .

3. Thereafter some dispute and deferences have arisen between the parties arising out of the agreement so for adjudication of the same referred to the Arbitrator Hon'ble Mr. Justice B.C. Saksena(former judge of this Court) under the Arbitration and Conciliation Act, 1996(hereinafter referred to as 'Act') and the sole Arbitrator on 24.10.2000 has given an interim award in favour of the Contractor, challenged by way of appeal (F.A.F.O. No.530 of 2000) by the petitioner , dismissed by judgment and order dated 30.11.2000 again challenged before Hon'ble the Supreme Court by way of Special Leave to Appeal (Civil) No. 5215 of 2001 etc. dismissed by order dated 10.5.2001.The said order on reproduction reads as under:-

"SLP(C) No.5215/2001 This Matter will be heard only on the merits of the interim award. So far challenge to the jurisdiction of the Arbitrator is concerned, we decline to exercise our

powers. List this matter for final hearing after four months on a non miscellaneous day. Parties may exchange any additional documents , if they are so advised.

SLPNO....CC 3015/2001

The Special Leave petition is dismissed both on the ground of delay as well as on merit."

4. In view of the said facts, contractor / respondent no.1 filed Execution case under Section 36 of the Act before opposite party no.2/ Civil Judge(Senior Division) Lucknow in which notice have been issued to petitioner who put his appearance and file objection regarding maintainability of the execution proceedings.

5. The Executing Court / Civil Judge (Senior Division) Lucknow passed an impugned order dated 22.5.2001 in Execution Case no. 3 of 2001 challenged by way of present writ petition filed before this Court .

6. Sri P.K.Khare, learned counsel for the petitioner while challenging the impugned order submits that opposite party no.2 has got no jurisdiction to entertain the application for execution as he is not a principal Civil Court of original jurisdiction in view of the provisions under Section 2 (1) (e) of the Act which reads as under:-

"2 (1) (e) "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes."

7. Accordingly, Sri P.K. Khare, learned counsel for the petitioner with the add of definition as given in Section 2 (1) (e) of the Act submits that the "District Judge" is the "Principal Civil Court of original jurisdiction" in a district thus the opposite party no.2 has no authority to entertain the execution proceedings so the order dated 22.5.2001 (Annexure no.1) passed by opposite party no.2 is non est and without jurisdiction liable to be set aside. In support of his contention , Sri Khare has placed reliance on a judgment of this Court given in the case of ***M/s I.T.I. Ltd. Allahabad Vs. District Judge, Allahabad and others, AIR 1998 Allahabad 313.***

8. Sri N.K. Seth, learned Senior Counsel assisted by Sri Sachin Garg Advocate for opposite party no.1, in rebuttal , submits that as per the admitted facts on record principal amount has already been paid to the Contractor on the basis of interim award given by the Arbitrator However, the interest has not paid to opposite party no.1 by the petitioner for which he is otherwise entitle to get in view of the order passed by Hon'ble Apex Court but on one or other pretext petitioner is lingering the matter without any jestification or reason. However, he fairly admits the legal position that the Civil Judge (Senior Division) Lucknow has got no jurisdiction to entertain the execution proceedings.

9. I have heard the learned counsel for the parties and gone through the record.

10. A plain reading of the clause (e) of Section 2(1), the 'Court' means the Principal Civil Court of Original Jurisdiction in a District, and includes the High Court in exercise of its ordinary original Civil Jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit, but does not include any Civil Court of a grade inferior to such Principal Civil Court or any Court of small causes. Thus, the expression 'Court' , therefore means--

(a) Principal Civil Court or original jurisdiction in a District;

(b) High Court in exercise of its ordinary original Civil Jurisdiction;

(c) Such Courts must have jurisdiction to decide the questions forming the subject matter of arbitration if the same had been the subject matter of a suit.

(d) Any Civil Court of a grade inferior to such principal Civil Court, is not included in the definition of "Court";

(e) Any Court of Small Causes is also not included in the definition of "Court".*(See: National Aluminum Co. Ltd. Vs. Pressteel and Fabrications (2004) 1 SCC 540: 2004(1) RAJ 1: 2003 (10) Scale 1062:2003(8) Supreme 876:2004(1) SLT 336: 2004 (3) SRJ 471: 2004 (1) Arb LR 67)*

11. In the case of ***M/s Nilachkra Constructions Vs. State of Orissa and another, 2005 (1) RAJ 209,*** after referring to Section 2(1) (e) of the Act which defines the 'court' and Section 2(4) of the Code of Civil Procedure, the Orissa High Court held that a plain reading of both the definitions makes it manifest that the Principle Court of Original jurisdiction means the district court in as much as District Judge is the presiding officer of that Court. From a conjoint reading of the aforesaid Sections, it is obvious that the court of "District Judge" is the principal Civil Court of original jurisdiction in a district. The definition , as given under Section 2(1) (e) of the Act expressly excludes any other Civil Court or any Court of small Causes.(see: Patel Roadways Limited Vs. Prasad Trading Company, (1991) 4 SCC 270 and Khalil Ahmad Dakhani V. Hatti Gold Mines Company Ltd.,(2000) 3 SCC 755)

12. In view of the facts stated above as well as the law as laid down by this Court in the case of **I.T.I. Ltd, Allahabad** (Supra) , opposite party no.2 has got no jurisdiction to entertain the application for execution proceedings in the matter in question hence the order dated 22.5.2001 is without jurisdiction , liable to be set aside.

13. For the forgoing reasons, the writ petition is allowed and the order dated 22.5.2001 passed by opposite party no.2/ Civil Judge (Senior Division) , Lucknow is set aside.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.01.2013

BEFORE
THE HON'BLE ASHOK SRIVASTAVA, J.

Criminal Revision No. - 2211 of 2012

Nihal ...Petitioner
Versus
State Of U.P. ...Respondents

Counsel for the Petitioner:
Dr. Arun Srivastva
Sri Rajiv.Lochan.Shukla
Sri Shrawan Kumar Shukla

Counsel for the Respondents:
Govt. Advocate

Juvenile Justice Act, Section 52 readwith section 401(2) Cr.P.C.-Right of complainant/informant to be heard in revision-offence u/s 302 Cr.P.C.-argument that informant is not a person-said to be adversely affected-held-in view of law laid down by Apex Court in Babloo Pasi case-complainant of F.I.R. Definitely an aggrieved person-opportunity of hearing is must-necessary direction issued.

Held: Para 10

On the basis of the above discussions I am of the view that in such type of cases the complainant of the FIR is definitely an aggrieved person and must be given an opportunity of hearing before passing an order in such type of revisions.
Caselaw discussed:
2009 (64) ACC 754; 2009 (65) ACC 629

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

1. I have heard learned counsel for the revisionist Nihal and the learned AGA. The short question, at this stage, which is to be answered in the revision is *whether the complainant-informant of the FIR should be heard in this revision or not.*

2. The brief facts of the case are that on 15.6.2011 an FIR was lodged with the police of P.S.Kotwali Pilibhit regarding an incident of murder which took place on the same day at about 6.30 p.m. The revisionist was named as an accused in the case. At a subsequent stage the revisionist took the plea that he was a juvenile on the date of the alleged incident which was considered and his case was referred to the Juvenile Justice Board for determination of his age. He was declared a juvenile. Thereafter a bail under section 12 of the Juvenile Justice Act (for short the Act) was moved before the Board. After calling for a report from the District Probation Officer and after hearing both the parties the Board was of the view that it was not in the interest of the juvenile in conflict with law to release him on bail and give him to the custody of his mother and therefore the application of the revisionist under section 12 of the Act was rejected.

3. Feeling aggrieved by the said order an appeal under section 52 of the Act was preferred before the Court of learned Sessions Judge which was ultimately disposed of by the learned additional Sessions Judge and the appeal was dismissed.

4. Feeling aggrieved by the order of the dismissal and earlier order of rejection the present revision has been filed. As mentioned above the sole question involved here is whether the informant/complainant of the case under section 302 IPC namely Ramesh should be heard by this Court before disposing of this revision or not.

5. Mr.R.L.Shukla, learned counsel for the revisionist has argued that the

complainant-informant of the FIR is not a person who can be said to be 'adversely affected' by the order which may be passed in this revision and which might result in allowance of this revision.

6. Learned AGA has opposed such arguments and said that from the language of Section 53 of the Act it is evident that any order passed under this revision will definitely affect the complainant of the case of murder and if the revision is allowed such order will definitely be prejudicial to him.

Section 54 of the Act is as follows:-

"54.Procedure in inquiries, appeals and revision proceedings-

1.Save as otherwise expressly provided by this Act, a competent authority while holding any inquiry under any of the provisions of this Act, shall follow such procedure as may be prescribed and subject thereto, shall follow, as far as may be, the procedure laid down in the Code of Criminal Procedure, 1973 (2 of 1974) for trials in summons cases.

2.Save as otherwise expressly provided by or under this Act, the procedure to be followed in hearing appeals or revision proceedings under this Act shall be as far as practicable, in accordance with the provisions of the Code of Criminal Procedure, 1973 (2 of 1974)."

Section 53 of the Act is as follows:-

" 53.Revision- The high Court may, at any time, either of its own motion or on an application received in this behalf, call for the record of any proceeding in which any competent authority or Court of Session has passed an order for the purpose of satisfying itself as to the legality or propriety of any such order and may pass such order in relation thereto as it thinks fit;

Provided that the High Court shall not pass an order under this section prejudicial to any person without giving him a reasonable opportunity of being heard."

7. Since in section 54 of the Act reference of Cr.P.C. has come it appears necessary that sub-section 2 of Sec.401 Cr.P.C. should also be quoted here which is:

"No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleaser in his own defence.?

My attention has been drawn towards **2009(64) ACC 754, Babloo Pasi Vs. State of Jhakhaand and another & 2009(65) ACC 629 Raghu Raj Singh Rousha Vs. M/S Shivam Sundaram Promoters (P) Ltd. and another.**

8. From a bare perusal of the proviso attached to Section 53 of the Act it is evident that the High Court shall not pass an order under this section prejudicial to any person without giving him a reasonable opportunity of being heard. Sub-section 2 of section 401 Cr.P.C. states that no order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence. It is the established position of law that the provisions of law should be understood and taken in its plain and simple sense unless there is any scope for interpretation of the same. There should not be any unnecessary stretching of terms and jugglery of words to

complicate a matter to arrive at a conclusion which may suit a person competent in doing such stretching or jugglery.

9. In Babloo Pasi's case (Supra) Babloo Pasi was the appellant of the case and the accused was respondent no.2. In para 11 of the said judgment the Apex Court has said that in its opinion having regard to the nature of controversy before the High Court and the scheme of the relevant statutory provisions whereunder the High Court was exercising its jurisdiction, the 'fairness in action' did demand that the complainant(appellant of the said case) should have been given an opportunity of hearing in the revision preferred by the accused(respondent no.2 of the said case). It is true that the Apex Court has further said in the following lines that the appellant of the said case was impleaded as party respondent, but this by itself does not mean that if he did not appear before the trial Court he should not be heard by the High Court when the revision was argued before it. From bare perusal of Para 11 of Babloo Pasi's case it is evident that complaint of such type of cases should be heard in revision under section 53 of the Act.

10. On the basis of the above discussions I am of the view that in such type of cases the complainant of the FIR is definitely an aggrieved person and must be given an opportunity of hearing before passing an order in such type of revisions.

11. Accordingly, the revisionist is directed to implead the complainant of the F.I.R. of the case as respondent no.2 in this revision. For the purpose an impleadment application may be moved within 7 days from today. Put up on 23.1.2013 for orders.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.01.2013

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Civil Misc. Writ Petition No. 2672 of 2012

India Waste Energy Development Ltd.
...Petitioner
Versus
Greater Noida Industrial Development Authority And Another ...Respondents

Counsel for the Petitioner:
Sri Anoop Trivedi
Sri Anil Mullick

Counsel for the Respondents:
Sri Nisheeth Yadav

Constitution of India, Article 227 readwith Arbitration an Conciliation Act 1996 Section 34/42-petition against the award made by the Arbitration can not be challenged before the High Court as according to definition of Court means the Principal Civil Court of Original Jurisdiction of the District Judge-held-petition under Article 227 of the Constitution or Section 34 readwith Section 42 not maintainable in the High Court-petition dismissed.

Held: Para-12 and 13

The 'court' is defined under Section 2(e) of the Act to mean the Principal Civil Court of original jurisdiction in a district and may include a High Court in exercise of its ordinary civil jurisdiction having jurisdiction to decide the questions forming the subject matter of the arbitration, if it had been the subject matter of the suit and would not include any civil court of a grade inferior to such principal Civil Court.

It has been settled by various authorities that the court of District Judge in district

would be a Principal Civil Court of original jurisdiction for the purposes of court under the Act.

Case Law discussed:

AIR 2006 SC 540; AIR 2007 SC 465

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

1. Supplementary affidavit filed, is taken on record.

2. Heard Sri Anoop Trivedi, learned counsel for the petitioner. Sri Nisheeth Yadav, learned counsel appearing for respondents No. 1 and 2.

3. Petitioner in this petition under Article 227 of the Constitution of India read with Section 34/42 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) is challenging the award of the arbitral tribunal dated 8th September, 2012.

4. Petitioner has described the petition as a writ petition.

5. The award of an arbitral tribunal cannot directly be challenged by means of a writ petition under Article 226 of the Constitution of India in view of statutory remedy available to move an application for setting aside the award under Section 34 of the Act before the competent court. Therefore, a writ petition under Article 226 of the Constitution of India is not the proper remedy and is not maintainable.

6. The petition under Article 227 of the Constitution of India is also not maintainable as the power of superintendence of this court over all courts and tribunals is not available where the award is made by an arbitrator under the Act as the arbitrator in adjudicating the dispute does not exercise the States inherent power of judicial function and is not a tribunal in the real sense though described as tribunal.

7. The seven Judges Bench of the Supreme Court in **M/s S.B.P. & Co. Vs. M/s Patel Engineering Ltd. AIR 2006 SC 540** has clearly laid down that orders passed by arbitral tribunal are not open to challenge under Article 226 or 227 of the Constitution of India.

8. Thus basically this is an application in the form of a petition under Section 34/42 of the Act for setting aside the arbitral award.

9. A preliminary objection has been raised that an application for setting aside an arbitral award under Section 34 of the Act cannot be filed before the High Court and it should be before the Principal Civil Court of original jurisdiction.

10. Sri Anoop Trivedi, learned counsel for the petitioner contends that the arbitrator was appointed by this court and therefore, in view of Section 42 of the Act all subsequent applications would lie before this court only.

11. No doubt Section 42 of the Act postulates that all subsequent applications under the Act in respect of an arbitration agreement shall lie before the same court in which any application had been made earlier but the reference to applications in Section 42 of the Act by necessary implication is to the applications other than applications referred to in Section 11 of the Act i.e. all applications which are supposed to be filed before a Court.

12. The 'court' is defined under Section 2(e) of the Act to mean the

Principal Civil Court of original jurisdiction in a district and may include a High Court in exercise of its ordinary civil jurisdiction having jurisdiction to decide the questions forming the subject matter of the arbitration, if it had been the subject matter of the suit and would not include any civil court of a grade inferior to such principal Civil Court.

13. It has been settled by various authorities that the court of District Judge in district would be a Principal Civil Court of original jurisdiction for the purposes of court under the Act.

14. It is well acknowledged that the High Court of Judicature at Allahabad is not a court exercising ordinary civil jurisdiction and therefore, is outside the ambit of the word 'Court' used in the Act.

15. The Apex Court in **M/s Pandey and Co. Builders Pvt. Ltd. Vs. State of Bihar AIR 2007 SC 465** with reference to the definition in Section 2(e) of the Act laid down that High Court not exercising original civil jurisdiction is not a court.

16. The Chief Justice as referred in Section 11 of the Act in making a reference to an arbitral tribunal has not been referred to and included within the ambit of a 'court' as defined under Section 2(e) of the Act. The power which has been vested in the Chief Justice by virtue of Section 11 of the Act is different and not that which has been conferred upon any court as contemplated by the Act. Therefore, for the purposes of making an application under Section 11 of the Act, the authority of the Chief Justice cannot be equated to that of a court so as to permit filing of subsequent applications in respect of the matters relating to the said arbitration before the Chief Justice or to the High Court concerned.

17. In view of the aforesaid facts and circumstances, I am of the view that this petition whether under Article 226/227 of the Constitution of India or under Section 34 read with Section 42 of the Act is not maintainable before this court and the proper remedy available to the petitioner, if any, is to make proper application under Section 34 of the Act to the Court i.e. the Principal Court of original jurisdiction of the concern district.

18. The petition lacks merit and is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.01.2013

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

Misc. Bench No. 2971 of 2001

Smt. Kanak Garg ...Petitioner
Versus
U.P. Avas Evam Vikas Parishad, Through Its Chairman ...Respondents

Counsel for the Petitioner:
Sri A.K. Srivastava
Srib Hans Raj Yadav
Sri Rajesh Kumar Tripathi
Sri Santosh Kumar

Counsel for the Respondents:
Sri Mahesh Chandra
Sri Mahesh Chandra
Sri Nakul Dubey
Sri R.K. Mehrotra

U.P. Awas Evam Vikas Adhiniyam 1965, Section 12, Section 18-demolition of unauthoizd construction-construction made after sanction of lay out plan-non application and callous attitude of the

authorities by not indicating the error in noticed property subjected to unauthorized construction-held-demolition order can not sustain-quashed.

Held: Para-10

In the instant case, since the description of unauthorized construction has not been indicated in the impugned order of demolition, it cannot be sustained. It appears that authorities were swayed with the fact that constructions were raised without getting the lay out plan sanctioned but later on, in the counter affidavit, they admitted that the petitioner did get the lay out plan approved but raised unauthorized constructions.

Case Law discussed:

2008 (13) SCC 506

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

1. Heard learned Counsel for the petitioner and Sri Mahesh Chandra, learned Counsel for the respondents.

2. Through the instant writ petition under Article 226 of the Constitution of India, the petitioner challenges the order dated 7.6.2001 contained in Annexure No. 11 to the writ petition, whereby unauthorized constructions made upon Plot Nos. 64/17, 65/17, 78/17, 79/17 was directed to be demolished *inter alia* on the grounds that the petitioner constructed structures unauthorizedly over the plots in question without getting the map sanctioned.

3. Counsel for the petitioner submits that the petitioner was allotted commercial plot Nos. S-64/17, S-65/17, S-78/17, S-79/17 situated at Rajaji Puram Colony, Lucknow by the Uttar Pradesh Avas Evam Vikas Parishad, Lucknow vide letter dated 6.2.1990 and the physical possession of the plots in question was handed over to the petitioner on 7.5.1991. On 16.10.2000, registered sale deed was executed in favour of the petitioner. According to the petitioner, after taking possession of the plots in question, the petitioner applied for sanctioning the map, which was approved vide letter dated 25.10.1991 for plot No. S-64/17; vide letter dated 28.11.1991 for plot Nos. S-65/17 and S-79/17; and vide letter dated 26.10.1991 for plot No. S-78/17. Thereafter, the petitioner raised construction in accordance with sanctioned map.

4. According to the petitioner, though the construction existing on the plots in question is identical to the construction made on other commercial plots situated in the same vicinity, the Executive Engineer/Prescribed Authority issued notice to the petitioner on 11.1.2001, stating therein that constructions made on the plots in question was raised unauthorizedly. In response to the said notice dated 11.1.2001, the petitioner submitted his reply on 16.1.2001. Being not satisfied with the reply of the petitioner, another notice dated 21.3.2001 was issued to the petitioner, stating therein that maps of the petitioner were not approved by the Parishad. Subsequently, vide impugned notice dated 7.6.2001, it has been informed to the petitioner that as the maps for construction were not sanctioned, as such, unauthorized construction is to be demolished. Feeling aggrieved, the instant writ petition has been preferred by the petitioner.

5. Learned Counsel for the petitioner submits that Appendix-I of U.P. Housing and Development Board Regulations, 1982 framed in exercise of the powers under Clause (n) of Section 95 (1) read with Section 15 (1) (h) of U.P. Avas Evam Vikash Parishad Adhiniyam, 1965, empowered for charging compounding fee for unauthorized construction under Section 81 of the Act. He submits that if construction has been made according to bye-laws and regulation but if the applicant has not obtained prior permission for the construction, then, Rs.1000/- or Rs.500/- is provided in Item No.7 but in the instant case, the petitioner has raised the structures upon the plot in question after approval of the map by the Parishad. Therefore, it was incumbent upon the authorities to see that the constructions, which were raised by the petitioner, falls under compounding or not and only thereafter, they should have proceeded further but not doing so, is in contravention of the statutory provisions of Section 82 and 83 of the 1965 Adhiniyam. Thus, the impugned notice dated 7.6.2001 is not tenable in the eyes of law.

6. Per contra, Sri Mahesh Chandra, learned counsel for the respondent submitted that the order of demolition was passed by the Executive Engineer in the capacity of the competent authority duly authorized by the Housing Commissioner in exercise of the powers conferred under Section 12 (2) of the U.P. Awas Evam Vikas Parishad Adhiniyam, 1965 by notification dated 2.5.2001. The said order of demolition was issued as the constructions were not raised in accordance with sanctioned plan. While admitting that the maps were approved, it was stated on behalf of the respondents that constructions were not raised in accordance with sanctioned building plan and as such, action as prescribed under law was taken. Further, it is not the right of the petitioner to get unauthorized and illegal constructions compounded inasmuch as illegal constructions without sanctioned plan cannot necessarily be compounded.

7. Before dealing with the merits and demerits of the case, we would like to mention that this writ petition was filed in the year 2001 and a co-ordinate bench of this Court, while entertaining the writ petition being satisfied with the assertions of the petitioner, passed an ad interim order directing for maintaining status quo over the property in question.

8. It is an admitted fact that the lay out plan for constructing the structures over the plots in question were sanctioned by the competent authority. In the order dated 7.6.2001, it has been indicated that the petitioner has informed that maps were approved but Architect and Planning Unit-V has informed vide letter dated 18.5.2001 that no maps have been sanctioned. This allegation of the respondents is falsified by the statement made in paragraph 5 and 16 of the counter affidavit. Thus, it is imminently clear that the impugned order of demolition is based on incorrect facts and reflects non-application and callous attitude of the respondents. However, during the course of arguments, learned counsel for the petitioner admitted that the authorities have ample power under the Adhiniyam to order for demolition of unauthorized construction subject to following the due procedure as envisaged under the Act and Regulation.

9. In our considered view, while issuing notice/order for demolition, it is imperative upon the authorities concerned to indicate in the notice as to how much area of the property was the subject matter of unauthorized constructions. Had a proper show cause notice been served upon the petitioner, he could have shown that the alleged violation of the provisions of the Act is of negligible character, which did not warrant order of demolition. Aforesaid view of ours, is fortified by the decision rendered by the Apex Court in ***Municipal Corporation, Ludhiana Versus Inderjit Singh and another*** reported in 2008 (13) SCC 506.

10. In the instant case, since the description of unauthorized construction has not been indicated in the impugned order of demolition, it cannot be sustained. It appears that authorities were swayed with the fact that constructions were raised without getting the lay out plan sanctioned but later on, in the counter affidavit, they admitted that the petitioner did get the lay out plan approved but raised unauthorized constructions.

11. In view of the above, the impugned order of demolition dated 7.6.2001 being defective in nature, is hereby quashed.

12. The writ petition stands allowed in above terms.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.12.2012

BEFORE
THE HON'BLE VISNHU CHANDRA GUPTA, J.

W.P.No. 3158 (S/S) of 2011

Rajesh Kumar Misra, aged about 35 years, S/O Sri Dwarka Prasad Misra,R/O C-335, Avas Vikas Colony, Mira Bhawan, Pratapgarh, ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri L.P.Misra, Senior Advocate , Advocate

Counsel for the Respondents:
Standing Counsel

Intermediate Education Act 1921, Chapter 3 (Regulation 101 to 104) as amended 1992-the appointment on the post of Class IV employee in aided intermediate institution-vacancy caused due to retirement of permanent incumbent on the same day another vacancy of Class III employee occurred due to death in Harness-claim for compassionate appointment already processed-accepted by D.I.O.S.-the Principal without taking prior permission/information made direct appointment and send the papers for approval-refusal by D.I.O.S.-held-proper-according to mandatory provisions of regulations 101 to 107-without waiting the compassionate appointment-finally authority can not proceed to make direct recruitment-Court declined to interfere-as compassionate appointment has already been made-another existing vacancy of Class IV post can be made-subject to fulfillment of mandatory requirements of regulation.

Held: Para-27

In view of the fact that the person waiting for compassionate appointment, for whom information was sought by the DIOS by its letter dated 20.3.2010, have already given appointment on another vacant post, it would be proper that Principal may initiate fresh process of selection to fill up the vacant post, if any available in class IV cadre, of course, subject to fulfillment of mandatory requirements of regulations 101 to 107 of Chapter III of Sub section 6 of Section 16 of the Act and also in accordance with the provisions of law.

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

J U D G M E NT

1. Challenge in this writ petition is an order dated 03.05.2011 (Annexure-1 to the writ petition) passed by opposite party no. 4 (District Inspector of Schools, Pratapgarh,(hereinafter referred to D.I.O.S.) by which the approval for appointment of the petitioner as Class IV employee in Brijendra Mani Inter College, Kohdaur, District Pratapgarh was not accorded.

2. The brief facts giving rise to this petition are that Brijendra Mani Inter College (in short 'School')) is a recognized government aided institution under the provisions of Intermediate Education Act, 1921 (hereinafter referred to as Act). On account of retirement of one Rameshwar Prasad on 31.10.2009 a substantive vacancy occurred in the cadre of Class IV. On the same day another vacancy in cadre of class III was occurred on account of death of one Ajay Pratap Maurya, who died in harness. Smt. Rekha, W/O deceased Ajay Pratap was seeking appointment of his son Santosh Kumar on compassionate ground through a letter given to DIOS. The DIOS by its letter dated **20.3.2010** asked for certain information from the principal of school in regard to the compassionate appointment to be made in the light of the application of Smt. Rekha Devi. DIOS informed Smt. Rekha Devi by the same letter that she may apply to the principal of school for compassionate appointment of his son because, the application for compassionate appointment should be proceeded through the principal so further action may be taken thereon. In reply to this letter of DIOS principal intimated DIOS by his letter dated **15.5.2010** that the petitioner Rajesh Kumar Misra has been appointed against the vacant post in Class IV cadre on account of vacancy occurred due to retirement of Rameshwar Prasad. He further informed that now no post is lying vacant in Class IV cadre. This letter appears to have been written by the Principal with an intention to informe the DIOS that he had already made the appointment of the Petitioner of this case Sri Rajesh Kumar Misra, and now no vacancy exist in the Class IV cadre. It also reflect that the principal was not inclined to make compassionate appointment of Santosh Kumar, son of deceased Ajay Pratap, who died in harness, on the vacant post in class IV cadre.

3. It is not in dispute that the matter for compassionate appointment of Santosh Kumar was pending consideration when principal issued appointment letter to the of petitioner. Consequently approval of appointment of petitioner was rejected by DIOS vide his order dated 25.5.2010.

4. Aggrieved by it the present petitioner filed a writ petition in this court

having no. 6052 (S/S) 2010 (Rajesh Kumar Misra V/S U.P. State and ors.). The aforesaid writ petition has been disposed of finally by an order dated 1.11.2010(Annexure-9 to the writ petition). The order passed by this court dated 1.11.2010 is reproduced herein below, :-

"Heard Sri Nagendra B. Singh, learned counsel for the petitioner and learned Standing counsel for the respondents.

Case of the petitioner is that after proper selection his name was sent to the District Inspector of Schools for prior approval. The petitioner says that the District Inspector of Schools has rejected his case vide order dated 25.5.2010 as contained in Annexure-7. The ground taken by the District Inspector of Schools is that prior permission before starting of the selection process was not obtained hence the appointment order can not be issued and the selection is bad.

Learned counsel for the petitioner has annexed the order of ***Jagdish Singh Vs. State of U.P. and others, (2006) 2 UPLBEC 1851*** *in which this controversy has been cleared and it has been held that prior permission before initiation of the selection process is not required. Only after due process has been adopted and a candidate has been selected the papers have to be sent to the District Inspector of Schools and then a prior approval before order is issued is required. In the present case, the papers are pending with the District Inspector of Schools and the District Inspector of School has rejected the case erroneously in contravention of the law laid down in the case of Jagdish Singh (supra).*

Learned Standing counsel has fairly informed the Court about the legal position as observed in Jagdish Singh (supra).

Accordingly, the order dated 25.5.2010 is hereby quashed. The District Inspector of Schools, Pratapgarh is directed to look into the matter again and pass fresh orders in accordance with law laid down in the case of Jagdish Singh (supra) within a period of one month from the date a certified copy of this order is placed before him.

The writ petition is thus allowed."

5. In pursuance of the order passed by this court on 1.11.2010 matter was reconsidered. The DIOS issued letter dated 19.11.2010 to the Principal of the school(Annexure -17 to the writ petition). This letter is also reproduced herein below as follows:-

जिला विद्यालय निरीक्षक
प्रतापगढ ।

सेवा में

प्रद्यानाचार्य
वृजेन्द्र मणि इ0 का0
कोप्होर, प्रतापगढ ।

कमांक : मा0 पटटी / 19895 – 95 / 2010 – 11
दिनांक : 19.11.10.

विषय :– रिट याचिका सं0 : 6052 { एस. एम.} / 2010 राजेश कुमार मिश्रा बनाम उ0 प्र0 सरकार व अन्य में मा0 उच्च न्यायालय द्वारा पारित आदेश दिनांक : 01. 11.2010 के संबंध में ।

महाशय्

उपर्युक्त विष।यक के संदर्भ में कहना है कि आप द्वारा विद्यालय में श्री राजेश कुमार मिश्रा की चतुर्थ श्रेणी कर्मचारी पद पर नियुक्ति पूर्वानुमति प्राप्त किये बिना ही नियुक्ति करली गयी है जिसकी सूचना आपके पत्र

दिनांक 15.5.2010 द्वारा अवगत कराया गया है कि विद्यालय में चतुर्थ श्रेणी की नियुक्ति कर ली गयी है अब कोई पद रिक्त नहीं है । आप द्वारा की गयी नियुक्ति अनियमित एवं अवैद्यानिक है । वादी श्री राजेश कुमार मिश्रा ने मा0 उच्च न्यायालय में रिट चाचिका सं0 6052 { एस. एम.} / 2010 दाखिल किया जिसमें मा0 उच्च न्यायालय ने दिनांक : 01.11.2010 को आदेश पारित किया तथा निर्देशित किया कि जिला विद्यालय निरीक्षक उक्त आदेश दिनांक 01.11.2010 में उल्लिखित जगदीश सिंह बनाम उ0 प्र0 सरकार व अन्य { 2006} में पारित आदेश के अनुपालन में कार्यवाही सुनिश्चित करें ।

मा0 उच्च न्यायालय के आदेश दिनांक : 01.11. 2010 के अनुपालन में दिनांक : 27.11.2010 को प्रकरण पर सुनवाई की तिथि प्रातः 10:00 बजे अद्योहस्ताक्षरी कक्ष में सुनिश्चित की जाती है । अतः आपको अवगत कराया जाता है कि उक्त सुनवाई की तिथिए समय व स्थान पर निम्न सूचनाएं/ अभिलेखोंऐ अभिकथनों के साथ उपस्थित होने का कष्ट करें जिससे प्रकरण पर सुनवाई करके अग्रिम कार्यवाही की जा सके ।

01. चतुर्थ श्रेणी कर्मचारी के पद सजन की छाया प्रति प्रमाणित ।

02. चतुर्थ वर्गीय कार्यरत कर्मचारी की नियुक्ति तिथिए जन्म तिथि, नियुक्ति का प्रकारए जाति वार विवरण व शैक्षिक योंग्यता वेतन आहरित हो रहा हो ।

03. रिक्त पदो की संख्या ।

04 रिक्ती का कारण ।

05. संख्या में कोई मृतक आश्रित शेष तो नहीं है का प्रमाण प्रत्र ।

भवदीय
हा0 / ओम प्रकाश मिश्र
जिला विद्यालय निरीक्षक
प्रतापगढ

प्रतिलिपि :– याची श्री राजेश कुमार मिश्र पुत्र श्री द्वारिका प्रसाद मिश्र सी0– 335 आवास विकास कॉलनी मीरा भवन प्रतापगढ को इस निर्देश के साथ प्रेषित कि वे मा0 उच्च न्यायालय के आदेश

दिनांक : 1.11.2010 में उल्लिखित जगदीश सिंह बनाम उ0 प्र0 सरकार व अन्य 2006 में पारित मा0 न्यायालय के आदेश की पठनीय प्रति के साथ तथा अपने अभिकथनों के साथ निर्धारित सुनवाई हेतु समय, तिथि व सीान पर उपस्थित होकर सुनवाई में सहयोग प्रदान करें ।

02. प्रबन्सधक बृजेन्द्र मणि इ0 का0 कोहडोर, प्रतापगढ को सूचनार्थ प्रेषित ।

हा0 / ओम प्रकाश मिश्र
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प्रतापगढ

6. When DIOS did not received the reply of the aforesaid letter written by him to the principal the DIOS proceeded to summon the principal along-with relevant record for hearing the matter on 18th of December, 2010. The parties were informed by letter dated 10.12.2010 of the aforesaid date fixed for hearing. The Principal and the Rajesh Kumar Misra (the present petitioner) both appeared on 18.12.2010. During the course of hearing the Principal informed that on account of vacancy occurred on 31.10.2009 due to retirement of Rameshwar Prasad Yadav in Class IV cadre, the same was filled. The vacancy was published in News Paper. The selection committee was also constituted for filling up the vacancy. The committee after complying all the procedural requirements appointed Rajesh Kumar Misra on 23.11.2009 on Class IV post. The petitioner Rajesh Kumar Misra joined office on 26.11.2009 and he continued to work on the said post. His work and conduct is satisfactory and Rajesh Kumar Misra is entitled to salary from the date of his joining and he filed the required documents and asked for the approval of the appointment of Sri Rajesh Kumar Misra. The DIOS after considering the material on record and the statement made by the Principal passed the impugned order dated 3.5.2011. The relevant portion of which is produced herein below :-

"यहॉ यह उल्लेखनीय है कि पत्र दिनांक 20.03. 2010 द्वारा ऐसी कोई सूचना नही मॉगी गयी थी जो याची श्री राजेश कुमार मिश्र के नियुक्ति से सम्बन्धित किसी भी प्रकार का पत्राजात आदि कार्यालय में नही प्रस्तुत किया गया। यहॉ तक कि सुनवाई के समय भी कोई पत्राजात आदि कार्यालय में नही प्रस्तुत किया गया । सुनवाई के समय मॉगे जानें पर उनके द्वारा यह कहा गया कि दिनांक 05.12.10 में दी गयी आख्या के अनुसार उन्हे और कुछ नही कहना हैं । न ही पद रिक्त होने की कोई सूचना दी गयी और न ही इण्टर मीडिएट शिक्षा अधिनियम 1921 की धारा 16(6) में बने विनियम 101 अध्याय (3) के अन्तर्गत पद भरनें की मॉगए न तो नियुक्ति के पहले की गयी और न तो नियुक्ति के बाद में ही की गयी । प्रधानाचार्य द्वारा अपने अभिकथन दिनांक 05.12.2010 में वेतन भुगतान की औपचारिक स्वीकृति बिना नियुक्ति सम्बन्धी पत्राजात प्रस्तुत करके की गयी हैं जो उचित एवं न्याय संगत नहीं है ।

निर्णय

श्री राजेश कुमार मिश्र को राज्य सरकार के अनुदान से वेतन भुगतान की कोई देयता नही बनती है । अतः प्रधानाचार्य एवं याची की मॉग के अनुसार वेतन भुगतान करने की औपचारिक स्वीकृति प्रदान किया जाना सम्भव नही है ।

(डा0 ओम प्रकाश)
जिला विद्यालय निरीक्षक
प्रतापगढ "

7. The DIOS again did not approved the appointment of the petitioner. Aggrieved by the order rejecting the approval for appointment by impugned order the petitioner filed this writ petition for quashing the same.

8. It is important to mention here that neither the management nor Principal of school challenged the order passed by the DIOS rejecting the approval of appointment of the petitioner made by the principal on the basis of recommendation given by the Selection Committee. From perusal of the material on record it reveals that the earlier order passed on 25.5.2010 by which the petitioner alleged that his appointment has not been approved is on record as Annexure-8. The perusal of which reveals that a reference has been made of the letter dated 15.5.2010 of the Principal who informed that Rameshwar Prasad retired on 31.10.2009. The vacancy was occurred and the same was filled up by making appointment of petitioner Rajesh Kumar Misra. No vacancy has been available in Class-IV cadre.

9. It is important to mention here that letter dated 15.5.2010 has not been brought on record either by the petitioner or by the Principal or the Management Committee of the institution. From the perusal of the impugned order it reveals that letter dated 15.5.2010, which was issued in reply to the letter dated 23.3.2010 issued by DIOS requiring certain information with regard to consider the compassionate appointment of Santosh Kumar. It also appears that by the letter dated 15.5.2010 the Principal informed the DIOS that Rajesh Kumar Misra has been appointed on the vacant post and asked for its approval. The DIOS was of the opinion that appointment made was not in accordance with regulations of Chapter III framed under Section 16(6) of the Act.

10. The order dated 1.11.2010 passed by this court, by which the DIOS was directed to re-consider the matter, a reference has been made therein of a judgment reported in **2006 (2) UPLBEC 1851 Jagdish Singh V/S State of U.P. and Ors.** This is the judgement on the basis of which DIOS required to re-consider the matter.

11. In this case the counter affidavit on behalf of Respondent no. 1 to 5 was filed for whom notice has been accepted

by the Chief Standing Counsel. In spite of service upon respondent no. 6 and 7, the Committee of Management and Principal of School, no counter affidavit has been filed and they did not chose to contest this petition.

12. Petitioner filed a supplementary affidavit along with 9 annexures. Annexure-1 is the letter dated 4.12.2009, which is said to have been issued by the Principal of the School informing the appointment of Rajesh Kumar Misra to DIOS and asking for formal approval of the appointment. Enclosers 1 to 9 to this letter were also filed. Another letter alleged to have been issued by the Principal of the School on 5.12.2010, has also been annexed as Annexure -2 to this supplementary affidavit wherein the details of Class IV cadre were given. It was informed therein that three matters for compassionate appointment were pending. In the counter affidavit filed on behalf of respondent no. 2,3 and 4 it has been categorically stated that the Principal of the School did not produce any paper or documents regarding the appointment of the petitioner during the course of hearing of the matter by the DIOS. This allegation has not been controverted by the Principal or the Management Committee of the School by filing their counter affidavit. Moreover no papers were filed by respondent no. 6 and 7 in this writ petition. The papers which said to have been filed by the petitioner, are those papers which has been purported to be written by Principal and ought to have been filed by the Principal or the Management Committee of this School. From the perusal of the Supplementary affidavit filed in support of this writ petition it has not been disclosed by the petitioner that from where he got these papers and who handed over these papers to him.

13. In view of the aforesaid facts, the matter has to be considered by this court.

14. Sri L.P.Mishra, learned Senior Advocate appearing for the petitioner submits that the impugned order is not sustainable in view of the judgment of the Division Bench of this court in Jagdish Singh's case (Supra). It was further submitted that the Division Bench of this court while considering the regulation framed under Chapter III of Section 16(6) of the Act held that the prior approval of the Inspector is not necessary. Hence, the order impugned is liable to be set aside and this court is required to approve the appointment of the petitioner made by the principal on the vacant post.

15. It was further submitted that the grievance of the DIOS has now set at rest because of the fact that to the dependent of Ajay Pratap, who died in harness on 31st October 2009, appointment has been given against a vacancy occurred on 31.08.2007 due to retirement of one Raja Ram Pandey a Class IV employee vide resolution dated 23.12.2010. The relevant record regarding appointment annexed as Annexure-14 to this writ petition. Therefore, now there is no impediment in granting the approval of the appointment of the petitioner.

16. The learned Standing Counsel submits that while passing the impugned order the decision rendered in Jagdish Singh's case (Supra) by the Division Bench of this court has been rightly and properly applied by the DIOS. It was further submitted that in view of the regulation 104 of Chapter III, which has been amended in the year 1992 and is also

reproduced in Jagdish Prasad's Case (Supra), made it clear that matters relating to compassionate appointment were pending and the vacant posts should be filled first by making compassionate appointment and direct recruitment shall not be made ordinarily on such post. He further submits that the scheme of Regulation 101 to 107 is that while filling of the vacancy of Class IV preference should be given to the person waiting for appointment under compassionate ground and direct recruitment would not be permissible. Here in this case the principal concerned who is also one of the party to this petition purposely concealed the material facts which ought to have been furnished by him in reply to letter of DIOS informing the appointment made by him of the petitioner.

17. Replying the second limb of argument advanced by the counsel for the petitioner the learned Standing Counsel submits that the papers filed by the petitioner are not admitted to the respondents as their receipt of the same is not acceptable to them. In the alternative it was submitted that even if those papers are taken into consideration, the letter dated 15.5.2010 was material wherein the Principal has mentioned that after making the appointment of petitioner no vacancy in Class IV exists in the School. This information is patently wrong in view of Annexure-14 to the writ petition, which is a resolution dated 23.12.2010. In this resolution it has been mentioned that the compassionate appointment of the dependent of Ajay Pratap was made against the vacant post of 31.11.2007. It was further submitted that the Principal and committee both while making the appointment of the petitioner not adhered to the mandatory procedure prescribed under the regulations. Therefore, DIOS was rights in not approving the appointment of the petitioner.

18. It was further submitted by the learned Standing Counsel that perusal of the impugned order clearly demonstrated that neither before making direct recruitment as exception nor before issuing appointment letter to the petitioner, approval was sought from DIOS. Therefore, the law laid down in Jagdish Singh's case (Supra) has not been adhered to by the School authorities and there is no illegality, infirmity or impropriety in the impugned order.

19. It was further submitted by the learned Standing Counsel that proxy litigation should not be permitted by this court specially when the order refusing to accord the approval of appointment of the petitioner has not been challenged by the Principal and management committee of the School. In such situation, the petitioner has no right to assail the impugned order.

20. It was further submitted by the learned Standing Counsel that issuing the appointment letter and permitting the joining of the petitioner without approval is contrary to the provisions contained in regulation 101 as explained by the Division Bench of this court in Jagdish Singh's case (Supra). On these grounds the learned Standing Counsel submits that this petition has no merit and deserves to be dismissed with cost.

21. After considering the submissions made at bar it is necessary to reproduced the relevant regulation of Chapter III framed under Section 16(6) of the Act which are in operation after the amendment of 1992. The Regulations 101,

102, 103 and 104 are reproduced hereinbelow :-

" 101 Appointing Authority except with prior approval of Inspector shall not fill up any vacancy of non-teaching post of any recognised aided institution:

Provided that filling of the vacancy on the post of ***Jamadar*** *may be granted by the Inspector.*

102. Information regarding vacancy as a result of retirement of any employee holding a non-teaching post in any recognized, aided institution shall be given before three months of his date of retirement and information about any vacancy falling due to death, resignation or for any other reasons shall be intimated to the Inspector by the Appointing Authority within seven days of the date of such occurrence.

103. Notwithstanding anything contained in these regulations, where any teacher or employee of ministerial grade of any recognised, aided institution, who is appointed accordingly with prescribed procedure, dies during service period, then one member of his family, who is not less than eighteen years in age, can be appointed on the post of teacher in trained graduate grade or on any ministerial post, if he possesses prescribed requisite academic qualifications, training eligibilities, if any, and he is otherwise fit for appointment:

Provided that anything contained in this regulation would not apply to any recognised aided institution establish and administered by any minority class.

Explanation - For the purpose of this regulation "member of the family" means widow or widower, son, unmarried or widowed daughter of the deceased employee.

Note - This regulation and Regulations 104 to 107 would apply in relation to those employees who have died on or after Ist January, 1981.

104. Management of any recognised, aided institution within seven days of the date of death shall present a report to the Inspector about the members of the family of deceased employee, in which particulars of name of the deceased employee, post held, pay scale, date of appointment, date of death, name of the appointing institution and names of his family members, their academic and training eligibilities, if any, and age shall also be given. Inspector shall make entries of particulars of the deceased in the register maintained by himself."

22. Words 'prior approval' used in regulation 101 has been explained in Jagdish Singh's case. The Division Bench while explaining the same in Para 20, 21 and 22 has observed that the prior approval by the District Inspector of School is required after completion of the process of selection and before issuance of the appointment letter to the selected candidate. Para 20, 21 and 22 of Judgment of Jagdish Singh's case (Supra) are reproduced herein below:-

20. Scheme of Regulations 101 to 107 makes it clear that after receiving an intimation of vacancy, the District Inspector of Schools is empowered to send the application of member of deceased employee, who is entitled for

compassionate appointment to the institution, who has to issue appointment letter to such candidate. It is, however, implied in the scheme that in the event there is no candidate entitled for compassionate appointment to fill a particular vacancy, the intimation of which has been received by the District Inspector of Schools, the District Inspector of Schools can direct the appointing authority to fill up vacancy by direct recruitment but even in a case the selection is made by direct recruitment by the Principal/committee of management, prior approval is required of the District Inspector of Schools before issuing an appointment letter to the selected candidate. Without prior approval of the Inspector, the Principal or the committee of management cannot issue an appointment letter or permit joining of any candidate. The requirement of prior approval in Regulation 101 is a condition precedent before issuing an appointment letter and is mandatory. The observation of the learned single Judge in the case of Dingur v. District Inspector of Schools, Mirzapur (supra) as quoted above, is also to the effect that approval has to be considered by the District Inspector of Schools after examining ,the proceeding relating to appointment and after examining as to whether prescribed procedure in a fair manner has been followed or not.

21. The observation "of the learned single Judge in Ram Dhani's case (supra) that previous approval under Regulation 101 is required to be taken before issuing advertisement for filling up vacancy does not lay down correct law. We, however, make it clear that although prior approval is required from the District Inspector of Schools after completion of process of selection but there is no prohibition in the Principal/Management to seek permission of the District Inspector of Schools for filling up vacancy by direct recruitment. The permission may or may not be granted by the District Inspector of Schools but even if such permission to start the selection process or to issue advertisement is granted that is not akin to prior approval as contemplated under Regulation 101.

22. In view of the aforesaid, we are of the considered opinion that prior approval contemplated under Regulation 101 is prior approval by the District Inspector of Schools after completion of process of selection and before issuance of appointment letter to the selected candidate.

23. Admittedly, the letter part of mandate of Jagdish Singh's case (Supra) has not been observed by the Principal of the School. He issued appointment letter and permitted to join the petitioner in the school without prior approval of the DIOS.

24. So far as the earlier part of this exercise conducted by the Principal is concerned, in the opinion of this court the Principal was not competent to initiate the process of direct recruitment to fill up the vacancy occurred on account of retirement of Rameshwar Prasad in the cadre of Class IV unless all the matters relating to compassionate appointment are not disposed of. In such situation if there was some emergency or any compelling circumstances for making immediate appointment then the Principal or management of School was under statutory obligation to present a case before DIOS and to seek permission to fill up the vacancy by direct recruitment after

suspending the process of making compassionate appointment on the vacant post, which admittedly has not been done by the Principal or the management of the School.

25. From perusal of the regulations from 101 to 107 there is a scheme and there exists a legislative intent behind it. It leaves no room to doubt that until the applications of the persons waiting for compassionate appointment are finally disposed of , the appointing authority should not proceed to make direct recruitment on the vacant post. If it was necessary in the interest of the institution to make immediate appointment the appointing authority, i.e., Principal must place the reasons in writing before District Inspector of School and must seek prior permission to make direct recruitment on the vacant post.

26. In the aforesaid situation without giving much importance to the correspondence alleged to have been taken place in between the Principal and the DIOS as alleged according to petitioner, this court is of the view that this matter may be decided on the broader legal aspect of the case. In view of willful violation by principal of the statutory mandate contained in regulations 101 to 107 as discussed above, the impugned order of DIOS cannot said to be against the law or facts.

27. In view of the fact that the person waiting for compassionate appointment, for whom information was sought by the DIOS by its letter dated 20.3.2010, have already given appointment on another vacant post, it would be proper that Principal may initiate fresh process of selection to fill up the vacant post, if any available in class IV cadre, of course, subject to fulfillment of mandatory requirements of regulations 101 to 107 of Chapter III of Sub section 6 of Section 16 of the Act and also in accordance with the provisions of law.

28. In view of the aforesaid observations, this writ petition lacks merit and is liable to be dismissed.

29. Accordingly, writ petition is dismissed. There shall be no order as to costs.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.12.2012

BEFORE
THE HON'BLE AJAI LAMBA, J.

Crl. Misc. Case No.4208 (B) of 2012.

Musheer Ahamad @ Munna ...Petitioner
Versus
State of U.P. ...Respondents

Code of Criminal Procedure-Section 439-bail application-offence under Section 8/21 Narcotic Drugs and Psychotropic Substances Act, 1985 -on ground of non fulfillment of the formalities issued under circular date 05-05-2012-recovery of 260 gm Morphine without using weightment scale-using word "approximately"-itself clear violation of the circular-substance less than commercial quantity-entitled for bail-subject to heavy surety.

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

1. Applicant prays for bail in Case Crime No.120 of 2012 under Section 8/21 Narcotic Drugs & Psychotropic

Substances Act, Police Station Jaidpur, District Barabanki.

2. For brevity sake, order dated 16.10.2012, is extracted here below :-

"Applicant prays for bail in Case Crime No.120 of 2012 under Sections 8/21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'N.D.P.S. Act'), Police Station Jaidpur, District Barabanki.

Learned counsel appearing for the applicant contends that allegedly, 260 Grams of morphine has been recovered from the applicant which would constitute non-commercial quantity.

Recital in the F.I.R. indicates that approximately 260 Grams of morphine was recovered from the applicant. The F.I.R./recovery memo does not indicate that a weighing scale was used for weighment of the substance.

Morphine above 250 Grams would constitute commercial quantity as per table provided under Section 2 of the N.D.P.S. Act.

The quantum of sentence varies to a large extent under Section 21(a) of the N.D.P.S. Act where small quantity is involved; under Section 21(b) where quantity recovered is less than commercial but greater than small quantity; and under Section 21(c) where quantity involved is commercial. The Court has to perceive the gravity of offence in context of the sentence to be awarded.

The Director General of Police, Uttar Pradesh is directed to consider as to under what circumstances the investigating officers/raiding parties working in various police stations are not using weighment scale and recording that weighment scale was used at the time of recovery of substance under N.D.P.S. Act. Merely saying that substance was of "approximately 260 Grams" would be not a clear indicator to the Court to consider the quantity of the substance to be commercial.

Let reply be filed in the above context by Director General of Police, Uttar Pradesh on or before 20.11.2012, as to under what circumstances in a large number of cases weighing scales are not used while weighing narcotic drugs or psychotropic substance. The D.G.P. shall also indicate the remedial measures adopted in this regard.

Administration of criminal justice is being seriously and adversely affected in cases under the N.D.P.S. Act, particularly in a State like Uttar Pradesh where it has border with Nepal, Bihar, Rajasthan and Haryana and Madhya Pradesh. Benefit of such ambiguity and improper investigation is given to the accused who gets away with acquittal or lesser sentence, though he might have committed a serious offence. It results in failure of justice.

Let copy of this order be transmitted to Director General of Police, Uttar Pradesh through Ms. Suniti Sachan, learned Government Advocate."

3. An affidavit has been filed by Shri Ambrish Chandra Sharma, Director General of Police, U.P. It has been stated in the affidavit that two circulars have been issued for improving the quality of

investigation so as to avoid ambiguity such as left in the present case. Circular dated 15.5.2012 and Circular dated 9.11.2012 have been appended with the affidavit as Annexure Nos.SA-1 and SA-2.

4. In circular dated 15.5.2012 issued to Senior Police Officers in the State, while making reference to orders of this Court, the following directions have been given :-

"It is, therefore, requested to kindly direct all the subordinate Sub-Inspector, Inspector and Gazzeted Officers to ensure that on the recovery of Narcotic Drugs/Psychotropic Substance the prescribed measurement instrument(Tarazu-Bant) shall be used for measurement of recovered contraband and the actual weight of the recovered contraband and the instrument used for measurement shall also be mentioned in the First Information Report/Recovery Memo and in the investigation records necessarily".

5. In Circular issued by Director General of Police, Uttar Pradesh to Senior Police Officers dated 9.11.2012, the following has been provided:

"No.D.G.-Letter_51/2012 Dated : Lucknow : Nov.,9,2012.

To,

1. All D.G.P./Additional D.G.P., U.P.

2. All I.G. Range, U.P.

3. All D.I.G., U.P.

4. All Senior Superintendent of Police/Superintendent of Police, Incharge District Uttar Pradesh.

It has come to my notice that on the recovery of Narcotic Drug/Psychotropic Substance the recovery officer in some matters are mentioning the recovered contraband in the Recovery Memo & First Information Report by using the words about/near about/presuming.

2. In this relation it is to inform that in the crime which relates to Narcotics the punishment is prescribed by amending the relevant Sections of N.D.P.S. Act, 1985 through N.D.P.S.Act (Amendment) Act, 2001 according to the quantity of recovered Narcotic Drugs/Psychotropic Substances. In the above context the Government of India, Finance Department, Revenue Department, New Delhi by issuing a Notification No.-773, dated 19-10-2001 has categorized the Narcotic Drugs/Psychotropic Substances according to the small quantity, large quantity and commercial quantity which is mentioned in gram and kilograms and about/near about/presumed word is no where mentioned.

3. That before the above amendment in N.D.P.S. Act, 1985 in respect of taking sample, seizure of sample, examination of sample and for disposal thereof by informing the prescribed proceedings to you direction in respect of the classification of recovered drug by name, for weighing and for preparation of samples at the place of incident has been given through the letter no.C.B.-14/97 (Naar), dated 11-04-1997 of C.B.C.I.D alongwith the order no.1/89, dated 13-06-1989 of Narcotics Control Bureau, New Delhi in para 2.1 whereof it has been

mentioned that All drugs shall be properly classified, weighed etc., and carefully sampled on the spot of seizure.

4. After the disposal of the cases related to N.D.P.S. in respect of the disposal proceedings of the recovered/seized Narcotic Drugs & Psychotropic Substance it has been mentioned in the letter no.C.B.-14/97(Nar), dated 27-08-1999 of the C.B.C.I.D. alongwith the para 2(3.1) of order dated - 2/88 of Narcotic Control Bureau, New Delhi that All Drugs should be properly classified, carefully weighed and sampled on the spot of seizure.

5. As per the standing order of the direction issued by the Additional Director General of Police (Ap/Ka & Vyav.), U.P. Lucknow by the office memorandum no.D.G.-Seven-S-3(40)/2002 dated 11-02-2002 to all the Zonal Inspector Generals it has been provided that all drugs shall be classified, measured on the spot and the samples shall be taken.

6. In the above context the Hon'ble High Court, Lucknow Bench in Criminal Misc. Case No.2165/2012(Bail) Nekpal @ Vinod Singh @ Lambhua Versus State of U.P. in respect of Case Crime No.-485/2010 under Section 8/20 N.D.P.S. Act, Police station Risiya, district Bahraich has observed in the judgment that "In the absence of weighing scale, the quantity/weight of the narcotic/psychotropic substance cannot be assessed so as to bring it within a particular category. With the increase in weight of the substance, the sentence also increases. In the absence of precise weight of the narcotic/psychotropic substance recovered from an accused, the trial court would not know as to whether to deal with the case under Section 20(b) (ii) (A), 20(b) (ii) (B) or 20(b) (ii) (C). In case wieghing scale is not used, it would adversely affect administration of criminal justice in context of case under N.D.P.S. Act The benefit of such ambiguity committed at the hands of investigating agency is likely to go in favour of the accused."

7. In the light of the above observation of the Hon'ble High Court, Lucknow Bench the C.B.C.I.D., Uttar Pradesh vide its letter no.C.B.-5/2012 (Nar), dated 15th May, 2012 had issued clear directions that on the recovery of Narcotic Drugs/ Psychotropic Substances the prescribed weight instrument (Tarazu-Bant) shall be used for actual weight of the recovered contraband and the instrument used in weighing shall be mentioned in the First Information Report/Recovery Memo and in the records of the investigation mandatorily.

8. That the Hon'ble High Court, Lucknow Bench again directed in the order passed in Crl. Misc. Case No.4208(B) of 2012 Musheer Ahmd @ Munna S/O Chutkan R/O H.NO.90/70 Preetam Nagar Police Station Dhumanganj, district Allahabad Versus State of U.P. in relation to Case Crime No.20/2012 under Section 8/21 N.D.P.S. Act, Police Station Jaidpur, district Barabanki in which the quantity of the recovered contraband is mentioned about 260 grams, tha "The Director General of Police, Uttar Pradesh is directed to consider as to under what circumstances the investigating officer/raiding parties working in various police stations are not using weighment scale and recording that weighment scale was used- at the time of

recovery of substance under N.D.P.S. Act. Merely saying that substance was of "approximately 260 Grams" would be not a clear indicator to the Court to consider the quantity of the substance to the commercial."

9. It is clear that in the provisions of N.D.P.S. or Government of India/Narcotic Control Bureau/C.B.C.I.D. or in the letters/directions issued by this Headquarter at the time of recovery of the Narcotic Drugs/ Psychotropic Substances the weight should carefully be done, in which about/near about/estimate word is not mentioned with the weight.

10. Therefore, you must ensure that on the recovery of the Narcotic Drugs/ Psychotropic Substances approximate about/near about/estimate words shall not be used with the weight in the Recovery Memo/First Information Report/records of investigation in any case, in fact the weight shall be mentioned only in Kilogram/gram/milligram. In furtherance the procedures for taking sample, for sending for examination and for storing and disposal of recovered/seized Narcotic Drugs @ Psychotropic Substance the directions of the Government of India/Narcotic Control Bureau/C.B.C.I.D. or the directions of this Headquarter shall be ensured strictly.

(Ambrish Chandra Sharma)

D.G.P., Uttar Pradesh."

6. Considering the fact that the appropriate instructions have been issued by Director General of Police, who would be senior most law enforcing officer in the State, the Court has been assured by the learned Additional Government Advocate that the circulars shall be strictly implemented and in future, all the investigating officers/raiding parties shall weigh the contraband recovered and provide the exact weight of the substance recovered.

7. It is further required to be provided that every investigation is required to be completed without unnecessary delay. In any case, considering the intent of law, investigation should be concluded within ninety days of the detention of the accused. Prolonged investigation, when accused is in custody, defeats the rights of the person in custody. In such circumstances, the forensic reports which are necessary for the prosecution case, are required to be furnished as soon as possible and in any case not beyond ninety days of custody of the accused.

8. To cite an example, some substance is recovered from an accused, which in the perception of the investigating officer, is narcotic or psychotropic substance. The accused is taken into custody. The chemical examiner's report is not received in close proximity of time. Subsequently the substance is not found to be narcotic or psychotropic. It would result in failure of criminal justice system, if in such circumstances an accused is kept in custody only to await the result from the forensic science laboratory. This example would highlight the relevance and importance of minimum time frame that should be provided for furnishing reports by the forensic science laboratories.

9. So far as the present case is concerned, allegedly approximately 260 grams of morphine was recovered.

10. Considering peculiar facts and circumstances of the case in particular the fact that weight of the substance recovered is in close proximity to the weight provided for less than commercial quantity, application for grant of bail to the applicant is allowed.

11. Bail to the satisfaction of the court concerned.

12. Heavy surety.

ORIGINAL URISDICTION
CIVIL SIDE
DATED: LUCKNOW 12.12.2012

BEFORE
THE HON'BLE ANIL KUMAR, J.

Misc. Single No. - 6998 of 2012

Surendra Kumar ...Petitioner
Versus
State Of U.P. Thru Collector, Sitapur & Others ...Respondents

Counsel for the Petitioner:
Sri S.M. Waseem

Counsel for the Respondents:
C.S.C.
Sri R.N. Gupta

U.P. Panchayat Raj Act, 1947 Section 28 (c) readwith U.P. Zamindari and Land Reforms Act 1950, Section 198 (1) (c)-cancellation of patta granted to land less agricultural labor belonging to backward class-living below the poverty line-cancellation on basis of Lekhpal report on ground when the patta was granted the petitioner was office bearer of Bhumi Prabhandak Samiti-hence in view of provisions contained under section 28 (c) of Panchayat Raj Act not eligible to get the patta-same is outcome of fraud-held-court below committed no illegality or infirmity-petition dismissed.

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

1. Heard Sri S.M. Waseem , learned counsel for the petitioner, learned State Counsel as well as Sri R.N.Gupta, learned counsel appearing on behalf of Gaon Sabha.

2. Facts, in brief , of the present case are that the land recorded in Gata No. 511-0.101 and 571-0.229 as per version of the petitioner was allotted to him on 11.8.2004 by the Land Management Committee of the village Panchayat under Section 198(1) (c) of the U.P. Zamindari Abolition and Land Reforms Act, 1950 (hereinafter referred to as 'Act') as he is a landless labourer, belonging to backward class living below the poverty line.

3. However, the same was cancelled on the basis of Lekhpal report dated 19.3.2008 (Annexure no.3) by opposite party no.3/Additional Collector, Sitapur on 29.6.2011.

4. Aggrieved by the said fact, petitioner for redressal of his grievance , filed a revision (Revision No. 3 of 2010-11, Surendra Kumar Vs. State of U.P. and others) under Section 333 of the Act, dismissed by opposite party no.2/ Additional Commissioner(Judicial) Lucknow Division, Lucknow vide order dated 7.9.2012 (Annexure no.4).

5. Learned counsel for the petitioner has challenged the impugned orders on the ground that the same are illegal arbitrary in nature as well as the in contravention of the facts and circumstances of the case because there is no irregularities or infirmity in allotting the land to him by way of patta/ lease as he falls under the backward

category as per the provisions provided under Section 198 of the Act.

6. He further submits that the action on the part of the opposite party no.3 to cancel the same in view of the provisions as provided under Section 28 (C) of the U.P. Panchyat Raj Act is an illegal exercise and contrary to law as the same cannot be cancelled in view of the said provisions as per the facts and circumstances of the case. In support of his arguments , he has placed reliance on the judgment of this Court in the case of ***Govind and others Vs. Sub-Divisional Officer , Machlishahar , District Jaunpur and others, 1986 All.C.J. 479, and Jiya Ram and others Vs. State of U.P. and others 2012 (2) ADJ 683*** Accordingly, it is submitted by learned counsel for the petitioner that the impugned orders are illegal , arbitrary in nature, liable to be set aside.

7. Learned State Counsel as well as Sri R.N.Gupta, learned counsel appearing for Gaon Sabha submits that as the petitioner was the member of Land Management Committee at the time of allotment of land by way of patta/ lease hence the same cannot be granted to him in view of the provisions as provided under Section 28-C of the U.P. Panchyat Raj Act, 1947 hence there is neither any illegality or infirmity in the impugned orders under challenge in the present writ petition.

8. I have heard the learned counsel for the parties and perused the record.

9. From the perusal of the pleadings, as made by the petitioner in the present writ petition (specially in para-8) undisputed facts are that the petitioner was a member of Land Management Committee at the time of allotment of land by way of patta/ lease, so in view of the said fact and as per the provisions of Section 28-C of U.P. Panchayat Raj Act, he could not have been alloted the land in question without permission in writing of the Collector as the said section provides as under:-

"28-C. Members and officers not the acquire interest in contracts etc. with Bhumi Prabandhak Samiti,-- (1) No member or office bearer of Gaon Panchayat or Bhumi Prabandhak Samiti shall , otherwise than with the permission in writing of the Collector, Knowingly acquire or attempt to acquire or stipulate for or agree to receive or continue to have himself or through a partner or otherwise any share or interest in any licence, lease, exchange, contract or employment with , by , or on behalf of the Samiti concerned."

10. This Court in the case of **Ram Pal Singh and others Vs. The Board of Revenue, U.P. Allahabad and others, 1981 RD 333** after taking into consideration the provisions as provided for allotment of land by way of patta/ lease under Section 195, 197 read with Section 198 of the Act and Section 28-C of the U.P. Panchyat Raj Act held that the land cannot be allotted by way of patta/ lease to the member or office bearer of Gaon Panchayat or Bhumi Prabandhak Samiti, otherwise than with the permission in writing of the Collector .

11. Further in the case of **Govind (Supra)** this Court has held as under:-

"From the aforesaid statutory provision , it is evident that no member or office bearer of the Goan Panchyat or the Bhumi Prabandhak Samiti can acquire or deemed to acquire any interest in the licence or lease except with the permission in writing of the Collector. It is , thus clear

that there must be a finding that the petitioner has acquired any interest in the lease. Simply , because some of the family members of the Pradhan have obtained the lease, it would not lead the inference that the Pradhan has received some interest. In other words the Sub-Divisional Officer must record a finding as to whether the petitioner has received any interest in the lease even though it might have been obtained in the name of some of the relations or family members of the Pradahan or office bearers of the Gaon Panchayat or Bhumi Prabandhak Samiti.

12. Thus, it is clear that land by way of patta/ lease cannot be granted to any members of the office bearers of Gaon Panchyat or Bhubhi Prabandhak Samiti without taking permission in writing of the Collector, so there is no illegality or infirmity in the impugned orders passed in the present case

13. In the case of J**iya Ram and others (Supra)** this Court in para -17 has held as under:-

"Moreover, allowing the collector to initiate suo motu proceedings for cancellation of allotment/lease at any time would mean that the allotment would never be final and there would always be danger of its cancellation. This perhaps could never be the intention of the legislator. The limitation of three years as contained in Appendix III of the Rules and five years provided under Section 198(6) of the Act is a well thought of as the aforesaid period of time is sufficient enough either for the person aggrieved to make a complaint against the irregular allotment or for the authorities to examine and verify the record and to take action for cancellation suo motu , if necessary."

14. As stated herein above, once it is admitted by the petitioner himself that he is a member of Gaon Sabha when the land was allotted to him on patta/lease which cannot be done in view of the provisions as provided under Section 28-C of the U.P. Panchayat Raj Act then in that circumstances once initial grant of patta in his favour is without jurisdiction/ void ab initio as he is not eligible for the same as per the procedure as provided for grant of patta rather the said act is nothing but amounts to be outcome of fraud played on behalf of the petitioner with oblique motive and purpose only to get the land in question by way of patta hence he cannot derive any benefit from the law as laid down in the case of **Jiya Ram (Supra)** as it is settled proposition of law that if the court is convinced that the order was wangled through fraud or misrepresentation of such a dimension as would affect the very basis of the claim because fraud and justice never dwell together. (Frans at Jus Nunquam Cohabitant) is a pristine maxim which has never lost its temper over all these centuries.

15. In ***Smith V. East Elloe, Rural Distt. Council (1956) L All ER 855*** the House of Lord held that the effect of fraud would normally be to vitiate any act or order.

16. In another case , ***Lazarus Estates Ltd. V. Beasley,(1956) I ALL ER 341*** Denning L.J. Said:

" No judgment of a court , no order of a Minister, cant be allowed to stand if it has been obtained by fraud . Fraud unravels everything."

17. In the case of ***Indian Bank Vs. Satyam Fibres (INDIA) Private Limited,***

(1996) 5 Supreme Court Cases,550 Hon'ble Supreme Court after taking into consideration above two judicial pronouncement had held as under:-

" The judiciary in India also possesses inherent power, specially under Section 151 CPC, to recall its judgment or order if it is obtained by fraud on court. In the case of fraud on a party to the suit or proceedings, the court may direct the affected party to file a separate suit for setting aside the decree obtained by fraud. Inherent powers are powers which are resident in all courts, especially of superior jurisdiction. These powers spring not from legislation but from the nature and the constitution of the tribunals or courts themselves so as to enable them to maintain their dignity, secure obedience to its process and rules, protect its officers from indignity and wrong and to punish unseemly behavior. This power is necessary for the orderly administration of the court's business.

Since fraud affects the solemnity, regularity and orderliness of the proceeding of the court and also amounts to an abuse of the process of court, the courts have been held to have inherent power to set aside an order obtained by fraud practiced upon that court.

18. In the case of ***S.P. Chengalvaraya Naidu(dead) by LRs. V. Jagannath (dead) by LRs. and others , 1994 (1) SCC 1*** Hon'ble Supreme Court has held :-

" Fraud avoids all judicial acts, ecclesiastical or temporal- observed Chief Justice Edward Coke of England about three centuries ago. It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non exit in the eyes of law . Such a judgment decree- by the first court or by the highest court- has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings".

19. For the foregoing reasons, I do no find any illegality or infirmity in the impugned orders under challenge in the present writ petition thus lacks merits and is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.12.2012

BEFORE
THE HON'BLE SHRI NARAYAN SHUKLA, J.

Writ Petition No.8082 (SS) of 2003

Babu Ram ...Petitioner
Versus
State of U.P. And another
...Opposite Parties

U.P. Recruitment of Dependants of Govt. Servants Dying in Harness Rule 1974, Section 2(1)- compassionate appointment-petitioner being grand son of deceased employee although can not be terms of family-where the son of deceased employee being physically handicapped unable to do any job-certainly the petitioner being grandson stepped to save the family for survival-being lineal decedent of deceased-held-entitle to get appointment.

Held: Para-7 and 8

I am of the view that the dependents, who are placed even beyond the term of 'family', are definitely entitled to get the appointment under the Rules, otherwise the purpose of framing the Rules definitely shall be defeated, therefore, I am of the view that the purposive construction of the Rules would be to extend the benefit of compassionate

appointment particularly in such an extra ordinary situation to other members of the family also who are dependent of the deceased being in the lineal descendant.

In the case at hand, the petitioner's father is a permanent physically handicapped person and the petitioner is not a stranger to the family, rather he is lineal descendant of the deceased, therefore, it is the petitioner only who can be held to be entitled to get the appointment.

(Delivered by Hon'ble Shri Narayan Shukla, J.)

1. Heard Ms.Prashansha Singh, learned Advocate holding brief of Mr.S.K.Upadhyay, learned counsel for the petitioner as well as learned Standing Counsel.

2. The petitioner has challenged the order dated 25th of January, 2002, passed by the Executive Engineer, Construction Division No.3, Public Works Department, Sultanpur.

3. The petitioner, on the demise of his grand-father, namely, Ram Dularey, who died while in service on the post of Mate on 19.8.2001, claimed compassionate appointment under the U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974(in short 'Rules). On the demise of his grand father, his father Lahuri moved an application before the authority concerned to extend the compassionate appointment in favour of the petitioner, who is his son as he is a permanent physically handicapped person. Thus, since the deceased's son Lahuri is not capable to discharge the duty and the deceased was only the bread earner of the family, he consented to extend the compassionate appointment in favour of the petitioner, being grand-son of the deceased. It is further stated that the deceased's son and grandson (petitioner) all were dependent for their livelihood upon the source of income of the deceased.

4. The learned counsel for the petitioner submits that except the petitioner no other person is there in the family to earn the bread for the family and thus after the death of Ram Dularey, the whole family is passing through the unsustainable position of starvation. The authority concerned has rejected the petitioner's claim on the ground that being grand son of the deceased, he does not come within the term 'family' as is defined under Section 2 (c) of the U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974. Section 2(c) defines the term 'family' as under:-

[(c) "family" shall include the following relations of the deceased Government servant;

(i) wife or husband;

(ii) sons;

(iii) unmarried and widowed daughters;

(iv) if the deceased was unmarried Government servant, brother, unmarried sister and widowed mother dependent on the deceased Government servant;]"

5. Admittedly, the petitioner being grand son of the deceased, does not come within the term of 'family', but upon

perusal of the Rules, I find that Rule 3 provides that these Rules shall apply to recruitment of dependents of the deceased government servants to public services and posts in connection with the affairs of State of Uttar Pradesh, except services and posts which are within the purview of the Uttar Pradesh Public Service Commission.

6. The statement of aims and objects of the Rules also provides that in exercise of powers conferred by the proviso to Article 309 of the Constitution of India and all other powers enabling him in this behalf, the Governor of Uttar Pradesh is pleased to make the following special rules regulating the recruitment of the dependents of Government servants dying in harness. Thus, the Rules have been framed to the benefit of the dependents of the deceased and it is a beneficial legislation. There may be occasion that on the demise of the bread earner of the family, there may be some other persons being alive in the family, who were completely dependent upon the bread earner, like the petitioner, but are not covered under the definition of "family". If the construction of word 'dependent' is given the narrow meaning by confining it to the term 'family', then the purpose of framing of the Rules is bound to be defeated as it has been framed for the benefit of the dependents of the deceased, who may not come under the term 'family'.

7. The position of the case at hand is very peculiar as the son of the deceased is permanently physically handicapped person and is unable to do any job, even after extension of benefit of the compassionate appointment, therefore, the grand son necessarily has to come forward and step to lead the family for survival of other members, who come within the term 'family'. Therefore, in such a situation, I am of the view that he would be only the eligible and competent person to get the employment for survival of the family. In such a situation, I am of the view that the dependents, who are placed even beyond the term of 'family', are definitely entitled to get the appointment under the Rules, otherwise the purpose of framing the Rules definitely shall be defeated, therefore, I am of the view that the purposive construction of the Rules would be to extend the benefit of compassionate appointment particularly in such an extra ordinary situation to other members of the family also who are dependent of the deceased being in the lineal descendant.

8. In the case at hand, the petitioner's father is a permanent physically handicapped person and the petitioner is not a stranger to the family, rather he is lineal descendant of the deceased, therefore, it is the petitioner only who can be held to be entitled to get the appointment.

9. Under the circumstances, I hereby quash the order impugned dated 25th of January, 2002, passed by the Executive Engineer, Construction Division No.3, Public Works Department, Sultanpur and issue a writ of mandamus to the respondents to extend the benefit of compassionate appointment in favour of the petitioner within one month after receipt of a certified copy of this order.

10. In the aforesaid terms the writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.01.2013

BEFORE
THE HON'BLE ASHOK SRIVASTAVA, J.

Criminal Misc. Writ Petition No. - 9560 of 2012

Shyam Bihari ...Petitioner
Versus
State of U.P. & another ...Respondents

Counsel for the Petitioner:
Sri S.K. Dubey

Counsel for the Respondents:
Govt. Advocate

Criminal Procedure Code, Section 451-released of Motor Cycle involved in case no. 1429 of 2011, the Police rubbed the engine and chassis-rejected by the Magistrate-learned Session Judge also without appreciating the law laid down by the Apex Court in Sunderbhai Ambalal Desai-rejected-held-the magistrate is not limb but a judicial officer, he should have acted in more responsible manner-order passed by the Court below set-a-side-liberty to file a fresh application-it shall be decided in accordance with law.

Held: Para-10

Keeping in view the character of U.P. Police the possibility that the number plate has been changed or the engine & chassis numbers have been rubbed to make it illegible, can not be ruled out. In such circumstances the duty of a judicial officer is enhanced and it necessitates that the Court should behave in a more responsible manner. In the instant case the way in which the learned Magistrate has acted while disposing of the release application of the petitioner cannot be appreciated. He must not forget that he is not a limb of the police, but is a judicial officer. The learned Additional Sessions Judge also did not care to go deep in the matter and appreciate the law as laid down by the Apex Court in Sunderbhai Ambalal Desai Vs. State of Gujrat (2003) SC 6318 & Sulekh Chnad Vs. Suresh Chand (1991) Crl. L.J. 469 (SC).

Case Law discussed:
(2003) SC 6318; (1991) Crl. L.J. 469 (SC)

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

1. The instant writ petition has been filed as the petitioner has felt aggrieved by an order dated 12.4.2012 passed by V additional Sessions Judge, Mirzapur in criminal revision No.11 of 2012 and order dated 8.11.2011 passed by the Addl. Chief Judicial Magistrate 1st, Mirzapur in S.T.No.253 of 2011(arising out of case crime No.260 of 2011), State Vs. Ashish Patel & others, P.S.Ahrora, district Mirzapur.

2. Respondent No.2 of this case is Station Officer of P.S. Ahrora district Mirzapur who is properly represented by the learned AGA and so is the case of respondent no.1, hence no notice has been issued to respondent no.2 and with consent of the parties present before this Court this petition is finally disposed of after due hearing.

3. In a police encounter which took place at 12.45 p.m. on 17.5.2011 one Ashis Patel was also arrested by the police. Ashish Patel is the son of the petitioner Shyam Bihari. After detention and arrest of all the accused persons named in the FIR certain stolen articles and illicit arms and ammunitions were recovered from their possession. Asish Patel was riding a Hero Honda Passion motorcycle which too was taken into custody by the arresting officer and it was

also brought to the police station. On examination it was found that the said motorcycle was having a fake registration number. It was also found that the engine and chassis numbers were tampered and were made illegible.

4. When the petitioner came to know that his motorcycle was detained at the police station he approached the Magistrate of the Court concerned with an application informing the Magistrate that the said motorcycle was his property and he was its registered owner. The learned Magistrate called for the report of the police station and when he found that the registration number of the motorcycle as mentioned by the petitioner in his application under section 451 Cr.P.C. was not detained by the police in the relevant case he, in a cursory manner, rejected the application for release of the said vehicle.

5. Feeling aggrieved by such order the petitioner approached the Court of learned Sessions Judge and filed the revision No.11 of 2012 which was ultimately transferred and decided by the Court of V Additional Sessions Judge, Mirzapur. The revision was dismissed. Hence the present petition.

6. It has been submitted from the side of the petitioner that the petitioner is the owner of motorcycle No. UP 67/A-3980 which he purchased on 19.5.2011 from one Nasim Ahmad and the registration certificate of the said vehicle was amended accordingly and his name was incorporated as the registered owner of the said vehicle. It has been further stated from the side of the petitioner that his son Ashish Patel was picked up by the police of P.S.Ahrora from his residence in the early hours of 16.5.2011 and the police took away with it the motorcycle in question. It has further been submitted that a telegram was sent to D.G.P.,Lucknow in this regard on 16.5.2011 at 2.30 p.m. It has also been submitted that after picking up his son on 16.5.2011 he was roped in in a false case on 17.5.2011 showing the time of the incident as 12.45 p.m. It has further been submitted that in a nefarious manner the registration plate of the said motorcycle has been changed and the engine and chassis numbers of the vehicle tampered and rubbed by the police of P.S. Ahrora in order to harass the son of the petitioner. It has also been submitted that the release application filed by him under section 451 Cr.P.C. before the learned Magistrate has been disposed of in a reckless and cursory manner. It has further been submitted that the learned revisional Court did not try to appreciate the matter and in an improper way the revision has been dismissed.

7. I have heard learned counsel for the parties and perused the record.

8. On the back of page no.32 of the paper book the application under section 451 Cr.P.C. is available. From perusal of this page it is evident that the petitioner Shyam Bihari moved an application before the Court of learned A.C.J.M. 1st Mirzapur with the prayer that his vehicle No.UP 67/A-3980 be given to his custody. The relevant case no. is 1429 of 2011. In this application engine and chassis numbers have also been mentioned. This page also indicates that the learned Magistrate called for the report of the police station. Through an order passed on the back of the said application, on 8.11.2011 the said prayer to release the vehicle was rejected without going deep in the matter and by a cryptic order. From perusal of the judgment of the revisional Court it appears that it has been

passed ignoring all the legal norms as contained in Section 451 Cr.P.C. The learned additional Sessions Judge has written a long judgment but it is worthless.

9. In the instant case it is the admitted case of the prosecution that the said motorcycle was recovered from the possession of the son of the petitioner. This Court had summoned the investigating office of the case and he was asked to file a counter affidavit. In his counter affidavit dated 22.11.2012 in paras 4 & 5 the investigating officer has mentioned that the said motorcycle was stolen but there in nothing on record which may indicate the facts on the basis of which such opinion has been formed by the investigating officer It is evident from the record that till 22.11.2012 the said motorcycle was not connected to any incident of theft.

10. Keeping in view the character of U.P. Police the possibility that the number plate has been changed or the engine & chassis numbers have been rubbed to make it illegible, can not be ruled out. In such circumstances the duty of a judicial officer is enhanced and it necessitates that the Court should behave in a more responsible manner. In the instant case the way in which the learned Magistrate has acted while disposing of the release application of the petitioner cannot be appreciated. He must not forget that he is not a limb of the police, but is a judicial officer. The learned Additional Sessions Judge also did not care to go deep in the matter and appreciate the law as laid down by the Apex Court in **Sunderbhai Ambalal Desai Vs. State of Gujrat (2003) SC 6318 & Sulekh Chnad Vs. Suresh Chand (1991) Crl. L.J. 469 (SC).**

11. In the above set of circumstances this Court has been left with no option but to quash and set aside both the orders impugned herein and remand back the matter to the Court where, at present, the relevant case is pending. It appears from the record that the matter is being tried by a Court of Sessions as I find a noting on the certified copies of the documents filed alongwith the affidavit wherein S.T.No. 253 of 2011 has been mentioned. The learned Sessions Judge. Mirzapur is directed to find out the Court where such case is pending and send this order to that Court for compliance.

12. The case is remanded back. The learned Court concerned is directed to peruse the position of law as contained in section 451 Cr.P.C. and after giving a detailed and careful hearing to both the parties pass an appropriate and reasoned order in this case. The learned Court concerned is also directed to read carefully the law as laid down in Sunderbhai Ambalal Desai's case (supra) and follow the same while disposing of the application under section 451 Cr.P.C. The petitioner herein is at liberty to file a fresh application before the Court concerned under section 451 Cr.P.C. within a period of 30 days from today. If such an application is moved the same shall be disposed of by the Court concerned within a period of 45 days from the date of its presentation.

13. With the above observations and directions the petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.01.2013

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 14915 of 2011

Akhilesh Kumar Yadav ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri V.K. Singh
Sri Balwant Singh
Sri G.K. Singh

Counsel for the Respondents:
C.S.C.

U.P. Police Constable and Head constable Service Rules, 2008, Rule 15- appointment on post of constable after passing physical efficiency test/medical examination and written examination- before could join-a complaint made as petitioner's left forefinger is cut up to the nails-not fit for Government job-on second medical board examination opinioned such physical deformity does not constitute as handicapped person- does not make handicapped person- held-the competent authority can not sit over the opinion of medical experts-nor the claim can be rejected on surmises and conjunctures-petition allowed- direction to issue appointment letter within two weeks given.

Held: Para-6

In the light of the aforesaid medical opinion given by a team of medical experts, it was no longer open to the competent authority to hold that the physical deformity may interfere in the efficient performance of his duties. The competent authority could not reject the claim of the petitioner on the basis of mere surmises and conjuctures especially when the medical opinion was otherwise.

(Delivered by Hon'ble Tarun Agarwala, J.)

1. Heard the learned counsel for the parties.

2. The petitioner applied for the post of constable under Rule 15 of the U.P. Police Constable and Head Constables Service Rules, 2008. The petitioner was required to undergo a physical standard test, physical efficiency test, medical examination and written examination. In accordance with the procedure prescribed under the Rule 15 of the aforesaid Rules, the petitioner was successful in the physical standard test and the physical efficiency test and thereafter he was required to appear before the Medical Board for his medical examination. The Medical Board also cleared him. The petitioner was thereafter issued a call letter to appear for the written examination in which the petitioner participated and cleared the written examination, but before he could be issued an appointment letter, some complaint was made that the petitioner is a handicapped person and has a physical defect which may interfere with the efficient performance of his duties as a constable. In the light of the said complaint, the petitioner was again directed to appear before the Medical Board. The Medical Board after reexamining the petitioner submitted a report dated 31st August, 2010 and opined that the physical deformity in left forefinger, which is cut up to the nails, does not make the petitioner a handicapped person and that the petitioner is fit for being given an

appointment in Government service. In spite of this medical report being given in his favour, the competent authority issued an order dated 15th February 2011 cancelling his appointment on the post of constable. The petitioner being aggrieved by the said order, has filed the present writ petition.

3. The impugned order and the counter affidavit indicates that the petitioner's claim for appointment on the post of constable has been rejected on the ground of physical deformity taking protection of Rule 13 of the Rules of 2008 which is extracted hereunder :-

"13. Physical fitness. *- No candidate shall be appointed to a post in the service unless he is in good mental and bodily health and free from any physical defect likely to interfere with the efficient performance of his duties. Before a candidate is finally approved for appointment he shall be required to pass an examination by a medical board.*

Note.*- The medical board shall also examine the deficiencies such as knock knee, bow legs, flat feet, vericose veins, distant and near vision, colour blindness, hearing test comprising of Rinne's test, Webber's test and tests for vertigo etc."*

4. From the aforesaid rule, it is clear that no candidate could be appointed in the service if he suffers from any physical defect which is likely to interfere with efficient performance of his duties. The rule further provides that before a candidate is finally approved for appointment, he shall be required to pass an examination of a Medical Board.

5. In the instant case, the petitioner has been cleared twice by the Medical Board and, in the second medical report, the Medical Board has given a clear opinion that the physical deformity in the petitioner's left forefinger does not constitute any kind of deformity nor does it make the petitioner a handicapped person. The Medical Board has further opined that the petitioner is fit for being given an appointment in a Government service.

6. In the light of the aforesaid medical opinion given by a team of medical experts, it was no longer open to the competent authority to hold that the physical deformity may interfere in the efficient performance of his duties. The competent authority could not reject the claim of the petitioner on the basis of mere surmises and conjuctures especially when the medical opinion was otherwise.

7. In the light of the aforesaid, the impugned order cannot be sustained and is quashed. The writ petition is allowed and a writ of mandamus is issued to the respondents to issue an appointment letter in favour of the petitioner for the post in question within two weeks from the date of production of certified copy of this order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.12.2012

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.
THE HON'BLE PRAKASH KRISHNA, J.
THE HON'BLE SANJAY MISRA, J.

Civil Misc. Writ Petition No. 20740 of 2012

Arun Kumar Singh & others
...Petitioner
Versus
State of U.P. & Others ...Respondents

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Constitution of India, Article 226-Right of Deputinist-parent department's decision to take back those BRC and NRPC-considering change Government Policy-facing great scarcity of teachers on through out the state-whether those deputinist could resist on ground of getting higher pay during deputation ?-held-No.

Held: Para-39

Our answer to the above reframed question is that the Government order dated 2nd February, 2011, which has reconstituted the Block Resource Centres and Nyaya Panchayat Resource Centres has rightly provided for sending back the coordinator/co-coordinators to their parent institutions and their entitlement to receive higher pay scale was no impediment in sending back the said teachers, moreso when actually no Headmaster/Teacher/Assistant Teacher of primary schools was getting higher pay scale while working as coordinators of Block Resource Centres or Nyaya Panchayat Resource Centres.

Case Law discussed:
(1988) 2 SCC 602; (1991) 4 SCC 139; (2011) 1 SCC 694; (2011) 7 SCC 639; (2012) 7 SCC 1; (2008) 5 SCC 1; (2007) 6 SCC 276; (2010) 4 UPLBEC 2669; (1990) 3 SCC 157; (1988) Supp. SCC 740; (1983) 3 SCC 33

(Delivered by Hon'ble Ashok Bhushan, J.)

1. A learned Single Judge, while hearing Writ Petition No.20740 of 2012 (Arun Kumar Singh and others vs. State of U.P. and others) and other similar matters made a reference for constituting a Full Bench to answer following three questions:-

"(a) Whether the power of the parent department to revoke the deputation even before the expiry of the term for good and valid reason is lost, only due to the fact that the deputationist was getting some additional monetary benefits while working on deputation.

(b) Whether the decision of the employer in revoking the deputation even before expiry of the term on good and valid reasons would be bad merely because the employee during deputation was getting better salary/allowances.

(c) Whether the Single Judge was justified in declaring the judgment of the Single Judge and of the Division Bench dated 17.02.2011 and dated 27.05.2011 respectively as per incuriam or he was obliged to refer the matter to a larger bench if he had doubts about the said judgments."

2. The Hon'ble the Chief Justice vide order dated 22nd May, 2012 constituted this Full Bench.

3. Before we proceed to answer the questions referred, it is necessary to note background facts giving rise to the reference.

4. It shall be sufficient to note the pleadings in Writ Petition No.20740 of 2012 (Arun Kumar Singh and others vs. State of U.P. and others) for considering the questions referred which may be treated as leading writ petition.

5. The petitioners were appointed as Assistant Teachers in Junior Basic Schools run by U.P. Board of Basic Education. The petitioners were appointed as Assistant Teachers between 1997 to 1999 and were subsequently given promotion as Assistant Teacher in Senior Basic Schools between the year 2004-2006. The constitutional provisions contained in Part-IV of the Constitution of India (Articles 39, 41, 45 and 46) enjoin upon the State to frame its laws and policy to implement objectives which have been delineated in the aforesaid constitutional provisions. The aforesaid constitutional provisions enjoin the State to take effective steps for providing education to children. Right to education is now a fundamental right of children between age of 6 to 14 and State is obliged to provide free and compulsory education to all children. The Central Government for attaining the aforesaid objectives, had taken a policy decision to launch a mission namely "Sarva Shiksha Abhiyan". The State Governments were involved in the implementation of the scheme so that compulsory education be provided to children. The State of U.P. has also launched various schemes for achieving the aforesaid goal. The Block Resource Centres and Nyaya Panchayat Resource Centres (BRC and NPRC) were created towards the aforesaid end. A Government order dated 1st September, 2001 was issued providing for a methodology for selecting coordinators/co-coordinators at Block Resource Centres and Coordinator at Nyaya Panchayat Resource Centres. The Government order contemplated selection of coordinator at Block Resource Centre from amongst Headmasters of primary school or Assistant Teachers of junior high schools or a teacher who has worked as coordinator at Nyaya Panchayat Resources Centre for two years. Similarly for Co-coordinator at Block Resource Centres Assistant Teachers of primary schools having four years experience were eligible. For Coordinator at Nyaya Panchayat Resource Centre, Headmaster of primary schools or Assistant Teacher of junior high schools having 8 years service were eligible. Necessary posts for coordinator/co-coordinator at Block Resources Centres and coordinator at Nyaya Panchayat Resource Centres were created by the State Government. Large number of coordinator/co-coordinators at Block Resource Centres and coordinator at Nyaya Panchayat Resource Centres were appointed in pursuance of the Government order as modified from time to time. The engagements of coordinator/co-coordinator were initially for a period of two years. The State while implementing the scheme realised that Nyaya Panchayat Resource Centres have completely failed to achieve the object and due to large number of teachers being posted at Nyaya Panchayat Resource Centres there is shortage of teachers in the Primary/Junior High Schools. The State Government decided to reconstitute the Block Resource Centre and Nyaya Panchayat Resource Centres. A Government order dated 2nd February, 2011 was issued by the State Government for reconstituting the aforesaid resource centres. The State Government decided that

coordinators of Block Resource Centre shall be Assistant Basic Shiksha Adhikari or Nagar Shiksha Adhikari, ex-officio. It was further decided that at Nyaya Panchayat level the Headmasters of Junior High School shall be made Sankul Prabhari who shall be ex-officio coordinator of Nyaya Panchayat Resources Centre. In the new reconstituted scheme the Coordinators were thus made ex-officio. The Government also decided that due to shortage of teachers in the institutions, it is necessary to send teachers who have been working at Block Resource Centres and Nyaya Panchayat Resource Centres to their parent institutions. The reconstituted scheme was implemented and the posts which were created for Block Resource Centre and Nyaya Panchayat Resource Centre were surrendered and the Government order contemplated that out of surrendered posts certain posts be transferred to Nyaya Panchayat Resources Centre for implementation of new scheme. The Government order dated 2nd February, 2011 gives figure of the posts which have been surrendered and the posts which are to be now utilised by transfer on the aforesaid posts for implementation of new scheme. The Government order clearly meant that earlier scheme is now given up and the new scheme shall be implemented as a consequence of which large number of teachers were to be repatriated to their parent institutions for teaching work which was suffering. In pursuance of the Government order dated 2nd February, 2011, the State Project Director issued a consequential order dated 10th February, 2011 inviting fresh applications from Assistant Teachers of Primary and Junior High Schools for choosing co-coordinators at Block Resource Centres and Nyaya Panchayat Resource Centres. The post of co-coordinators in Block Resource Centre were to be filled from teachers of Science, Maths, English, Hindi and Social Science. After issuance of the Government order dated 2nd February, 2011 and the order dated 10th February, 2011, large number of Assistant Teachers and Headmasters who were working as cCoordinator/co-coordinators were to be repatriated to their parent institutions.

6. Those Assistant Teachers and Headmasters who were working as Coordinators and Co-coordinators challenged the Government order dated 2nd February, 2011 and the order dated 10th February, 2011 by filing writ petitions. In this context reference is made to Writ Petition No.9393 of 2011 (Har Pal Singh and others vs. State of U.P. and others), Writ Petition No.10232 of 2011 (Virendra Singh and others vs. State of U.P. and others) and Writ Petition No.16615 of 2011 (Subhash Chandra Rathore and another vs. State of U.P. and others). All the aforesaid writ petitions were heard and dismissed by learned Single Judges of this Court upholding the Government order dated 2nd February, 2011 and the order dated 10th February, 2011. The challenge to the Government order on the ground that Government order is arbitrary, was repelled. This Court held that consequent to the Government order, the teachers and Headmasters who were working have to report to their parent institutions. Special appeals were filed before the Division Bench challenging the order of the learned Single Judges. Reference is made to Special Appeal No.371 of 2011 (Har Pal Singh & others vs. State of U.P. and others) which was filed against the judgment and order of learned Single Judge dated 17th February, 2011 by which the writ petition was dismissed. All the special appeals were heard by the Division Bench of this Court and vide its detail judgment and order dated

27th May, 2011, the Division Bench dismissed all the special appeals and upheld the order of learned Single Judges. The writ petitioners in pursuance of the Government order dated 2nd February, 2011 applied and were selected for appointment as co-coordinators. Reference has been made to the appointment letter dated 19th May, 2011 by which the petitioners were appointed as co-coordinators in Block Resource Centres. The petitioners claimed to have joined in May, 2011 and were entitled to continue at least up to May, 2013.

7. Several writ petitions being Writ Petition No.1178 (SS) of 2011 (Sunil Dutt & others vs. State of U.P. and others) and other writ petitions have been filed at Lucknow Bench of this Court in which writ petitions also the order dated 10th February, 2011 issued by the State Project Director inviting applications for appointment in pursuance of the Government order dated 2nd February, 2011 was under challenge. The aforesaid writ petitions were filed by those coordinator/co-coordinators who were selected and working since before 2nd February, 2011. The petitioners of that writ petitions challenged the Government order dated 2nd February, 2011 as well as the consequential order dated 10th February, 2011 on several grounds including the ground that by repatriation they will suffer financial loss since as Block Resource Coordinators they shall be entitled to receive higher salary. Before the learned Single Judge at Lucknow Bench of this Court the respondents pointed out that writ petitions filed by similarly situated persons have already been dismissed by judgment and order of learned Single Judge in ***Har Pal Singh's*** case (supra) upholding the Government order dated 2nd February, 2011 and the petitioners have no right to continue on the post of coordinator/co-coordinators. Before the judgment could be delivered by the Lucknow Bench of this Court, the respondents also pointed out that special appeals against the judgment of learned Single Judges have also been dismissed by the Division Bench vide its judgment and order dated 27th May, 2011. The learned Single Judge of Lucknow Bench of this Court after noticing the judgment of learned Single Judge of this Court dismissing the writ petition as well as the Division Bench judgment of this Court in ***Har Pal Singh's*** case (supra), allowed the writ petitions vide its judgment and order dated 9th February, 2012. Learned Single Judge of Lucknow Bench held the judgments of learned Single Judge and Division Bench in ***Har Pal Singh's*** case (supra) as per-incuriam. After the judgment of learned Single Judge dated 9th February, 2012, the State Project Director has cancelled its earlier order dated 10th February, 2011 passed in consequence of the Government order dated 2nd February, 2011. A letter dated 13th April, 2012 was issued by the State Project Director in purported compliance of the judgment of learned Single Judge of Lucknow Bench dated 9th February, 2012. In Writ Petition No.20740 of 2012 order dated 13th April, 2012 was challenged. The petitioners are apprehending that their working as co-coordinators is likely to be interfered with in view of setting aside the order of State Project Director dated 10th February, 2011.

8. In pursuance of the order dated 13th April, 2012, the Basic Shiksha Adhikari in certain districts have issued an order dated 20th April, 2012 directing for restoration of earlier position and new appointments of coordinators and co-coordinators in pursuance of the Government order dated 2nd February, 2011 were cancelled. For

example, in Writ Petition No.20741 of 2012 order passed by the Basic Shiksha Adhikari dated 20th April, 2012 has been brought on the record. In all the writ petitions, which are up for consideration in this bunch of writ petitions, the order of the State Project Director dated 13th April, 2012, which has been issued in pursuance of the order of the learned Single Judge of Lucknow Bench, is under challenge.

9. A learned Single Judge of this Court while entertaining the writ petitions, has framed the aforesaid three questions and made a reference and also passed an interim order staying the order dated 13th April, 2012 of the State Project Director.

10. All the three issues, which have been referred for consideration being interconnected, are taken together.

11. As noted above, the coordinator/co-coordinators were appointed earlier in pursuance of the Government order dated 1st September, 2001 at Block Resource Centres and Nyaya Panchayat Resource Centres. Large number of teachers from primary institutions/junior high schools including Headmasters of primary institutions were appointed. For implementation of Sarva Shiksha Abhiyan and various projects undertaken by the State Government for providing compulsory education to the children schemes were framed and implemented by the State Government as a policy decision of the State and the appointments as coordinator/co-coordinators were made by executive orders issued by the State Government. The State Government issued Government order dated 2nd February, 2011 for reconstituting the Block Resource Centres and Nyaya Panchayat Resource Centres in reference to the Government order dated 1st September, 2001 and other Government orders issued from time to time. The Government order dated 2nd February, 2011 specifically noticed that Nyaya Panchayat Resource Centres created under Sarva Shiksha Abhiyan are not able to provide impetus to education programmes. The State Government decided to reconstitute the resource centres since expected results were not being delivered by the resource centres. The State Government also specifically noted that due to posting of 8249 coordinators at Nyaya Panchayat Resource Centres there was shortage of teachers in the institutions. It was specifically provided in the Government order that as there is shortage of teachers, teachers be sent to their parent institutions. It is useful to note the salient features of the Government order dated 2nd February, 2011 with regard to reconstitution of Block Resource Centres and Nyaya Panchayat Resource Centre, which are as under:-

(i)The Coordinators of Block Resource Centre shall be henceforth Assistant Basic Shiksha Adhikari/Nagar Shiksha Adhikari who shall be ex-officio coordinators of Block Resource Centre/Urban Resource Centre.

(ii)The Headmasters of Junior High Schools who have been made Sankul Prabhari shall be ex-officio Coordinators of Nyaya Panchayat Resources Centre.

(iii)The Co-coordinators who shall be required at Block Resource Centre and Nyaya Panchayat Resources Centre shall be appointed and the posts shall be earmarked subjectwise, namely, Science, Mathematics, English, Hindi, Social Science and Special Education.

(iv)The posts of coordinators at Nyaya Panchayat Resources Centre shall be surrendered and shall be transferred to Block Resource Centre.

12. The methodology for selecting the co-coordinators at resource centres was also changed and qualifications were laid down in the Government order dated 2nd February, 2011 and in pursuance of the said Government order, the State Project Director issued order dated 10th February, 2012 and thereafter steps were taken in all districts and co-coordinators were selected and appointed. The petitioners are thus co-coordinators who have been appointed subsequent to the Government order dated 2nd February, 2011. The petitioners before the Lucknow Bench of this Court in Writ Petition No.1178 (SS) of 2011 (Sunil Dutt and others vs. State of U.P. and others) and other connected matters were the coordinator/co-coordinators who were selected and working prior to reconstitution of the Block Resource Centres by Government order dated 2nd February, 2011. Although the writ petitions filed by similarly situated coordinator/co-coordinators appointed and working prior to 2nd February, 2011 like ***Har Pal Singh's*** case (supra) and other writ petitions were dismissed and the special appeals have also been dismissed by a Division Bench of this Court, but a decision was taken by a learned Single Judge of Lucknow Bench of this Court in ***Sunil Dutt's*** case (supra) holding the earlier two judgements as per-incuriam and allowed the writ petition filed by such coordinator/co-coordinators who were appointed prior to Government order dated 2nd February, 2011 and further allowed them to continue and also issued mandamus to pay them higher salary.

13. From the salient features of the Government order dated 2nd February, 2011, it is clear that earlier policy for appointment of coordinator/co-coordinators were changed and given up with specific stipulation that teachers who were earlier appointed shall go to their parent institutions since there was shortage of teachers for teaching and new scheme will be implemented in which coordinators at Block Resource Centres as well as Nyaya Panchayat Resource Centres shall be ex-officio Assistant Basic Shiksha Adhikari and Sankul Prabhari. Various posts earlier created were surrendered and transferred. Thus the Government order completely reconstituted the scheme and abolished the scheme of coordinators at Block Resource Centres and Nyaya Panchayat Resource Centres. There cannot be any dispute that policy making is in the domain of the State and policy can be changed from time to time by the State Government. One of the submissions which has been noticed in ***Sunil Dutt's*** case (supra) is that the policy dated 2nd February, 2011 shall be prospectively implemented and shall not effect appointments already made. It was also noticed that the process of appointment, which was introduced by the Government order dated 2nd February, 2011, is only for future appointment and the said Government order was to be implemented with immediate effect. The submission noted in ***Sunil Dutt's*** case (supra) is that the new policy cannot affect the working of the coordinator/co-coordinators who are already working. The policy was a integrated policy which affected both i.e. coordinator/co-coordinators who were working at the relevant time and those who were to be newly appointed in accordance with the changed policy. When the policy contemplated that there is shortage of

teachers and the teachers working in the Nyaya Panchayat Resource Centres shall be reverted to their parent institution, the said policy clearly affected the incumbents who were already working as coordinator/co-coordinators. Thus the submission that the said Government order cannot be applicable on the coordinator/co-coordinators who are already working is fallacious and against the clear stipulation in the Government order dated 2nd February, 2011.

14. Before the learned Single Judge and also before the Division Bench in ***Har Pal Singh's*** case (supra) all the arguments made by coordinator/co-coordinators who were working at the time of issuance of Government order dated 2nd February, 2011, were raised and considered. The Division Bench noted following 4 points for consideration which are as under:-

"(1) Under what circumstances this Court can interfere in policy decisions taken by the State Government.

(2) Whether the change in policy by issuance of Government Order dated 2nd February, 2011 is arbitrary and unreasonable.

(3) Whether the appellants have any vested right to continue as Coordinator/Co-Coordinator after the Government dated 2nd February, 2011 is given effect to.

(4) Whether the learned Single Judge was bound to follow the interim order passed in a similar matter by another Single Judge of the Lucknow Bench of this Court."

15. Both the parties made elaborate submissions on the aforesaid points and while answering Point No.1 and 2, the Division Bench made following observations:-

"From the perusal of the Government Order dated 2nd February, 2011, we are of the considered opinion that the change in the policy effected by the State Government is based on relevant considerations and cannot be said to be arbitrary so as to entitle this Court to interfere. It is for the State Government to see that the teaching does not suffer. It is the constitutional obligation to provide free education to the children between the age of 6years and 14 years. This is specially in aid of achieving the avowed object. Therefore, it cannot be said that the policy framed by the Government is arbitrary. The submission of the learned counsel for the appellants that one set of teachers are being replaced by another set of teachers is wholly misplaced. The existing Coordinators/Assistant Coordinators were not doing any regular teaching work. They were involved in supervision of teaching work and various other activities as a result of which teaching work in the school suffered. In the new scheme Co-Coordinators are also required to do teaching work which will be a welcome step towards fulfilling the constitutional obligation.

The plea that the Government Order dated 2nd February, 2011 would operate prospectively and would not cover the cases of existing Coordinators/Co-Coordinators is not correct. It is to be taken note of that all the appellants have been appointed as Coordinators/Assistant Coordinators, as the case may be, on a fixed term of two years on deputation basis and they are still holding their lien on their original post. They are not being paid any extra remuneration what they were getting as teachers. Their primary duty is to teach students. If for some reason

they have been appointed under a policy and on a review of their working the Government comes to the conclusion that it is not achieving the desired result it is fully entitled to change the policy. The appellants have no vested rights to say that their appointment as Coordinators/Co-Coordinators cannot be terminated midway. We find from the letter of appointment that a specific condition has been mentioned there that their appointment can be cancelled at any time. That being the position we are of the considered opinion that with the change of policy the appellants cannot claim any right to continue to complete their full tenure.

Applying the test laid down by the Apex Court in the aforesaid cases regarding interference in a policy decision, we are of the considered opinion that above policy framed by the State Government cannot be said to be arbitrary, unreasonable and it is the result of conscious decision on a review of the working of the existing system of Coordinators and Co-Coordinators and State is well within the jurisdiction to change the same in order to achieve the desired result. We may mention here that there is not allegation of mala fied raised against the State Government or the Authorities in framing the said policy. We further find that the change in the policy is of the State Government is well informed by reasons and it is to ensure that the education of the children does not suffer. Therefore, it cannot be said to be arbitrary and unreasonable so as to violate Article 14 of the Constitution of India or other parameters deduced under Point No.1."

16. The issue as to whether the coordinator/co-coordinators have vested right to continue, was negativated and following was laid down by the Division Bench:-

"While dealing with Point No.2 hereinabefore we have already held that the appointment of the appellant as Coordinators/Co-Coordinators was for a fixed term of 2 years. They were not paid any extra remuneration for that work. We also find that their lien on the original post of teacher has been maintained. Thus their appointment on the post of Coordinator/Co-Coordinator is only by way of deputation even if the appointment has been made by facing a selection process. It can be terminated at any time either by a special or general order as held by this Court in the case of Ram Kumar(supra) that an officiating employee has no right to post and his appointment can be cancelled at any time.

In the case of Babu Ram Ashok Kumar and another vs. Antarim Zila Parishad, AIR 1964 Alld. 534, the Full Bench of this Court has held as follows:

'(9) A Court of appeal would not interfere with the exercise of discretion by the Court below, if the discretion has been exercised in good faith, after giving due weight to relevant matters and without being swayed by irrelevant matters. If two views are possible on the question, then also the Court of appeal would not interfere, even though it may exercise discretion differently, were the case to come initially before it. The exercise of discretion should manifestly be wrong.'

Respectfully following the law laid down in the aforesaid case to the facts of the present case, we are of the view that the discretion exercised by the learned Single

Judge does not call for any interference as it is in accordance with law."

17. The judgment of learned Single Judge in ***Sunil Dutt's*** case (supra) has taken a view that the issue that coordinator/co-coordinators shall be getting less salary after repatriation and this question was not considered by the Division Bench in ***Hal Pal Singh's*** case (supra). It is relevant to note that the Division Bench while dealing with Point No.3 noted following regarding emoluments:-

"It may be mentioned here that all the appellants are being paid the same emoluments which they were getting as teachers and they are not paid any extra amount for the work which they are doing as Coordinator/Co- Coordinator. However, after being appointed as Coordinator and Co- Coordinator they have stopped doing teaching work in their respective schools."

18. Learned Single Judge in ***Sunil Dutt's*** case (supra) although noted that coordinator/co-coordinators are getting the same salary but took the view that they are entitled for payment in higher scale and ultimately issued direction for making payment of the post of Headmaster of Junior High School. Thus it transpires that coordinator/co-coordinators were not being paid any higher pay scale to which they were getting while working as Assistant Teacher/Headmaster that is why the Division Bench noticed that while working as coordinator/co-coordinators they were not being paid any higher emoluments. Thus the fact that petitioners before the learned Single Judge of Lucknow Bench claimed that they are entitled for higher emoluments was not a factor on the basis of which it can be said that the judgments of learned Single Judge and Division Bench of this Court in ***Har Pal Singh's*** case (supra) can be treated to be a not binding precedent and has virtually held them to be per-incuriam.

19. Then a judgment can be held to be per-incuriam is now to be looked into and we have to answer as to whether the judgments of learned Single Judge and Division Bench in Har Pal Singh's case (supra) can be held to be per-incuriam.

20. The word "per-incuriam" is a Latin word which is defined in P. Paramanatha Aiyar "Law Lexicon" (1997th Edition) in following words:-

*"**Per incuriam**. Through inadvertence or though want of care. (Latin for Lawyers) Through carelessness, through inadvertence.*

A decision should be treated as given per incuriam when it is given in ignorance in terms of a statute, or of a rule having the force of a statute..."

21. Per-incuriam is an exception to a binding precedent. A constitution Bench of the Apex Court in the case of ***A.R. Antulay vs. R.S. Nayak and another*** reported in (1988)2 SCC 602 considered the concept of per-incuriam. In the said case an earlier order dated 16th February, 1984 was passed without taking into consideration Section 7(2) of the Criminal Law Amendment Act, 1952. The question arose as to whether said directions are per-incuriam. The Apex Court laid down following in paragraph 42 of the said judgment:-

*"**42**. ..... "Per incuriam' are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or some authority binding on the*

Court concerned so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account to be demonstrably wrong. See Morelle v. Wakeling. Also see State of Orissa v. Titaghur Paper Mills Co. Ltd. We are of the opinion that in view of the clear provisions of Section 7(2) of the Criminal Law Amendment Act, 1952 and Articles 14 and 21 of the Constitution, these directions were legally wrong."

22. The Apex Court had occasion to consider as to when a judgment is held to be per-incuriam in the case of ***State of U.P. vs. Synthetics and Chemicals Ltd.*** reported in (1991)4 SCC 139 and laid down following in paragraphs 40 and 41:-

*"**40.** 'Incuria' literally means 'carelessness'. In practice per incurium appears to mean per ignoratium.' English Courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, 'in ignoratium of a statute or other binding authority'. (1944 IKB 718 Young v. Bristol Aeroplane Ltd. Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law. In Jaisri Sahu v. Rajdewan Dubey, [1962] 2 SCR 558 this Court while pointing out the procedure to be followed when conflicting decisions are placed before a Bench extracted a passage from Halsbury Laws of England incorporating one of the exceptions when the decision of an Appellate Court is not binding.*

***41.** Does this principle extend and apply to a conclusion of law, Which was neither raised nor preceded by any consideration. In other words can such conclusions be considered as declaration of law? Here again the English Courts and jurists have carved out an exception to the rule of prece- dents. It has been explained as rule of sub-silentio. A decision passed sub-silentio, in the technical sense that has come to be attached to that phrase, when the particular' point of law involved in the decision is not perceived by the Court or present to its mind' (Salmond 12th Edition). In Lancaster Motor Company (London) Ltd. v. Bremith Ltd., [1941] IKB 675 the Court did not feel bound by earlier decision as it was rendered 'without any argument, without reference to the crucial words of the rule and without any citation of the authority'. It was approved by this Court in Municipal Corporation of Delhi v. Gumam Kaur, [1989] 1 SCC 101. The Bench held that, 'prece- dents sub-silentio and without argument are of no moment'. The Courts thus have taken recourse to this principle for relieving from injustice perperated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. Uniformity and consistency are core of judicial discipline. But that which escapes in the judgment without any occasion is not ratio decedendi. In Shama Rao v. State of Pondicherry, AIR 1967 SC 1680 it was observed, 'it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein'. Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law."*

23. In large number of cases the Apex Court had explained and reiterated the grounds when a judgment can be held to be per-incuriam. It is useful to note certain recent judgments regarding per-incuriam. In the case of ***Siddharam Satlinagappa Mhetre vs. State of Maharashtra*** reported in (2011)1 SCC 694 following was laid down in paragraphs 128, 129 and 130 which are as under:-

"**128**. Now we deem it imperative to examine the issue of per incuriam raised by the learned counsel for the parties. In Young v. Bristol Aeroplane Company Limited (1994) All ER 293 the House of Lords observed that `Incuria' literally means `carelessness'. In practice per incuriam appears to mean per ignoratium. English courts have developed this principle in relaxation of the rule of stare decisis. The `quotable in law' is avoided and ignored if it is rendered, `in ignoratium of a statute or other binding authority. The same has been accepted, approved and adopted by this court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law.

In Halsbury's Laws of England (4th Edn.) Vol. 26: Judgment and Orders: Judicial Decisions as Authorities (pp. 297-98, para 578) per incuriam has been elucidated as under:

"A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of coordinate jurisdiction which covered the case before it, in which case it must decide which case to follow (Young v. Bristol Aeroplane Co. Ltd., 1944 KB 718 at 729 : (1944) 2 All ER 293 at 300. In Huddersfield Police Authority v. Watson, 1947 KB 842 : (1947) 2 All ER 193.); or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or rule having statutory force.'

129. Lord Godard, C.J. in Huddersfield Police Authority v. Watson (1947) 2 All ER 193 observed that where a case or statute had not been brought to the court's attention and the court gave the decision in ignorance or forgetfulness of the existence of the case or statute, it would be a decision rendered in per incuriam.

130. This court in Government of A.P. and Another v. B. Satyanarayana Rao (dead) by LRs. and Others (2000) 4 SCC 262 observed as under:

"8. The rule of per incuriam can be applied where a court omits to consider a binding precedent of the same court or the superior court rendered on the same issue or where a court omits to consider any statute while deciding that issue."

24. Again in the case of ***State of Madhya Pradesh vs. Narmada Bacho Andolan*** reported in (2011)7 SCC 639 following was laid down in paragraph 67 which is as under:-

"Thus, "per incuriam' are those decisions given in ignorance or forgetfulness of some statutory provision or authority binding on the Court concerned, or a statement of law caused by inadvertence or conclusion that has been arrived at without application of mind or proceeded without any reason so that in such a case some part of the decision or some step in the reasoning on which it is

based, is found, on that account to be demonstrably wrong."

25. In the case of ***Rattiram and others vs. State of Madhya Pradesh*** reported in (2012)4 SCC 516 following was laid down in paragraphs 30, 31 sand 32:-

*"**30.** In this context, it is useful to refer to a passage from A. R. Antulay (supra), wherein, Sabyasachi Mukharji, J (as his Lordship then was), while dealing with the concept of per incuriam, had observed thus:-*

"42. ..... "Per incuriam' are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong.'

Again, in the said decision, at a later stage, the Court observed:-

"It is a settled rule that if a decision has been given per incuriam the court can ignore it.'

***31**. In Punjab Land Development & Reclamation Corporation Ltd. v. Presiding Officer, Labour Court, Chandigarh & another Constitution Bench, while dealing with the issue of per incuriam, opined as under:-*

"The Latin expression per incuriam means through inadvertence. A decision can be said generally to be given per incuriam when this Court has acted in ignorance of a previous decision of its own or when a High Court has acted in ignorance of a decision of this Court.'

***32.** In State of U. P. And Another v. Synthetics and Chemicals Ltd. And Another, a two-Judge Bench adverted in detail to the aspect of per incuriam and proceeded to highlight as follows:-*

"40. ..`Incuria' literally means `carelessness'. In practice per incuriam appears to mean per ignoratium. English courts have developed this principle in relaxation of the rule of stare decisis. The `quotable in law' is avoided and ignored if it is rendered, `in ignoratium of a statute or other binding authority'. (Young v. Bristol Aeroplane Co. Ltd.17). Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law."

26. In one recent judgment the Apex Court had occasion to consider conflicting views expressed by two Division Benches of this Court in the case of ***U.P. Power Corporation Limited vs. Rajesh Kumar and others*** reported in (2012)7 SCC 1. The Apex Court in the said judgment observed that if a Division Bench comes across another Division Bench on the same subject judicial decorum demands that in the event another Division Bench does not agree with coordinate Division Bench, the matter should be referred for constitution of Larger Bench. Following was laid down by the Apex Court in paragraphs 17, 18, 19 and 20 which are as under:-

*"**17.** Similarly, the Division Bench at Lucknow erroneously treated the verdict of Allahabad Bench not to be a binding precedent on the foundation that the principles laid down by the Constitution Bench in M. Nagraj (supra) are not being appositely appreciated and correctly*

applied by the Bench when there was reference to the said decision and number of passages were quoted and appreciated albeit incorrectly, the same could not have been a ground to treat the decision as per incuriam or not a binding precedent. Judicial discipline commands in such a situation when there is disagreement to refer the matter to a larger Bench. Instead of doing that, the Division Bench at Lucknow took the burden on themselves to decide the case.

18. *In this context, we may profitably quote a passage from Lala Shri Bhagwan and another v. Ram Chand and another[3]:-*

"18. .. It is hardly necessary to emphasise that considerations of judicial propriety and decorum require that if a learned single Judge hearing a matter is inclined to take the view that the earlier decisions of the High Court, whether of a Division Bench or of a single Judge, need to be reconsidered, he should not embark upon that enquiry sitting as a single Judge, but should refer the matter to a Division Bench or, in a proper case, place the relevant papers before the Chief Justice to enable him to constitute a larger Bench to examine the question. That is the proper and traditional way to deal with such matters and it is founded on healthy principles of judicial decorum and propriety. It is to be regretted that the learned single Judge departed from this traditional way in the present case and chose to examine the question himself."

19. *In Sundarjas Kanyalal Bhathija and others v. The Collector, Thane, Maharashtra and others[4] while dealing with judicial discipline, the two- Judge Bench has expressed thus:-*

"One must remember that pursuit of the law, however, glamorous it is, has its own limitation on the Bench. In a multi-Judge Court, the Judges are bound by precedents and procedure. They could use their discretion only when there is no declared principle to be found, no rule and no authority. The judicial decorum and legal propriety demand that where a learned single Judge or a Division Bench does not agree with the decision of a Bench of co-ordinate jurisdiction, the matter shall be referred to a larger Bench. It is a subversion of judicial process not to follow this procedure."

20. *The aforesaid pronouncements clearly lay down what is expected from the Judges when they are confronted with the decision of a Co-ordinate Bench on the same issue. Any contrary attitude, however adventurous and glorious may be, would lead to uncertainty and inconsistency. It has precisely so happened in the case at hand. There are two decisions by two Division Benches from the same High Court. We express our concern about the deviation from the judicial decorum and discipline by both the Benches and expect that in future, they shall be appositely guided by the conceptual eventuality of such discipline as laid down by this Court from time to time. We have said so with the fond hope that judicial enthusiasm should not obliterate the profound responsibility that is expected from the Judges."*

27. From the law laid down by the Apex Court, as noticed above, binding precedent of a judgment can be eroded and the judgment can be termed as per-incuriam only when the judgment has been delivered in ignorance of a statutory provision or in ignorance of some binding authority. The

judgment of learned Single Judge in ***Sunil Dutt's*** case (supra) does not refer to any statutory provision which has been ignored by learned Single Judge or the Division Bench in ***Har Pal Singh***'s case (supra). The learned Single Judge in ***Sunil Dutt's*** case (supra) also has not referred to any binding precedent which has escaped notice of learned Single Judge or Division Bench in Har Pal Singh's case. Hence the learned Single Judge in ***Sunil Dutt's*** case (supra) without there being sufficient ground for declaring the judgment of learned Single Judge and the Division Bench in ***Har Pal Singh's*** case as not a binding precedent, held the same as per-incuriam. Thus the view of the learned Single Judge in ***Sunil Dutt's*** case (supra) holding the aforesaid judgments of learned Single Judge and Division Bench in ***Har Pal Singh***'s case (supra) as per-incuriam, is erroneous and cannot be approved.

28. It is also necessary to notice several judgments of the Apex Court, which have been referred to and relied by the learned Single Judge of Lucknow Bench in ***Sunil Dutt's*** case (supra). The judgment in the case of ***Dr. L.P. Agarwal vs. Union of India and othes*** reported in (1992)3 SCC 526 has been relied by the learned Single Judge which was a case of appointment on the post of Director of Indian Institute of Medical Sciences which was a tenure post. The post of Director under the recruitment rules was a tenure post and was required to be filled by direct recruitment. The appointment of the Director was with the condition that he is appointed for a period of 5 years or till he attains the age of 62 years. The Director before completing his tenure of 62 years, was retired prematurely. In the said context, the Apex Court held that appellant could not have been prematurely retired and was entitled to continue for 5 years or 62 years of age the appointment being on tenure post. In the present case the appointment of coordinator/co-coordinators was made under the scheme implemented by executive instructions issued by the State Government. The appointment was not a statutory appointment on any tenure post. The appointments of coordinator/co-coordinators were appointments made for a term of two years. There are two reasons for which the judgment in ***Dr. L.P. Agarwal's*** case (supra) does not help the coordinator/co-coordinators appointed prior to 2nd February, 2011. Firstly the resource centres were reconstituted by the Government order dated 2nd February, 2011 and secondly the posts of coordinators of Block Resource Centres were now to be held by ex-officio Assistant Basic Shiksha Adhikari and the coordinators working were to be repatriated to their parent institutions. Due to reconstitution the posts of coordinators of Block Resource Centre actually came to an end and coordinators of Block Resource Centres were made ex-officio Assistant basic Shiksha Adhikari, hence there was no post on which coordinators of Block Resource Centre could claim to continue. The 8249 posts of coordinators working in Nyaya Panchayat Resource Centres were also surrendered as noticed in the Government order dated 2nd February, 2011. When on reconstitution the posts of coordinator were no longer in existence and posts of co-coordinator were stood surrendered, the continuance of earlier incumbents cannot be allowed nor it was contemplated. Any direction for their continuance could be clearly in the teeth of the scheme. There is one more reason due to which the repatriation of coordinator/co-coordinators could not be objected. The Division Bench in ***Har Pal Singh's*** case (supra) has specifically noted that in the letter of appointment there was specific

condition that their appointment can be cancelled at any time. While discussing Point No.2 the Division Bench held following:-

"We find from the letter of appointment that a specific condition has been mentioned there that their appointment can be cancelled at any time."

29. There being specific condition in the appointment letter itself, it cannot be accepted that the coordinator/co-coordinators have any indefeasible right to continue for a period of two years.

30. Another judgment relied by learned Single Judge in ***Sunil Dutt's*** case (supra) is in the case of ***P. Venugopal vs. Union of India*** reported in (2008)5 SCC 1. The said judgment was again a judgment rendered in a case of Director of Indian Institute of Medical Sciences where the Apex Court held that the appointment on the post of Director was for a fixed term of 5 years. In the said case the constitutional validity of proviso to Sub-section (1-A) of Section 11 of the All India Institute of Medical Science Act, 2007 was challenged. Section 11(1-A) of the 2007 Act as amended, was as follows:-

"11(1-A) - The Director shall hold office for a term of five years from the date on which he enters upon his office or until he attains the age of sixty-five years, whichever is earlier.

Provided that any person holding office as a Director immediately before the commencement of the All India Institute of Medical Sciences and the Post-Graduate Institute of Medical Education and Research (Amendment) Act, 2007, shall in so far as his appointment is inconsistent with the provisions of this sub-section, cease to hold office on such commencement as such Director and shall be entitled to claim compensation not exceeding three months' pay and allowances for the premature termination of his office or of any contract of service....."

31. The Apex Court in the said case held the said amendment as arbitrary and impermissible classification through a one man legislation. Following was laid down in paragraphs 37 and 40 of the said judgment:-

*"**37.** Such being our discussion and conclusion, on the constitutionality of the proviso to Section 11A, we must, therefore, come to this conclusion without any hesitation in mind, that the instant case is squarely covered by the principles of law laid down by this Court in the various pronouncements as noted herein above including in the case of D.S.Reddy vs. Chancellor, Osmania University and Ors. [1967 (2) SCR 214].*

***40.** In view of our discussion made hereinabove and for the reasons aforesaid, we are of the view that this writ petition is covered by the decisions of this Court in the case of D.S.Reddy and L.P.Agarwal and the impugned proviso to Section 11A of the AIIMS Act is, therefore, hit by Article 14 of the Constitution. Accordingly, we hold that the proviso is ultra vires and unconstitutional and accordingly it is struck down. The writ petition under Article 32 of the Constitution is allowed. In view of our order passed in the writ petition, the writ petitioner shall serve the nation for some more period, i.e., upto 2nd of July, 2008. We direct the AIIMS Authorities to restore the writ petitioner in his office as Director of AIIMS till his period comes to an end on*

2nd of July, 2008. The writ petitioner is also entitled to his pay and other emoluments as he was getting before premature termination of his office from the date of his order of termination. Considering the facts and circumstances of the present case, there will be no order as to costs."

32. The said judgment thus also does not help the coordinator/co-coordinators working prior to 2nd February, 2011.

33. The next judgment relied by learned Single Judge in ***Sunil Dutt's*** case (supra) was in the case of ***Union of India and another vs. Shardindu*** reported in (2007)6 SCC 276. In the said case the appointment of Shardindu was on the post of Chairperson of National Council of Teachers Education for a period of four years or till he attains the age of 60 years and the appointment was governed by National Council of Teachers Education Act, 1993. The Chairperson was sought to be removed from his office on the ground that in the State of U.P. while he was working on earlier post there was allegation and inquiry conducted against the officer. On the said ground the officer was sought to be removed from the office of Chairperson. The Apex Court in the said case held that term of office of Chairperson or member was governed by Section 4 of the 1993 Act and a member can be removed from his office. Section 5 dealt with disqualification and since none of the disqualifications as mentioned in Section 5 was incurred by Shardindu, he could not have been removed from the office. Following was laid down in paragraph 15 which is as under:-

*"**15.** Section 5 deals with disqualification for office of Members. Section 6 lays down the vacation of office of Member. We are not concerned with rest of the provisions of the Act as it deals with various functions and other connected matters of education. In purported exercise of the powers under Section 31 of the Act the Central Government framed the Rules known as National Council for Teacher Education Rules, 1997 (hereinafter to be referred to as ' the Rules'). Rule 5 of the Rules lays down the conditions of service of the Chairperson, the Vice-Chairperson and the Member-Secretary, like their pay, dearness allowance, house rent allowance and city compensatory allowance and other terminal benefits. Rule 6 deals with traveling and daily allowances to Members. Rule 7 deals with the powers and duties of the Chairperson. Therefore, from the scheme of the Act and the Rules it is apparent that the appointment of the Chairperson of the NCTE is a tenure post for a period of four years or any person attaining the age of sixty years whichever is earlier. Section 5 deals with disqualification and none of the disqualifications mentioned in that section has been incurred by the respondent. Neither he has been convicted nor sentenced to imprisonment for an office which in the opinion of the Central Government, involves moral turpitude, nor has he been un- discharged insolvent, nor was of unsound mind and has been removed or dismissed from the service of the Government or a body corporate owned or controlled by the Government, and has in the opinion of the Central Government such financial or other interest in the Council as is likely to affect prejudicially the discharge by him of his functions as a Member nor has committed any financial irregularity while working as Chairperson. Therefore, the respondent has not incurred any of the disqualifications as mentioned above. Section 6 deals with vacation of office of Member. Section 6 lays down that the Central Government can remove if any*

person has incurred any of the disqualifications as mentioned in Section 5. Proviso to Section 6 (a) further clarifies that the incumbent shall be removed on the ground that he has become subject to the disqualification mentioned in clause (e) of that section, unless he has been given a reasonable opportunity of being heard in the matter or refuses to act or becomes incapable of acting or without obtaining leave of absence from the Council, absent from three consecutive meetings of the Council or in the opinion of the Central Government has abused his position as to render his continuance in office detrimental to the public interest. Therefore, under these contingencies if a member is to be removed, then notice is required to be given to the incumbent. On the basis of the analysis of Sections 5 & 6 it is more than clear that the respondent has not incurred any of these disqualifications."

34. The said judgment was also on its own facts relating to tenure of statutory appointment and does not help the coordinator/co-coordinators working prior to 2nd of February, 2011.

35. Learned Single Judge in ***Sunil Dutt's*** case (supra) has also referred to and relied on judgments of the Apex Court in the cases of ***State of Bihar and others vs. Mithilesh Kumar*** reported in (2010)4 UPLBEC 2669, ***N.T. Devinkatti and others vs. Karnataka Publisher Vice Commission and others*** reported in (1990)3 SCC 157, ***P. Ganeshwar Rao vs. State of Andhra Pradesh*** reported in (1988) Supp. SCC 740 and ***A.A. Calton vs. Director of Education & others*** reported in (1983)3 SCC 33 for the proposition that change in the norms of recruitment applies prospectively and cannot effect those who have been selected. There cannot be any dispute to the proposition that change in the norms of recruitment applies prospectively and statutory rules and Government order is prospective in nature unless it is expressly or by necessary implication made to have retrospective effect. Learned Single Judge himself has observed this in following words:-

"The same view was taken in P. Ganeshwar Rao v. State of Andhra Pradesh [1988] Supp. SCC 740 and A.A. Calton v. Director of Education & Ors., [1983] 3 SCC 33 wherein it has been held by the Hon'ble Apex Court that it is a well accepted principle of construction that a statutory rule or Government Order is prospective in nature unless it is expressly or by necessary implication made to have retrospective effect. Where proceedings are initiated for selection by issuing advertisement, the selection should normally be regulated by the then existing rules and Government Orders and any amendment of the rules or the Government Order pending the selection should not affect the validity of the selection made by the selecting authority or the Public Service Commission unless the amended rules or the amended Government orders issued in exercise of its statutory power either by express provision or by necessary intendment indicate that amended Rules shall be applicable to the pending selections. See P. Mahendra & Ors. v. State of Karnataka & Ors."

36. Present is not a case where any recruitment rules are applied retrospectively on the coordinator/co-coordinators who were working prior to 2nd February, 2011. The Government order dated 2nd February, 2011 specifically applied the Government order on incumbents who were already working which is apparent from plain

language of Government order. The Government order dated 2nd February, 2011 reconstituted the Block Resource Centres and Nyaya Panchayat Resource Centres and contemplated repatriation of teachers who are already working since due to appointment of large number of coordinator/co-coordinators there was shortage of teachers in the institutions run by Basic Shiksha Parishad. The Government order contemplated their repatriation. Thus the Government order also covered the incumbents who were already working as coordinator/co-coordinators since by reconstitution of Block Resource Centres and Nyaya Panchayat Resource Centres they were to be affected which was specifically noticed. Thus the Government order clearly applied on the incumbents who were already working and further the Division Bench in ***Har Pal Singh's*** case (supra) specifically negativated the argument that the Government order dated 2nd February, 2011 is prospective and shall not effect the incumbents who were already working. Thus the judgments of the Apex Court relied by the learned Single Judge in ***Sunil Dutt's*** case (supra) in holding that the Government order dated 2nd February, 2011 shall have prospective operation is also not a correct view of law.

37. The Questions (a) and (b), which have been referred for consideration, are little wide question which need to be reframed to the extent it arise in facts of the present case.

38. Questions (a) and (b) both are reframed as only one question in following manner:-

(a) Whether the coordinator/co-coordinators who were working in Block Resource Centres and Nyaya Panchayat Resources Centres on the date of issuance of Government order dated 2nd February, 2011 could not have been repatriated to their parent institutions since they were entitled to receive additional monetary benefits while working on the post of coordinator/co-coordinators?

39. Our answer to the above reframed question is that the Government order dated 2nd February, 2011, which has reconstituted the Block Resource Centres and Nyaya Panchayat Resource Centres has rightly provided for sending back the coordinator/co-coordinators to their parent institutions and their entitlement to receive higher pay scale was no impediment in sending back the said teachers, moreso when actually no Headmaster/Teacher/Assistant Teacher of primary schools was getting higher pay scale while working as coordinators of Block Resource Centres or Nyaya Panchayat Resource Centres.

40. Our answer to Question (c) is that learned Single Judge in ***Sunil Dutt's*** case (supra) was not justified in declaring the judgment of the learned Single Judge and Division Bench in ***Har Pal Singh's*** case as per-incuriam. The learned Single Judge, if was unable to agree with the view taken by the learned Single Judge and the Division Bench in ***Har Pal Singh's*** case (supra) was obliged to refer the matter to Hon'ble the Chief Justice for constituting a Larger Bench. The judgment of learned Single Judge in ***Sunil Dutt's*** case being in direct conflict with the judgments of learned Single Judge and Division Bench in ***Har Pal Singh's*** case (supra) does not lay down the correct law and is overruled.

41. Let the writ petitions be listed before the learned Single Judge with our answers as given above.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.01.2013

BEFORE
THE HON'BLE RAN VIJAI SINGH, J.

Civil Misc. Writ Petition No. 33099 of 2012

Man Mohan ...Petitioner
Versus
D.D.C. And Others ...Respondents

Counsel for the Petitioner:
Sri Shamimul Hasnain
Sri Dhirendra Kumar Srivastava

Counsel for the Respondents:
C.S.C.
Sri Krishan Ji Khare

U.P. Consolidation of Holding Act 1953 Section 19-allotment of Chak whether the provisions of 19 are mandatory in nature or directory?-held-the word used (as far as possible) itself denote no embargo in allotment of urban chak-as such is directory.

Held: Para-19

In view of the various decisions of the apex Court, it is clear that while holding a particular statute as mandatory or directory, it would be necessary to look into the intention of the Legislature and the language used in the Statute. Here the section itself mentions that as far as possible compact area be allotted at the original holding, meaning thereby, it do not put any embargo that in case the allotment is not made at the original holding, it will render the allotment illegal. Therefore, I am of the considered opinion that the provisions contained under sub section (e) of section 19 of the Act is directory in nature not mandatory.

Case Law discussed:
2005 (99) RD 271; 2007 (102) RD 171; AIR 1952 SC 181; AIR 1961 SC 751; AIR 1965 SC 895; 1975 SC 2190; AIR 1980 SC 303; (1999) 1 SCC 354; AIR 2002 SC 2031; (2003) 3 SCC 433; AIR 2003 SC 511; AIR 2004 SC 2036 2007 (102) RD 171

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

1. Heard Sri Shamimul Hasnain, learned counsel for the petitioner, Sri Krishan Ji Khare, learned counsel for respondent nos. 3 and 4 and learned Standing Counsel.

2. The affidavits have been exchanged. With the consent of learned counsel for the parties, the writ petition is taken up for final disposal.

3. Through this writ petition, the petitioner has prayed for issuing a writ of certiorari quashing the judgment and order dated 26.4.2012 passed by the Deputy Director of Consolidation (in short, 'DDC') in revision no. 57/2011-12 (Kamlesh Prasad Vs. Man Mohan and Others), by which the revision filed by respondent nos. 3 and 4 has been allowed and the chak of the petitioner has been disturbed.

4. While assailing this order, Sri Hasnain contends that the DDC has erred in allowing the revision. In his submission, in view of sub section (e) of section 19 of the U.P. Consolidation of Holdings Act, 1953 (in short, 'the Act'), it was incumbent upon the DDC to allot the chak to the petitioner on his original holding, whereas in this case a udan chak has been given to the petitioner and the petitioner has been dislodged from his original holding. It is also contended that the provisions contained in section 19 of

the Act are mandatory in nature, therefore, non-compliance of that would render the proceeding of allotment void.

5. Sri Hasnain has placed reliance upon the judgment of this Court in the case of ***Mohd. Nabi and Another Vs. Deputy Director of Consolidation and Others*** 2005(99) RD 271, where the submission of the petitioner in that case was that the chak was carved out in violation of the provisions contained under section 19 of the Act. This Court has allowed the writ petition taking note of the fact that the order was cryptic in nature and no reason was assigned for change of chak. Reliance has also been placed upon decision of this Court in ***Fatehchand Chaturvedi Vs. Joint Director of Consolidation*** 2007(102)RD 171.

6. Refuting the submissions of learned counsel for the petitioner, Sri Khare submits that the provisions contained under section 19 of the Act are not mandatory in nature. He has further contended that although the udan chak has been given to the petitioner, but his area has not been reduced and he has been allotted chak in the same sector having facility of egress and ingress in the chak from two sides, as there are two chak roads at two sides of the petitioner's chak, therefore, no infirmity can be attached with the view taken by the learned DDC.

7. I have heard learned counsel for the parties and perused the records.

8. In the counter affidavit, Sri Khare has annexed a map showing the spot position, from the perusal of which, it transpires that the petitioner, who happens to be chak holder of plot no. 473, was given chak at the western side, in the middle of the chak of the respondents. A rejoinder affidavit has been filed, in which the factum of the spot position has not been disputed by the petitioner. What has been disputed is that the provisions contained under section 19(e) of the Act are mandatory in character and the petitioner has been dislodged from his original holding, therefore, the order passed by the DDC is contrary to the provisions contained in section 19(e) of the Act. The DDC, in his judgment, has recorded that the chak of the chak holders of plot nos. 473, 158 and 527 were falling in the midst of the chak of the respondent nos. 3 and 4, due to which the shape of his chak was disturbed and taking note of that he directed for carving out the chak of the petitioner at the north-western side, which is covered by chak road on two sides,i.e., north and west.

9. Learned counsel for the petitioner submitted that the provisions contained in section 19(e) of the Act are mandatory and non-observance of that would render the proceeding vitiated.

10. For appreciating the controversy, provision contained under section 19 of the Act would be necessary to be looked into, which reads as under:

*"**19 (e)** every tenure-holder is, as far as possible, allotted a compact area at the place where he holds the largest part of his holding;*

Provided that no tenure-holder may be allotted more chaks than three, except with the approval in writing of the Deputy Director of Consolidation:

Provided further that no consolidation made shall be invalid for the reason merely that the number of chaks allotted to a tenure-holder exceeds three."

11. From the bare reading of the aforesaid section, it would transpire that every tenure-holder, as far as possible, be allotted a compact area at the place where he holds the largest part of his holding, provided that no tenure-holder may be allotted more chaks than three, except with the approval in writing of the Deputy Director of Consolidation; provided further that no consolidation made shall be invalid for the reason merely that the number of chaks allotted to a tenure-holder exceeds three.

12. Here in the present case, the petitioner's case falls in the first part of sub-section (e) of section 19 of the Act and the proviso are not attracted. There the words used are "as far as possible, the compact area at the place where the tenure-holder has his land, shall be allotted chak." The language used in the section is unambiguous and clear. The allotment of chak at the largest holding is qualified by the word "as far as possible." The use of the word "as far as possible" dilutes the rigor of section, which requires the allotment of chak at the largest part of original holding. Otherwise also, the very purpose of the Act is to give the compact holding to the convenience of the tenure-holder.

13. For holding a provision mandatory or directory, the use of words in the statute coupled with the intention of Legislature has to be seen. For deciding as to whether a particular provision is mandatory or directory, there can be no straight jacket formula. The Supreme Court in the case of ***Dattatraya Moreshwar Vs. The State of Bombay & Ors.,*** AIR 1952 SC 181 has observed that a law which creates public duty is directory but if it confers private rights, it is mandatory. Relevant passage from this judgment is quoted below:-

"It is well settled that generally speaking the provisions of the statute creating public duties are directory and those conferring private rights are imperative. When the provision of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and at the same time would not promote the main object of legislature, it has been the practice of the Courts to hold such provisions to be directory only the neglect of them not affecting the validity of the acts done."

14. A Constitution Bench of the Hon'ble Supreme Court, in ***State of U.P. & Ors., Vs. Babu Ram Upadhya,*** AIR 1961 SC 751, while considering the issue as to whether a provision contained in a Statute is mandatory or directory, observed as under:-

"For ascertaining the real intention of the Legislature, the court may consider, inter alia, the nature and the design of the statute, and the consequences which would follow from construing it the one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the

circumstance, namely, that the statute provides for a contingency of the non-compliance with the provisions, the fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered."

15. In ***Raza Buland Sugar Co. Ltd., Rampur Vs. Municipal Board, Rampur, AIR 1965 SC 895; and State of Mysore Vs. V.K. Kangan,*** AIR 1975 SC 2190, whether a provision is mandatory or directory, would, in the ultimate analysis, depend upon the intent of the law-maker and that has to be gathered not only from the phraseology of the provision but also by considering its nature, its design and the consequence which would follow from construing it in one way or the other.

16. In ***Sharif-Ud-Din Vs. Abdul Gani Lone,*** AIR 1980 SC 303, the Supreme Court, while considering the provisions of Sub-section (3) of Section 89 of the J&K Representation of People Act, 1957, held that the difference between a mandatory and directory rule is that the former requires strict observance while in the case of latter, substantial compliance of the rule may be enough and where the statute provides that failure to make observance of a particular rule would lead to a specific consequence, the provision has to be construed as mandatory.

17. The Apex Court held as under:-

"In order to find out the true character of the legislation, the court has to ascertain the object which the provision of law in question is to sub-serve and its design and the context in which it is enacted. If the object of the law is required to be defeated by non-compliance with it, it has to be regarded as mandatory.....Whenever the statute provides that a particular act is to be done in a particular manner and also lays down that the failure to compliance with the said requirement leads to a specific consequence, it would be difficult to hold that the requirement is not mandatory and the specified consequence should not follow."

18. Similar view has been reiterated in ***Dinkar Anna Patil & Anr. Vs. State of Maharashtra & Ors.,*** (1999) 1 SCC 354; ***Shashikant Singh Vs. Tarkeshwar Singh***, AIR 2002 SC 2031; ***Balwant Singh & Ors., Vs. Anand Kumar Sharma & Ors.***, (2003) 3 SCC 433; ***Bhavnagar University Vs. Palitana Sugar Mill Pvt. Ltd. & Ors.,*** AIR 2003 SC 511; and ***Chandrika Prasad Yadav Vs. State of Bihar & Ors***., AIR 2004 SC 2036).

19. In view of the various decisions of the apex Court, it is clear that while holding a particular statute as mandatory or directory, it would be necessary to look into the intention of the Legislature and the language used in the Statute. Here the section itself mentions that as far as possible compact area be allotted at the original holding, meaning thereby, it do not put any embargo that in case the allotment is not made at the original holding, it will render the allotment illegal. Therefore, I am of the considered opinion that the provisions contained under sub section (e) of section 19 of the Act is directory in nature not mandatory.

20. It would further appear from the spot memo and finding recorded by the DDC, the petitioner's chak was falling in the midst of chak of respondent nos. 3 and 4, therefore, the petitioner has been shifted at a corner. It is not the case of the petitioner that either his area has been reduced or he has been allotted chak at a land of excess valuation or upon a bad quality of land, therefore, the decision in the ***Mohd. Nabi (***supra) case is at no help as in that case, the reason was not recorded while changing the chak and the order was cryptic. Here in the present case, valid reason has been recorded by the DDC in support of his order.

21. So far as the case of ***Fateh Chand Chaturvedi and another Vs. Joint Director of Consolidation, Allahabad and Others*** 2007(102) RD 171 is concerned, in this case the argument was that the petitioner was given chak over an area having excess valuation (land) in the plots which were situated near the river (nadihar) and in that context, the Court has inferred with the matter and quashed such allotment. This case is also distinguishable on the facts.

22. In view of the foregoing discussions, I do not find any illegality in the judgment and order dated 26.4.2012 passed by the Deputy Director of Consolidation.

23. The writ petition fails and it is hereby dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.01.2013

BEFORE
THE HON'BLE B. AMIT STHALEKAR, J.

Civil Misc. Writ Petition No. 47864 of 2000

Mohd. Rais ...Petitioner
Versus
State of U.P. & others ...Respondents

Counsel for the Petitioner:
Sri Ram Lal Singh
Sri Sheo Ram Singh
Sri Shashank Shekhar

Counsel for the Respondents:
C.S.C.
Sri V.K. Singh

Code of Civil Procedure, Order 9 Rule 13- application for setting-a-side ex-parte decree-when the suit decreed ex-parte-appeal dismissed on merit-held-Trail Court wrongly entertain-such application -held-order without jurisdiction-application seeking restoration of proceeding itself nor maintainable.

Held: Para-9 and 10

From a perusal of the impugned order and documents on record as well as the statutory provisions of the Explanation to Order 9, Rule 13 CPC, it is noticed that once the appeal preferred by the respondent nos.1 and 4 against the decree dated 11.8.1995 had been dismissed by the judgment and order dated 23.4.1998, the decree dated 11.8.1995 had become final between the parties and, thereafter, no application seeking recall or restoration of the said decree was maintainable before the trial court. Matter had already been thrashed out upto the stage of appeal.

In the circumstances, the entire proceedings seeking restoration of the

suit proceedings and for setting aside the decree dated 11.8.1995 were absolutely without jurisdiction and were not maintainable.

(Delivered by Hon'ble B. Amit Sthalekar, J.)

1. Rejoinder affidavit filed by learned counsel for the petitioner is taken on record.

2. By this writ petition the petitioner is challenging the order dated 16.9.2000 passed by the Sub Divisional Officer, Manjhanpur, District Kaushambi by which the Restoration Application filed by the respondent no.4, the Gaon Sabha, Babura Kaushambi was entertained and the stay order was passed and the operation of the decree dated 11.8.1995 was stayed. By the impugned order dated 3.10.2000 revision filed by the petitioner against the order dated 16.9.2000 has also been rejected.

3. The facts of the case, in brief, are that the petitioner is stated to be the owner in possession over the plot nos.207,393,22/5 and 305 situated in village Manjhanpur, Tehsil Manjhanpur, District Kaushambi on the basis of the lease executed by the then Zamindar. The proceedings for consolidation under Section 4 of the U.P. Consolidation of Holdings Act were initiated in the said village. The petitioner filed an objection under Section 9A (2) for the declaration of the Bhumidhari rights over the disputed plots before the Consolidation Officer, Manjhanpur. The Gaon Sabha appeared in the proceedings for contesting the objections. The objection of the petitioner was allowed and he was declared Bhumidhar of the disputed plots by the jugdment and order dated 5.4.1982. It is also stated that the order dated 5.4.1982 became final between the parties inasmuch as the same was never challenged by the Gaon Sabha or by the State Government. However, due to fault of the officials the order dated 5.4.1982 could not be incorporated in the revenue records and, therefore, when the village was notified under Section 52 of the U.P. Consolidation of Holdings Act. The plots in question continued to be shown in the ownership of the Gaon Sabha, respondent no.4. In the consolidation proceedings the plots in question were renumbered as plot nos. 318/348/159 and 403.

4. When the land continued to be shown in the name of the Gaon Sabha in spite of the order dated 5.4.1982, the petitioner filed suit for declaration under Section 229-B of the U.P. Zamindari Abolition and Land Reforms Act in which the State of U.P. and the Gaon Sabha were impleaded as defendants. It is stated that respondents also filed their written statement. Trial court after hearing the parties decreed the petitioner's suit and declared him to be the Bhumidhar of the plot in question by judgment and order dated 11.8.1995. Aggrieved by the said judgement an appeal was filed by the Collector, Kaushmbi as well as the Gaon Sabha before respondent no.2, the Additional Commissioner, Allahabad Division, Allahabad. This appeal was dismissed by the judgment and order dated 23.4.1998 and thus the decree dated 11.8.1995 stood confirmed. This judgment dated 23.4.1998 was never challenged by the State Government or by the Gaon Sabha and the decree dated 11.8.1995 thus became final between the parties.

5. However, subsequently it is alleged that respondents were trying to oust the petitioner from the plots in question. Therefore, the petitioner filed a Writ Petition no.32750 of 2000, Mohd. Rais vs. State of U.P. and others in which counter

affidavit was called and the writ petition is stated to be still pending. However, the Gaon Sabha moved an application on 14.9.2000 under Order 9 Rule 13 C.P.C. for setting aside the decree dated 11.8.1995 along with a stay application. This application was allowed by the respondent no.3, Sub Divisional Officer, Manjhanpur, District Kaushambi by the impugned order dated 16.9.2000 without issuing notice to the petitioner and an injunction was also granted. When the petitioner came to know about the said order he preferred a revision before the Additional Commissioner, Allahabad Division, Allahabad, which was dismissed by the impugned order dated 3.10.2000. Hence the present writ petition.

6. I have heard Sri Sheo Ram Singh, learned counsel for the petitioner and Sri Mata Prasad, learned Additional Chief Standing Counsel appearing for the respondents.

7. The submission of learned counsel for the petitioner is that once the decree dated 11.8.1995 had become final between the parties inasmuch as the appeal preferred by the respondent no.4 had been dismissed by the Additional Commissioner, Allahabad Division, Allahabad dated 23.4.1998, which was never challenged by the respondent nos.1 and 4, thereafter no application for recall of the decree dated 11.8.1995 was maintainable. Learned standing counsel submitted that decree dated 11.8.1995 was ex parte, therefore, recall application was maintainable.

8. Order 9, Rule 13 CPC and the explanation thereto reads as follows:-

*"**R.13. Setting aside decree ex parte against defendant**.- In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:*

Provided.....

Provided further.....

[Explanation.- Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex parte decree.]

9. From a perusal of the impugned order and documents on record as well as the statutory provisions of the Explanation to Order 9, Rule 13 CPC, it is noticed that once the appeal preferred by the respondent nos.1 and 4 against the decree dated 11.8.1995 had been dismissed by the judgment and order dated 23.4.1998, the decree dated 11.8.1995 had become final between the parties and, thereafter, no application seeking recall or restoration of the said decree was maintainable before the trial court. Matter had already been thrashed out upto the stage of appeal.

10. In the circumstances, the entire proceedings seeking restoration of the suit proceedings and for setting aside the decree dated 11.8.1995 were absolutely without jurisdiction and were not maintainable.

11. In the circumstances, the writ petition deserves to be allowed and is accordingly allowed. The impugned orders dated 16.9.2000 and 3.10.2000 are quashed. The restoration proceedings before the respondent no.3 on the application dated 14.9.2000 are quashed

12. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.12.2012

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.
THE HON'BLE RAN VIJAI SINGH, J.

Civil Misc. Writ Petition No. 52664 of 2004

Atar Singh ...Petitioner
Versus
State of U.P. And others ...Respondents

Counsel for the Petitioner:
Sri Vivek Dubey
Sri A.K. Upadhyay
Sri Kamal Kishore Mishra
Sri Jitendra Kr. Sharma
Sri K.K. Mishra
Sri Vivek Chaubey
Sri Om Vikas Chaudhary
Sri Vinay Dubey

Counsel for the Respondents:
C.S.C.
Sri A.K. Rai
Sri Ashok Kumar Srivastava
Sri Rahul Sahai
Sri S. Chaturvedi

U.P. Zamindari Abolition and Land Reforms Rule 1952 Rule 279, 284 readwith 282 of Civil Procedure Code, Section 54-auction sale of land without Munadi without publication-without valuation of property without taking resource to procedure-entire proceeding of auction limited to non observance of mandatory provision contained in the rule-auction quashed.

Held: Para-30 and 33

Here in this case, as we have noticed that the required munadi and required valuation of the property before holding auction proceedings have not been done, as required under the Act and Rules and these things go to the root of the matter, therefore, non-observance of that would vitiate the entire sale proceedings as the provisions contained under the Act and Rules relating to the auction of land for arrears of land revenue are mandatory in nature and non-observance of the same would render the proceeding void.

Here in the present case, no munadi / publication was made, no valuation was fixed as required under Rule 283 of the Rules and without taking recourse as contained in condition nos. (a), (b) and (c) of section 279 of the Act the land has been auctioned on the consideration of Rs. 1,08,000/-, which would go to establish that a valuable land was auctioned by the respondents without taking recourse to procedure as contained under the Act and the Rules, therefore, the entire proceeding of auction is vitiated and the same deserves to be quashed.

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

1. Through this writ petition, the petitioner has prayed for issuing a writ of certiorari, quashing the auction proceedings dated 13.9.2004, auctioning the petitioner's valuable land measuring about 0.650 hectare for an amount of Rs. 1,08,000/- in favour of respondent no. 6.

2. Heard Sri Kamal Kishore Mishra, learned counsel for the petitioner, learned Standing Counsel and Sri Ashok Kumar

Srivastava along with Sri Rahul Sahai, learned counsel for the respondents.

3. The facts giving rise to this case are that, it appears, the petitioner was sanctioned loan for a sum of Rs. 50,000/- by respondent no. 5, the State Bank of India, in February, 2000 under Prime Minister Rojgar Yojna for running shop of general merchant. In paragraph no. 3 of the writ petition, it is stated that the petitioner was only paid Rs. 25,000/- and remaining Rs. 25,000/- was never given. Since the petitioner could not pay the loan in due time, it appears, the bank has issued a recovery certificate on 4.1.2003 for recovery of Rs. 69,729/- before respondent no. 2, the Collector, Mathura. In paragraph No. 6 of the writ petition, it is stated that without giving any information to the petitioner and without following the provisions of auction, i.e., without munadi and publication, the auction was held and a bid offered by respondent no. 6 for an amount of Rs. 1,08000/- was accepted. It is also stated that the valuation of the land is more than 5 lakhs and the Gram Pradhan has also written a letter for cancellation of the aforesaid auction proceeding on 31.9.2004.

4. After the aforesaid auction, the petitioner herein, it appears, has filed an application before the Collector, Mathura for depositing the amount of loan in easy instalments and the Collector thereon has directed the Naib Tehsildar to accept Rs. 25,000/- and for remaining amount, some time be granted. Pursuant thereto, the petitioner has deposited Rs. 25,000/- with the bank on 11.10.2004.

5. Thereafter, the petitioner has filed present writ petition on the ground that the entire proceeding is vitiated on account of non-observance of the procedure contained in U.P. Zamindari Abolition and Land Reforms Act, 1950 (hereinafter referred to as, 'the Act') and the Rules framed thereunder for recovery of the government dues as arrears of land revenue. In the said writ petition, on 10.12.2004, a Division Bench of this Court has passed an interim order for not confirming the auction sale. However, it appears, the said writ petition was dismissed for want of prosecution on 17.8.2005 and the then Tehsil authorities have confirmed the sale after dismissal of the writ petition in default on 5.10.2005.

6. However, subsequently, the writ petition was restored to its original number on 16.11.2005. On 4.4.2007, this Court has stayed the dispossession of the petitioner from the land in dispute and also passed an order that entire action taken by the respondents on account of the dismissal of the writ petition in default is illegal.

7. Two counter affidavits and one supplementary counter affidavit have been filed; one by the State and remaining two by respondent No. 6, in favour of whom auction was confirmed. In the counter affidavit filed by the State sworn by one Sri Darshan Singh, Tehsildar, Sadar District Mathura, it is stated in paragraph no. 3(1) that there is no record on the file of the auction proceedings with respect to the publication of notice in daily newspapers. In paragraph no. 2 of the same, it is stated that the Naib Tehsildar, on 15.10.2004, has submitted a report stating that the highest bid is of Rs. 1,08,000/-, whereas the valuation of the land is 3,20,000/-, therefore, auction be not confirmed.

8. In paragraph no. 4, it is stated that after dismissal of the writ petition on 17.8.2005, a proceeding for confirmation of

sale was initiated and after getting the reports, the sale was confirmed on 5.10.2005 because of absence of interim order and possession of the land was given to respondent no. 6, Smt. Rajesh Devi. It is also stated that after depositing Rs. 25,000/- on 4.10.2004, the petitioner has not deposited any amount.

9. In response to the averments made in the writ petition, that procedure relating to the auction of the immovable property, has not been followed, it is stated in paragraph no. 9 of the counter affidavit that there is no paper in the record with respect to Munadi and publication for auction. It is stated in paragraph no. 13 of the counter affidavit that on 2.11.2004, a notice was sent to the petitioner to deposit the remaining amount. In paragraph no. 14 of the counter affidavit, it is stated that citation was issued, but the petitioner has refused to accept the same and that was pasted on the door of the petitioner.

10. A rejoinder affidavit has been filed in response to the counter affidavit filed by the State-respondents, in which it is stated that the procedure contained in the Act and the Rules relating to auction of the immovable property has not been followed. It is also stated that after deposit of Rs. 25,000/-, the petitioner has tried to deposit the remaining amount, but that was not accepted. In paragraph no. 8 of the rejoinder affidavit, it is stated that the petitioner is still in possession over the land in dispute. It is reiterated in the rejoinder affidavit that without there being any advertisement in newspaper and without fixing the valuation of the land and without munadi, the auction was held against the mandatory provisions contained in the Act. It is also stated in paragraph no. 17 of the rejoinder affidavit that for satisfaction of loan of Rs. 69,729/-, the petitioner's valuable land, worth of Rs. 6 lakhs, has been auctioned for Rs. 1,08,000/-, but out of that excess amount, not even a single penny has been paid to the petitioner.

11. Although, the respondent no. 6 has not filed any counter affidavit in the writ petition, but he has filed a counter affidavit in the restoration application, wherein it is stated that the petitioner has transferred the land in dispute through registered sale deed dated 21.4.2009 in favour of one Sri Padam Singh. A copy of the sale deed has also been brought on record of the counter affidavit filed in restoration application, from the perusal of which, it transpires that the land in dispute was sold through registered sale deed on the consideration of Rs. 5 lakhs in favour of Sri Padam Singh, on which stamp duty of Rs. 28,150/- has been paid.

12. Through supplementary affidavit, the respondent no. 6 has brought on record the sale deed of the said property executed in favour of respondent no. 6 on 26.11.2005, for which sale certificate was issued on 14.11.2005. It is also stated that the possession of the land was given to respondent no. 6 on 5.12.2005.

13. On the record of counter affidavit, an order passed by Sub Divisional Magistrate, Mathura dated 8.4.2011 passed in case no. 5 of 2011, in between State Vs. Rajesh Devi and Others, has been brought on record, from which it transpires that the crop of Laha was given in supardgi of third person, with the direction that after getting it harvested and selling the same on market price, deposit the sale proceed in the Court.

14. A rejoinder affidavit, in response to the counter affidavit filed by respondent no. 6, has been filed, in which also it is

reiterated that without following the procedure contained in the Act and Rules, the auction proceeding has been concluded.

15. It is contended by Sri Kamal Kishore Mishra, learned counsel for the petitioner that the petitioner belongs to Harizan community and is a very poor person and after mortgaging the entire land which he possessed, i.e., 0.650 hectare, applied for loan of Rs. 50,000/- for opening a Pertune shop with a view to augment his income and out of which, only 25,000/- has been paid and the bank has sent an illegal recovery certificate to the Collector for recovering Rs. 69,729/-. Pursuant thereto, the petitioner's land was auctioned for an amount of Rs. 1,08,000/-, whereas the valuation of the land was more than Rs. 5 lakhs. In his submissions, the relative of respondent no. 6 was collection amin in the Tehsil and he has manipulated the entire auction proceedings. He has further contended that there is a complete mechanism for auction of immovable property, i.e., land given in the Act and the provisions contained therein are mandatory in character, therefore, without taking recourse of the same, if any auction was held, that cannot be sustained in the eye of law. In his submissions, the respondents have not been able to deny the petitioner's specific stand with regard to the holding of auction without there being any munadi and publication, therefore, the same deserves to be quashed.

16. Refuting the submissions of learned counsel for the petitioner, learned Standing Counsel as well as Sri Ashok Kumar Srivastava along with Sri Rahul Sahaiand respondent no. 6 have submitted that the auction proceeding was conducted in accordance with law and in the event of failure of petitioner in depositing the amount contained in the citation, the auction was confirmed on 5.10.2005. In their submissions, ample opportunity was given to the petitioner to satisfy the loan even after the auction, which took place on 13.9.2004 and thereafter, on 11.10.2004. Petitioner has only deposited Rs. 25, 000/- and thereafter, he did not deposit any amount and on failure, there was no escape, except to auction the mortgaged land.

17. We have heard learned counsel for the parties and perused the record.

18. For resolving the controversy in hand, it would be in benefit to peruse the provisions in the Act, the Rules framed there under in the year 1952 known as U.P. Zamindari Abolition and Land Reforms Rules, 1952 (hereinafter referred to as, 'the Rules') and the relevant provisions of the Code of Civil Procedure, 1908, which read as under:

Relevant provisions of the Act.

*"279. **Procedure for recovery of an arrear of land revenue,-**(1) An arrear of land revenue may be recovered by any one or more of the following processes - (a) by serving a writ of demand or a citation to appear on any defaulter, (b) by arrest and detention of his person, (c) **by attachment and sale of his movable property including produce.** (d) by attachment of the holding in respect of which the arrears is due, (e) (by lease or sale) of the holding in respect of which the arrear is due", (f) **by attachment and sale of other immovable property of the defaulter, (and) (**g) by appointing a receiver of any property, movable or immovable of the defaulter. (2) The costs of any of the processes mentioned in sub-section (I) shall be added to and be*

recoverable in the same manner as the arrears of land revenue."

19. Section 280 of the Act deals with writ of demand and citation to appear. According which, as soon as an arrear of land revenue has become due, a writ of demand may be issued by the tahsildar on the defaulter calling upon him to pay the amount within a time to be specified. Sub section (2) of section 280 of the Act provides that in addition to or in lieu of a writ of demand, the tahsildar may issue a citation against the defaulter to appear and deposit the arrears due on a date to be specified. Further, section 281 provides penal provision for the defaulter, according to which, on failure to deposit the land revenue, the person may be arrested and detained in custody upto a period not exceeding 15 days. This section also provides that no woman or minor shall be liable to arrest or detention. Section 282 of the Act deals with attachment and sale of movable property.

20. The corresponding rules in this regard, have been made under U.P. Zamindari Abolition and Land Reforms Rules, 1952 (hereinafter referred to as 'the Rules'). The relevant rules, relating thereto, are reproduced hereinunder:

Relevant provisions of the Rules.

*"**273.** Where any land is attached in pursuance of the provisions of clause (d) or (f) of Section 279 or sub-section (1) of Section 284 or of Section 280 or is let out under sub-section (2) of section 284, **a proclamation in Z.A. Form 78, shall be affixed at a conspicuous place in the village in which the land is situate, and it shall also be notified by beat of drum.***

***273-A.** The attachment of holding or other immovable property under clause (d) or (f) of section 279 or under section 284 or section 286, shall be **effected in the manner prescribed in Order XXI, Rule 54 of the Code of Civil Procedure,** 1908 and the order to the defaulter shall be issued in Z.A. Form 73-D.*

***274.** [* * *]*

***275.** [* * *]*

***276**. [* * *]*

***277.** [* * *]*

***278.** As soon as may be, after the holding is attached under sub-section (1) of section 284, the Collector shall proceed to let out the holding to any person other than the defaulter, whom he thinks fit, and who pays the whole of the arrears due on the holding before a lease is given to him in respect of that holding.*

***279.** The lease given by the Collector under section 284 shall be in Z.A. Form 73-C.*

***280.** [* * *]*

***280-A**. When a lease is made under section 284, the Collector shall issue orders for the necessary mutation of names to be made in the registers. No fee shall be levied in respect of any such mutation.*

281. Section 284**. - (1) **Recourse can only be had to the sale of the holding under section 284 when the process specified in clause (a), (b), (c) or (d) of section 279 would be insufficient for the recovery of the arrear.

(2) Process for sale of holding under section 284 and of other immovable property under section 286 shall be issued by the Collector.

***(2-A)** In the case of sale of a holding the Collector shall auction the holding in lots of 1.26 hectares 3.125 (acres) to 5.04 hectares (12.50 acres) after working out and announcing the land revenue and the **estimated value** of each lot.*

It should also be made clear that only those persons would bid in the auction, acquisition of land by whom would not contravene the provisions of section 154.

***(3)** [* * *]*

***282.** The proclamation of sale shall be in Z.A. Form 74.*

283.** In proclamation for sale under section 286, the Collector shall state **the amount of the annual demand and the estimated value of the property calculated in accordance with the rules in Chapter XV of the Revenue Manual.

***284.** (1) When the land is put up for sale a charge shall be levied on account of the costs of every sale, upon such amount not exceeding the total sum due for recovery as may be realised by the sale at the following rates:*

(i) Where such amount does not exceed 200 rupees at the rate of one rupee for every 100 rupees or portion of 100 rupees;

(ii)Where such amount exceeds 200 rupees but does not exceed 1,000 rupees, 2 rupees for the first 200 rupees and at the rate of 150 naye paise for every 100 rupees or portion of 100 rupees, in excess of 200 rupees;

(iii) Where such amount exceeds 1,000 rupees, six rupees for the first 1,000 rupees and at the rate of one rupee for every 500 rupees or portion of 500 rupees in excess of 1,000 rupees.

(2) When immovable property other than the land is put up for sale, a charge shall be levied upon such amount not exceeding the total sum due for recovery as may be realized by the sale at the rate of three naye paise per rupee of the sale proceeds, fractions of a rupee being excluded.

(3) When the sale officer goes to any place to conduct a sale and no sale takes place, a charge shall be levied to meet the cost of his deputation according to the following scale: Rs. P.

(i) When the amount for recovery does not exceed Rs. 100. 1 50

(ii) When such amount exceeds Rs. 100 but does not exceed Rs. 1, 000. 3 00

(iii) When such amount exceeds Rs. 1,000. 6 00

***285**. Whenever any house or other building situated within the limits of a military cantonment or station is sold, the Collector shall as soon as the sale has been confirmed, forward to the Commanding Officer of such cantonment or station for his information, or for record in the brigade or other proper office, a written notice that such sale has taken place, and such notice shall contain full particulars of the property sold and of the name and address of the purchaser."*

Relevant provisions of the Code of Civil Procedure,1908

"54. Attachment of immovable property. *(1) Where the property is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taken any benefit from such transfer or charge.*

(1-A) The order shall also require the judgment-debtor to attend Court on a specified date to take notice of the date to be fixed for settling the terms of the proclamation of sale.

(2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the Court-house, and also, when the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situate and, where the property is land situate in a village, also in the office of Gram Panchayat, if any, having jurisdiction over that village."

21. From going through the record of the writ petition, counter affidavits and rejoinder affidavits, following undisputed facts would appear:

(1) There was no publication in any newspaper with respect to the auction in question.

(2) No valuation was fixed of the land auctioned prior to holding of auction.

(3) Ignoring the report of Naib Tehsildar dated 15.10.2004 for cancelling the sale, the sale has been confirmed.

22. When the writ petition was filed on 10.12.2004, an order was passed restraining the respondents from confirming the sale in question. The writ petition was dismissed in default on 17.8.2005 and restored on 16.11.2005. The sale was confirmed on 5.10.2005.

23. For appreciating the controversy, it would be necessary to peruse the contents of paragraph 6 of the writ petition and its reply given in paragraph 9 of the counter affidavit filed by the State - respondents, where the averments have been made for non-publication of notice and munadi before proceeding with the auction, which are reproduced hereinunder:

Paragraph No. 6 of the Writ Petition:

"That the land mortgaged has been auctioned in favour of the Respondent no. 6 without giving any information to the petitioner and without following the provisions of the auction of the land. It is also stated that no munadi was made in the village and there was no publication for the auction and the auction was held in favour of the Respondent no. 6 in collusion with Bhawar Singh, who is the husband of the Respondent no. 6 in as much as the auction has been held at low price where as the valuation of the land is more than 5 lakh. The Gram Pradhan of the village has requested for cancellation of the auction by letter dated 21.9.2004. A true copy of the letter dated 21.9.2004 is being filed herewith and marked as Annexure no. 3 to this writ petition."

24. The reply of paragraph no. 6 of the writ petition has been given in paragraph 9 of the counter affidavit filed by the State, in which following averments have been made:

"9- यह कि याचिका के प्रस्तर 6 में वर्णित कथन जिस प्रकार उल्लिखित किया गया वह गलत है और स्वीकार नही है। इस मद में तत्कालीन अधिकारियों द्वारा विधिवत नीलामी दिनांक 13.09.2004 किया जाना स्वीकार है फर्द नीलामी की छाया प्रति इस प्रतिशपथपत्र के साथ संलग्नक सी0ए0 –3 के रूप में संलग्न की जा रही यह गलत लिखा है कि नीलामी में कथित तौर पर जमीन की नीलामी संबंधी प्राविधानों का अनुसरण नही किया गया हो। मुनादी व प्रकाशन विभागीय पत्रावली में उपलब्ध नही है लेकिन याची को सूचित किया सूचना पत्र दिनांक 12.3.2004 की छाया प्रति संलग्नक सी0ए0 –4 के रूप में संलग्न की जा रही है। जहॉ तक तत्कालीन ग्राम प्रधान द्वारा पत्र दिनांक 21.09.2004 प्रस्तुत किये जाने का प्रश्न है, ऐसा कोई पत्र विभागीय पत्रावली में प्राप्त होना नही पाया जाता। ठ

25. From the perusal of the reply given by the State - respondents, it would appear that the respondents have not come with the clear case that the munadi and publication was made prior to holding the auction. However, what they state is that the record of the munadi and publication is not available on record. There is no denial with respect to the valuation of the land in dispute, which according to the averments made in paragraph no. 6, was five lakhs.

26. Rule 273 A of the Rules provides that the attachment of holding or other immovable poperty under clause (d) or (f) of section 279 or under section 284 or section 286, shall be effected in the manner prescribed in Order XXI, Rule 54 of the Code of Civil Procedure, 1908 and the order to the defaulter shall be issued in Z.A. Form 73-D. Sub rule (1A) of Rule 54, Order XXI of Civil Procedure Code, 1908 provides that the order shall also require the judgment-debtor to attend Court on a specified date to take notice of the date to be fixed for settling the terms of the proclamation of sale. The sub-rule (2) of the aforesaid Rule provides that the order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the Court-house, and also, when the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situate and, where the property is land situate in a village, also in the office of Gram Panchayat, if any, having jurisdiction over that village. Rule 273 of the Rules also provides almost the same thing.

27. In view of sub-rule (1A) of Rule 54, Order XXI of Civil Procedure Code, 1908, it is incumbent upon the authority holding auction and taking recourse of sale of the land to fix a date for settling the terms of proclamation for sale. Under section 283 of the Act, the Collector shall state the amount of the annual demand and the estimated value of the property calculated in accordance with the rules in Chapter XV of the Revenue Manual. The State - respondent has filed counter affidavit. In the counter affidavit, it has no where been stated that the estimated value of land was calculated in accordance with the Rules and was made known to all before holding the auction. The factum of non-publication of notice and munadi has also not been denied. It may also be noticed that the petitioner himself has sold the land through registered sale deed on the consideration of Rs. 5 lakhs, which, it appears, has latter on been cancelled. The requirement under the Rules for munadi before holding an auction and fixation of the value of the land is the condition precedent and if any auction is

held, contravening the statutory provisions of the Rules, that cannot be sustained in the eye of law.

28. The matter may be examined from another angle also. In view of Rule 281 of the Rules read with section 284 of the Act, it would transpire that recourse can only be had to the sale of holding under section 284 of the Act, when the process specified in Clauses (a), (b), (c) and (d) of section 279 of the Act would be insufficient for the recovery of the arrears.

29. Here, from the perusal of the pleadings of the parties, available on record, it transpires that so far as the condition no. (a) of section 279 of the Act is concerned, the service of writ of demand or a citation has been denied. So far as the condition no. (b) is concerned,i.e., the arrest and detention, that is also absent here in this case. So far as the condition no. (c) is concerned, there is no such averment in the counter affidavit that recourse to condition no. (c) has been taken, whereas Rule 281 of the Rules provides that recourse of sale under section 284 can only be taken if the process of Clause (a), (b) and (c) of section 279 would be insufficient. The imposing of these conditions are purposive as the effect of taking recourse of auction of immovable property, i.e., the agricultural land, would mean the deprivation of a person from the land in question for every time, which will not only affect the person concerned, but it will deprive the persons of coming generations. The agricultural land of an agriculturist is the source of their livelihood, therefore, that cannot be taken casually without strict adherence to the provisions contained under the Act and Rules for taking recourse of the sale of the immovable property, i.e., the agricultural land.

Besides that, where a Statute requires to do certain thing in a particular method, then that thing must be done in that very method and other methods or mode of performance are impliedly and necessarily forbidden. The aforesaid legal proposition is based on a legal maxim " Expressio unius est exclusio alterius", meaning thereby that 'if a Statute provides for a thing to be done in a particular manner, then it has to be done in that very manner and other manner and procedure is ordinarily not permissible'. ***(Vide Taylor Vs. Taylor, (1876) 1 Ch.D. 426; Nazir Ahmed Vs. King Emperor***, AIR 1936 PC 253; ***Deep Chand Vs. State of Rajasthan,*** AIR 1961 SC 1527; ***Haresh Dayaram Thakur Vs. State of Maharashtra & Ors.,*** (2000) 6 SCC 179; ***Dhanajaya Reddy Vs. State of Karnataka*** etc. etc., (2001) 4 SCC 9; ***Commissioner of Income Tax, Mumbai Vs. Anjum M.H. Ghaswala & Ors.,*** (2002) 1 SCC 633).

It is also well settled that if any thing has not been done in the manner provided for under the Statute and the Statute has provided a consequence for non-performance of such act as provided for, then those provisions are mandatory and not directory. While determining whether a provision is mandatory or directory, in addition to the language used therein, the Court has to examine the context in which the provision is used and the purpose behind it to achieve. It may also be necessary to find out the intention of the legislature for enacting it and the serious and general inconveniences or injustice to persons relating thereto from its application.

30. Here in this case, as we have noticed that the required munadi and required valuation of the property before holding auction proceedings have not been done, as required under the Act and Rules

and these things go to the root of the matter, therefore, non-observance of that would vitiate the entire sale proceedings as the provisions contained under the Act and Rules relating to the auction of land for arrears of land revenue are mandatory in nature and non-observance of the same would render the proceeding void.

31. In the case of ***Union Bank of India Vs. Official Liquidator***, 2000 (5) SCC 274, the apex Court has observed as under:

"In auction-sale of the property of the company which is ordered to be wound up, the Company Court acts as a custodian for the interest of the company and its creditors. It is the duty of the Company Court to satisfy itself as to reasonableness of price by disclosing valuation report to secured creditors of the company and other interested persons. It was further held that the Court should exercise judicial discretion to ensure that sale of property should fetch adequate price. For deciding what would be reasonable price, valuation report of an expert is essential. The Company Judge himself must apply his mind to the valuation report. The Court observed that the High Court did not interfere with the auction-sale on the ground of sympathy for the workers which was not proper. The auction-sale was, therefore, set aside by this Court and the Official Liquidator was directed to resell the property after obtaining fresh valuation report and after furnishing copy of such report to secured creditors."

32. In ***Divya Manufacturing Company (P) Ltd. and Another Vs. Union of India and Others*** AIR 2000 SC 2346, the apex Court held that in appropriate cases, even the confirmed sale can be set aside. In ***Gajraj Jain Vs. State of Bihar and Others*** (2004) 7 SCC 151, the apex Court held that in absence of valuation report and reserve price, the auction sale becomes only a pretence and if there is no proper mechanism and if the intending purchasers are not able to know the details of the assets or itemised valuation, the auction-sale cannot be said to be in accordance with law. If publicity and maximum participation is to be attained, all bidders must know the details of the assets and the valuation thereof. In ***S.J.S. Business Enterprises (P) Ltd. Vs. State of Bihar*** 2004 (7) SCC 166, the apex Court held that it is the duty of the authority conducting the sale to ensure the maximum participation of the bidders in turn requires that a fair and practical period of time must be given to purchasers to effectively participate in the sale. Unless the subject matter of sale is of such a nature which requires immediate disposal, an opportunity must be given to possible purchaser who is required to purchase the property on 'as-is-where-is basis' to inspect it and to give a considered offer with the necessary financial support to deposit the earnest money and pay the offered amount, if required. It has also laid emphasis that the proper valuation has to be fixed and the bidder has to be noticed in adequate manner with a view to require their maximum participation.

33. Here in the present case, no munadi / publication was made, no valuation was fixed as required under Rule 283 of the Rules and without taking recourse as contained in condition nos. (a), (b) and (c) of section 279 of the Act the land has been auctioned on the consideration of Rs. 1,08,000/-, which would go to establish that a valuable land was auctioned by the respondents without taking recourse to procedure as contained under the Act and the Rules, therefore, the entire proceeding

of auction is vitiated and the same deserves to be quashed.

34. In the result, the writ petition succeeds and is allowed. The entire proceedings of recovery is hereby quashed.

35. The respondent no. 6 shall be entitled to the refund of the auctioned amount alongwith 9% interest, which is to be borne out by the petitioner and be paid within a period of one month from today. However, the petitioner shall also be entitled to get back the excess amount after satisfying the loan out of the auctioned money, if any.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.12.2012

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.
THE HON'BLE ABHINAVA UPADHYA, J.

Civil Misc. Writ Petition No. 58329 of 2012

Dilip Kumar Singh and another
...Petitioner
Versus
State of U.P. Thru Secy.and others
...Respondents

Counsel for the Petitioner:
Sri Deepak Kumar Jaiswal
Sri Sanjay Kumar Gupta

Counsel for the Respondents:
C.S.C.
Sri P.N. Tripathi
Sri Tarun Verma
Sri Vikram D. Chauhan

Securitization and Reconstruction of Financial Assets and Enforcement Security Interest Act, 2002-Section 14-Application before District Magistrate by secured crediting-whether maintainable even after execution of sale deed in favour of auction purchaser and pendency of application under Section 17 before the Tribunal-held-"Yes".

Held: Para-16 and 24

In view of the aforesaid discussions, the Issue No.1 is decided holding that secured creditor is legally entitled to take physical possession even after execution of sale deed in favour of auction purchaser and the application under Section 14 of the 2002 Act by the Bank before the District Magistrate was fully maintainable. The Issue No.1 and 2 are answered accordingly.

In view of the aforesaid discussions, we are of the view that by mere filing an application under Section 17 of the 2002 Act, there is no embargo on the Bank from proceeding under the 2002 Act.

Case Law discussed:
A.I.R. 2010 Madras 24; (1921) 41 MLJ 297; (1923) 45 MLJ 431; AIR 2006 P H 211

(Delivered by Hon'ble Ashok Bhushan, J.)

1. Heard Sri Deepak Kumar Jaiswal learned counsel for the petitioners, Sri Tarun Verma appearing for the Allahabad Bank and learned Standing Counsel for the State-respondents.

2. By this writ petition, the petitioners have prayed for quashing the order dated 3rd August, 2012 passed by the District Magistrate, Mirzapur under Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 directing for providing police help for taking possession of the mortgaged assets. A writ of mandamus has also been sought commanding the respondents No.2 to 5 not to dispossess the petitioners from their residential house situate at Plot No.78/1, Bhajan Ka Pura, Mirzapur.

3. Brief facts of the case as emerge from pleadings in the writ petition, are; petitioners took a housing loan of Rs.12,00,000/- from Allahabad Bank on 8th July, 2004. The security interest was credited on the Plot No.78/1. Default was committed by the petitioners in repayment of loan, consequently the Bank initiated proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the 2002 Act). A notice dated 24th February, 2009 under Section 13(2) of the 2002 Act was issued demanding repayment of the amount. The petitioners failed to make payment within the time allowed in the notice, hence the Bank invoked its power under Section 13(4) of the 2002 Act by issuing possession notice dated 9th July, 2009. The Bank further issued a notice for sale of the mortgaged assets dated 4th May, 2011 which was published on 6th May, 2011 in the newspaper inviting tenders for sale of the mortgaged assets and 8th June, 2011 was fixed for auction. The sale was confirmed and sale certificate dated 29th June, 2011 was issued. An application under Section 14 of the 2002 Act was filed by the Bank dated 29th July, 2011 before the District Magistrate on which an order was passed on 3rd August, 2011 for taking possession by police force. The petitioners filed a writ petition being Writ Petition No.36888 of 2011 in this Court challenging the action of the Bank taken under Section 13(4) of the 2002 Act which writ petition was dismissed on the ground of alternative remedy available under Section 17 of the 2002 Act. The petitioners thereafter on 8th July, 2011 filed an application under Section 17 of the 2002 Act which was registered as S.A. No.181 of 2011. The registered deed dated 14th July, 2011 was also executed by the Bank in favour of auction purchaser after issuance of sale certificate dated 29th June, 2011. The application filed by the petitioners under Section 17 of the 2002 Act was dismissed by the Debt Recovery Tribunal vide its order dated 31st October, 2012. The Debt Recovery Tribunal by another order of the dated (31.10.2012) granted 7 days time to the petitioners to approach the appellate Tribunal and a protection of 7 days from dispossession was granted. The petitioners thereafter instead of filing an appeal before the appellate Tribunal, has come up to this Court by filing this writ petition on 3rd November, 2012.

4. Sri Deepak Kumar Jaiswal, learned counsel for the petitioners submits that Bank is not legally entitled to take physical possession of the properties after executing the registered sale deed in favour of the auction purchaser. The Bank cannot maintain an application under Section 14 of the Act before the District Magistrate seeking police assistance to take possession of the secured assets after executing the registered sale deed in favour of auction purchaser. He further submits that after executing the registered sale deed by delivering the possession of the property the Bank complete the sale or transfer under Section 54 of the Transfer of Property Act as well as under Rule 9(9) of the Security Interest (Enforcement) Rules, 2002, the implied contract to give possession will operate from Section 55(1)(f) of the Transfer of Property Act and only may be enforced by a suit for specific performance because after executing the registered sale deed in favour of auction purchaser, the matter regarding possession belong to the civil Court and it will be decided under the suit for possession. It is further submitted that right of the Bank for further action is automatically suspended under the

provisions of Section 17(4) upon filing of an application under Section 17 of the 2002 Act and secured creditor cannot proceed further till the declaration of the recourse taken by secured creditor under Section 13(4) is in accordance with the provisions of the 2002 Act and the rules made thereunder. Sri Jaiswal further submits that Bank can only avail the opportunity of Section 17(6) to make an application before the appellate Tribunal for directing the Debt Recovery Tribunal for expeditious disposal of the application pending before the Debt Recovery Tribunal if the same is not disposed of within the period of four months as specified under Section 17(5) of the 2002 Act.

5. Sri Tarun Verma, learned counsel for the Bank, refuting the submissions of learned counsel for the petitioners, contends that Bank is fully entitled to make an application under Section 14 of the 2002 Act before the District Magistrate for taking actual physical possession even after issuance of sale certificate and there is no prohibition in the 2002 Act from moving the District Magistrate for physical possession. He further contends that mere fact that an application under Section 17 of the 2002 Act has been filed or pending does not prohibit the Bank from proceeding further in accordance with the 2002 Act. He further submits that application under Section 17 of the 2002 Act was filed by the petitioners much after sale of the mortgaged assets and issuance of sale certificate. It is submitted that the application under Section 17 of the 2002 Act filed by the petitioners having been dismissed, the remedy of the petitioners is to file an appeal under Section 18 of the 2002 Act and the writ petition be not entertained.

6. Learned counsel for the parties have placed reliance on decisions of this Court, Punjab and Haryana High Court and Madras High Court which shall be referred to while considering the submissions in detail.

7. From the submissions raised by learned counsel for the parties, following issues arise for determination:-

(i)Whether the secured creditor/Bank is legally entitled to take physical possession of the properties after executing the registered sale deed in favour of auction purchaser?

(ii)Whether the secured creditor/Bank can move an application under Section 14(1)(2) of the 2002 Act before the District Magistrate to seek the police assistance for taking possession of the secured assets after execution of the registered sale deed in favour of auction purchaser?

(iii)Whether the right of the secured creditor/Bank for taking further measures as provided under Section 13(4) are automatically suspended under the provisions of Section 17(4) upon filing of an application under Section 17(1) of the 2002 Act and secured creditor can proceed further only when the declaration is made that the recourse taken by the secured creditor under Section 13(4) is to be in accordance with the provisions of the 2002 Act and the rules made thereunder by the Debt Recovery Tribunal?

8. All the above issues being interconnected, are taken together.

9. Before we proceed to consider the issues, which have arisen for consideration, it is relevant to note that the application of

the petitioners filed under Section 17 of the 2002 Act having been rejected by order dated 31st October, 2012, the petitioners have statutory remedy under Section 18 of the 2002 Act, however, in view of the fact that learned counsel for the petitioners has raised certain issues pertaining to jurisdiction of the Bank and the issues relating to interpretation of scope and ambit of the provisions of Sections 14 and 17 of the 2002 Act, we proceed to consider the issues on merits also.

10. The submission, which has been much pressed by learned counsel for the petitioners, is that the Bank has no jurisdiction to file an application under Section 14 of the 2002 Act after sale of the mortgaged assets. Learned counsel for the petitioners referring to Section 14(1) of the 2002 Act submits that application for taking possession has to be made by the Bank before sale of the mortgaged assets. He submits that the scheme of the 2002 Act contemplates taking possession by the Bank before sale, since after sale the Bank is obliged to handover possession to the auction purchaser by virtue of sub-rule (9) of Rule 9 of the Security Interest (Enforcement) Rules, 2002. Section 14(1) of the 2002 Act, which is relevant for the purpose, is quoted below:-

*"**14.** Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset.- (1) Where the possession of any secured asset is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred by the secured creditor under the provisions of this Act, the secured creditor may, for the purpose of taking possession or control of any such secured asset, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or, as the case may be, the District Magistrate shall, on such request being made to him-*

(a) take possession of such asset and documents relating thereto; and

(b) forward such asset and documents to the secured creditor."

11. Section 14(1) contains two categories where an application before the District Magistrate is contemplated i.e. (i) where the possession of any secured asset is required to be taken by secured creditor or (ii) if any of secured asset is required to be sold or transferred by the secured creditor ..... The words "where the possession of any secured asset is required to be taken by the secured creditor", are wide enough to embrace in itself any contingency where possession of any secured asset is required to be taken. Although possession can be taken by the Bank of mortgaged assets when secured asset is required to be sold or transferred but the scheme of the 2002 Act does not indicate that it is necessary for the Bank to have actual physical possession before proceeding to exercise its power under Section 13(4) of the Act for sale of the mortgaged asset. Section 14 of the 2002 Act is a provision empowering the Bank to take assistance from Chief Metropolitan Magistrate or District Magistrate for taking possession of the secured asset. The power to take possession by the secured creditor flows from Section 13(4) of the 2002 Act where secured creditors is entitled to take recourse of any of the measures provided

under sub-section (4) of Section 13. In this context it is also relevant to refer to Rule 8 of the Security Interest (Enforcement) Rules, 2002 which enumerates various steps for sale of immovable secured assets and one of the steps to be taken by the secured creditor is to take possession. Rule 8(1), 8(2) and 8(3), which are relevant, are quoted below:-

*"**8.** Sale of immovable secured assets.- - (1) Where the secured asset is an immovable property, the authorised officer shall take or cause to be taken possession, by delivering a possession notice prepared as nearly as possible in Appendix IV to these rules, to the borrower and by affixing the possession notice on the outer door or at such conspicuous place of the property.*

(2) The possession notice as referred to in sub-rule (1) shall also be published in two leading newspaper, one in vernacular language having sufficient circulation in that locality, by the authorised officer.

(3) In the event of possession of immovable property is actually taken by the authorised officer, such property shall be kept in his own custody or in the custody of any person authorised or appointed by him, who shall take as much care of the property in his custody as a owner of ordinary prudence would, under the similar circumstances, take of such property."

12. The words "possession notice" as mentioned in Rule 8(1) and (2) is a notice for taking possession both actual possession or otherwise. Sub-rule (3) of Rule 8 of the Security Interest (Enforcement) Rules, 2002 uses the words "in the event of possession of immovable property is actually taken" which clearly indicates that taking of possession may be actual or may be constructive. Certain consequences follow after taking actual possession as indicated in sub-rules (3) and (4) of Rule 8. Thus before proceeding for sale of the mortgaged assets Bank can take actual possession as well as symbolic possession and the scheme of the 2002 Act and the 2002 Rules do not indicate that without taking actual possession, the Bank cannot proceed with the sale of the mortgaged assets.

13. The question as to whether the Bank can take possession by moving an application under Section 14 of the 2002 Act after issuance of sale certificate was raised before a Division Bench of Madras High Court in the case of ***M/s. Kathikkal Tea Plantations vs. State Bank of India and another*** reported in A.I.R. 2010 Madras 24. The issue was noticed by the Division Bench in paragraph 5 of the judgment. The Division Bench after considering several decisions repelled the contention that application under Section 14 of the 2002 Act is not maintainable after issuance of sale certificate. Following was laid down by the Division Bench of Madras High Court in paragraphs 8, 12, 16, 20 and 21 of the said judgment:-

*"**8.** Learned counsel appearing for the respondent bank in W.P.No.10228 of 2009 contended that section 13(4) empowers the bank to take possession of the secured assets and take over the management of the business of the borrower. It does not say anything about the actual physical possession. The object of the SARFAESI Act is only to realise long term assets, manage problems of liquidity, asset liability mis-match and improve recovery by exercising powers to take possession of securities, sell them and reduce non-*

performing assets by adopting measures for recovery or reconstruction. In other words, the object of the SARFAESI Act is a speedy recovery of the non-performing assets. Further, Section 13 does not say that the transfer has to be effected under section 13(6) only after taking physical possession. If the dues of the secured creditor are tendered at any time before the date fixed for sale or transfer, the secured assets shall not be sold or transferred by the secured creditor. Therefore, before the confirmation of sale, the property can be recouped by the borrower if he tenders the amount. On failure to pay the amount only, the sale is confirmed and sale certificate is issued in accordance with Rule 9(6) of SARFAESI Rules. Nowhere in section 13 of SARFAESI Act it has been stated that the right to transfer can be effected only after taking actual physical possession or that the exercise of taking over possession under section 13(4) shall be of actual physical possession. After taking symbolic possession or constructive possession under section 13(4), the borrower continues to be in the property only in de facto possession. Learned counsel has further contended that the language found in 14(1) has to be interpreted only in consonance with the objects of the SARFAESI Act. Therefore, it cannot be said that the word 'secured creditor' and 'secured debt' found in section 14(1) does not mean that the bank lost the power to take actual possession, after issuance of the sale certificate.

12.In view of the above submissions, now the question to be decided is whether the Respondent banks are legally entitled to take physical possession of the property after issuance of the sale certificate in favour of the auction purchasers by filing petition under section 14(1)(2) of SARFAESI Act before the concerned Magistrate. The statements and reasons for SARFAESI Act seem to be that the Act was enacted to reconstruction of financial assets and enforcement of security interest and for matters connected therein. The banks as 'secured creditor', as defined under section 2(zd) of the Act, are empowered under section 13(4) of the SARFAESI Act to take possession of the 'secured asset' as defined under section 2(zc) and also empowered to transfer the same under section 13(6) of the SARFAESI Act. It is relevant to extract Sections 13(4) and 13(6), which read as follows:

"13. Enforcement of security interest:

(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:-

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:

Provided that the right to transfer by way of lease,assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

Provided further that where the management of whole, of the business or

part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security of the debt;

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt".

Section 13(6) reads as follows:

"Any transfer of secured asset after taking possession thereof or take over of management under sub-section (4), by the secured creditor or by the manager on behalf of the secured creditors shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset."

16. *From the above, the submission made by the learned counsel for the respondents that section 14 of the Act cannot be read in isolation and has to be viewed in the context of all other provisions of the Act, such as Sections 13(4)(6)(8),15,17, 18 Rule 8(9) of SARFAESI Rules and section 55 of the Transfer of Property Act is acceptable. These provisions are in conjunction with Section 14 of the Act for the purpose of interpretation, to be adopted, to achieve and sub-serve the object of the SARFAESI Act. Any other approach or interpretation will defeat the object of the Act. The object of the Act is only to enable the secured creditor, financial institutions to realise the long term assets, manage problems of liquidity, asset liability mis-match and improve recovery by exercising powers to take possession of securities, sell them and reduce non-performing assets by adopting measures for recovery or reconstruction. Therefore, it could be understood that the Act was brought for recovering the amount in speedy manner in taking possession of the properties and in realising the money. The third party, who comes forward to purchase the secured asset, must have a confidence that he would get the title to the property at the earliest. If the transferring of the property by way of title is going to be delayed endlessly, then the object of the Act which is meant for speedy recovery, would be defeated in whole. Therefore, as contended by the learned counsel for the banks, that if interpretation is given by taking the words in isolation from section 14, it would defeat the whole object. Only on a combined reading of section 14 along with the other sections, it would give a clear picture of the object. In this regard, a useful reference could be placed on the decisions relied on by the learned counsel appearing for the impleaded party.*

(i) (1986) 2 SCC 237 (M/s.Girdhari Lal and Sons ..vs.. Balbir Nath Mathur and others

(ii) (1992) 1 SCC 361 (Administrator, Municipal Corporation ..vs.. Dattatraya Dahankar)

(iii) 2001(9) SCC 673: (Nirathilingam ..vs.. Annaya Nadar and Others;

20*. A reading of the dictum laid down in the above judgments would give a clear*

picture that the mechanical way of interpreting the provisions made in the statute will lead to defeat the object of the Act. Here, when the object is to speedy recovery of debt, by way of taking possession on transferring the property in favour of third party and issued a sale certificate, it cannot be contended that once the sale certificate is issued, physical possession cannot be taken by the secured creditors. Further, in this regard, a useful reference could be placed on the judgment reported in KOTTAKKAL CO-OP.URBAN BANK LTD ..vs.. BALAKRISHNAN (2008(2)KLT 456). In that case, after taking a symbolic possession under section 13(4) and selling the property in favour of the auction purchaser, the secured creditor approached the Chief Judicial Magistrate seeking the assistance for taking possession. The petition filed by the secured creditor under section 14(1) was dismissed by the Magistrate holding that that the provision contained in section 14 only enables the secured creditor to seek assistance of Court to take possession or control of property for effecting sale. Since the secured creditor had taken possession, effected sale and issued sale certificate, the provision cannot be invoked. Aggrieved over the same, the secured creditor preferred a writ petition before the High Court. The High Court while dealing with the case has held that there is no stipulation in section 13 or elsewhere that the right to transfer can be exercised only after taking over the actual physical possession or that the exercise of taking over possession under section 13(4) shall be of actual physical possession, resulting in complete dispossession of the secured debtor, de facto and de jure. The relevant passage in paragraph 5 is extracted hereunder: "5....to complete a transfer by a secured creditor in favour of a third party, the necessary pre-condition is that possession is taken in terms of S.13(4) of the Act. A close reading of S.13(4)(a) would show that what is authorised thereby is the taking of possession of the secured asset, including the right to transfer. While taking over of possession is authorised and such taking over of possession includes the taking over of the right to transfer, there is no stipulation in section 13 or elsewhere that the right to transfer can be exercised only after taking over the actual physical possession or that the exercise of taking over possession under section 13(4) shall be of actual physical possession, resulting in complete dispossession of the secured debtor, de facto and de jure....At any rate, a secured debtor, continuing to hold on de facto possession on the ground of not having been dispossessed, would only be one who would have been given the advantage to continue to hold on de facto possession for the time during which different steps would have followed, resulting in the confirmation of sale in favour of a third party auction purchaser. In the absence of any jurisdictional requirement for de facto possession to make a transfer in terms of S.13(6), there is no legal or jurisdictional error in the sale being held by the secured creditor on the strength of de jure possession. Such a sale or transfer would have the complete support of S.13(6).

***21**. Therefore, in our opinion, in the absence of any specific stipulation in Section 13, the properties could be sold only after taking physical possession and also the combined reading of sections 13 and 14 with the background of the object would show that it cannot be said that the secured creditor cannot take actual physical possession after issuing sale certificates merely for the reason that the*

language found in section 14 refers to the secured creditor and secured asset. Further more, as contended by the learned counsel for the petitioner in W.P.No.10228 of 2009, that under sectio1n 13(10) even after sale, the bank can approach the Debts recovery Tribunal by filing application having jurisdiction or a competent court, for recovery of the balance amount. Further, the contention of the learned counsel for the banks that the character of the secured creditor cannot be said to be ceased by executing the sale certificate also cannot be ignored."

14. Thus the submission of learned counsel for the petitioners that application filed by the Bank was not maintainable is without any substance.

15. Learned counsel for the petitioners has also placed reliance on two judgments of the Madras High Court in the cases of ***Elumalai Chetty and Jagannadha vs. P. Balakrishna Mudaliar*** reported in (1921)41 MLJ 297 and ***Sundara Ramanujam Naidu vs. Sivalingam Pillai and another*** reported in (1923)45 MLJ 431. In ***Elumalai Chetty's*** case (supra) the Madras High Court was considering Section 54 of the Transfer of Property Act and held that transfer of ownership of a immovable property falls under Section 54 and will require a registered instrument for the purpose. In ***Sundara Ramanujam Naidu's*** case (supra) the Madras High Court was considering a question as to what will be the value of the suit brought by plaintiff to enforce specific performance of a contract to sell a shop by directing the defendant to deliver a proper sale deed to him on his paying the price into Court. We are of the view that aforesaid two judgments of Madras High Court have no relevance on the issues which have arisen in the present case since the present is a case where power has been invoked by the Bank under the 2002 Act which is a special statute and rights and liabilities of the parties are to be governed by special enactment i.e. the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 which provision has a overriding effect by virtue of Section 35 of the 2002 Act, hence no help can be taken by the petitioners from the aforesaid two judgments of the Madras High Court.

16. In view of the aforesaid discussions, the Issue No.1 is decided holding that secured creditor is legally entitled to take physical possession even after execution of sale deed in favour of auction purchaser and the application under Section 14 of the 2002 Act by the Bank before the District Magistrate was fully maintainable. The Issue No.1 and 2 are answered accordingly.

17. The Issue No.3 is as to whether after filing of application under Section 17 of the 2002 Act the Bank's power to take measure under Section 13(4) is suspended. As noticed above, the Bank has proceeded with the auction proceeding and sale certificate was issued on 29th June, 2011 i.e. much before filing of the application by the petitioner under Section 17 of the 2002 Act which was filed on 8th July, 2011. Thus factually the issue does not arise. However, the issue having been raised, we are of the view that the said issue needs consideration in view of larger question raised by the petitioners that after Section 17 application has been filed all measures by the Bank have to be suspended.

18. Section 17 of the 2002 Act, which is relevant for the purpose, is quoted below:-

*"**17. Right to appeal** - (1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, may make an application alongwith such fee, as may be prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken:*

PROVIDED that different fees may be prescribed for making the application by the borrower and the person other than the borrower.

Explanation : For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under this sub-section.

(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management of the business to the borrower or restoration of possession of the secured assets to the borrower, it may by order, declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the secured creditors as invalid and restore the possession of the secured assets to the borrower or restore the management of the business to the borrower, as the case may be, and pass such order as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13.

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (4) of section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of section 13 to recover his secured debt.

(5) Any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application:

PROVIDED that the Debts Recovery Tribunal may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed

four months from the date of making of such application made under sub-section (1).

(6) If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as specified in sub-section (5), any part to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.

(7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the rules made thereunder."

19. Learned counsel for the petitioners referring to Section 17(4) of the 2002 Act contends that the said sub-section contemplates declaration by Tribunal that measures taken by the Bank are in accordance with the provisions of the 2002 Act which clearly means that the Bank has to stay his hands from proceeding any further till a declaration is granted by the Tribunal that measures taken by the Bank are in accordance with the 2002 Act. The scheme of the 2002 Act as delineated by Section 17 is that a right of appeal has been granted to a person including borrower against the action taken by the Bank under Section 13(4) before the Tribunal to enquire as to whether action taken is in accordance with the Act or is not in accordance with the Act. The consequences have also been provided in sub-section (3) of Section 17 when Tribunal holds that action taken is not in accordance with the 2002 Act. The Tribunal is clearly entitled to restore the possession of the property to the borrower if the action of the Bank is not in accordance with the Act. The proceeding under Section 17 of the 2002 Act has to be concluded by the Tribunal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (Act No.51 of 1993). Under the 1993 Act the Tribunal has power to grant interim relief. Thus under Section 17 of the 2002 Act also the Tribunal can grant interim relief on an application filed by the borrower. The scheme of Section 17 of the 2002 Act does not indicate that the said provisions contain any automatic stay of the proceeding by the Bank. Section 17 of the 2002 Act does not indicate that as and when an application under Section 17 is filed, the operation of proceedings is suspended and Bank cannot proceed any further.

20. The above question came for consideration before a Full Bench of Madras High Court in the case of ***Lakshmi Shanker Mills (P) Ltd. & others vs. Authorised Officer/Chief Manager, Indian Bank & others.*** The Full Bench noticed the aforesaid question which was referred to it. It is useful to quote paragraph 10, 13 and 17 of the said judgment:-

*"**10.** The first question is whether the right of the bank to take proceedings under Section 13(4) shall remain suspended on filing an application under Section 17. The second question concerns the jurisdiction of the Debt Recovery Tribunal to impose a*

condition of deposit for grant of stay of auction. Section 13(4) of the Securitisation Act is pivotal to the whole controversy. It provides that a secured creditor may enforce any security interest without intervention of the court or tribunal irrespective of Section 69 or Section 69-A of the Transfer of Property Act where according to sub-section (2) of Section 13 the borrower is a defaulter in repayment of the secured debt or any instalment of repayment and further the debt standing against him has been classified as a non-performing asset by the secured creditor. Sub-section (2) of Section 13 further provides that before taking any steps in the direction of realizing the dues, the secured creditor must serve a notice in writing to the borrower requiring him to discharge the liabilities within a period of 60 days failing which the secured creditor would be entitled to take any of the measures as provided in sub-section (4) of Section 13. Sub-section (4) of Section 13 provides for four measures which can be taken by the secured creditor in case of non-compliance with the notice served upon the borrower namely, (a) to take possession of the secured assets including the right to transfer the secured assets by way of lease, assignment or sale; (b) to take over the management of the secured assets including the right to transfer; (c) to appoint a manager to manage the secured assets which have been taken possession of by the secured creditor; and (d) to require any person who had acquired any secured assets from the borrower or from whom any money is due to the borrower to pay the same as it may be sufficient to pay the secured debt. Sub-section 3-A, which has been inserted by the amendment, provides that if on receipt of the notice under sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within one week of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower. The proviso to sub-section 3-A provides that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under Section 17 or the Court of District Judge under Section 17-A. In Mardia Chemical's case, the Supreme Court has clearly held that such right accrues only if measures are taken under sub-section (4) of Section 13 of the Securitisation Act (para.48 SCC page 348). Therefore, only if one or other measure is taken by the secured creditor, a cause of action arises for any person or borrower to prefer an application under Section 17 of the Securitisation Act.

***13**. Learned counsel for the borrowers however argued that the use of the expressions "if" and "then" would only mean that the bank can take one or more measures laid down under Section 13(4) only if the Tribunal declares that the action taken already is in accordance with the provisions of the Securitisation Act and the rules made thereunder. It was submitted that the use of the word "if" connotes a condition precedent and no further action can be taken unless the condition is fulfilled. We are unable to accept the submission of the learned counsel for the borrowers. The provisions of Sections 13 and 17 are amended after the Marida Chemicals case. The Statement of Objects*

and Reasons makes it manifestly clear that the amendment has been effected in view of the judgment of the Supreme Court and to discourage the borrowers to postpone the repayment of their dues and also to enable the secured creditor to speedily recover their dues, if required by enforcement of security or other measures specified in sub-section (4) of Section 13 of the Act. Legislature was clearly aware of the ruling in Marida Chemicals case which interpreted Section 17 as granting to the Tribunal a discretionary power of stay. Accepting the submission of the borrowers would mean that the Legislature intended to undo this by enacting Section 17 so as to suspend the power of the banks to take appropriate measures under Section 13. It is a recognized rule of interpretation of Statutes that expressions used therein should ordinarily be understood in a sense in which they harmonized with the object of the statute and which effectuate the object of the legislature (See New India Sugar Mills Ltd. Vs. Commissioner of Sales Tax, AIR 1963 SC 1207). The provisions of Section 17 must therefore receive such construction at the hands of the Court as would advance the object and at any event not thwart it. In other words, the principle of purposive interpretation should be applied while construing the said provision. The Securitisation Act is enacted to provide a speedy and summary remedy for recovery of thousands of crores which were due to the banks and financial institutions and accepting the interpretation suggested by the counsel for the borrowers would defeat the very object of the Act.

17. We accordingly hold that there will be no automatic stay on filing of an application under Section 17 of the Securitisation Act, and the Tribunal while granting stay of auction can impose a condition relating to deposit. Re. Question (iii)"

21. The Full Bench while summarising its opinion held following in paragraph 22 of the judgment:-

*"**22**. In the light of the foregoing discussion, we summarise our findings as follows: -*

(i) The right of the bank is not automatically suspended upon filing of an application under Section 17 of the Securitisation Act and the secured creditor can proceed to auction secured asset where no stay is granted by the Tribunal.

(ii) The Tribunal has power to impose the condition relating to deposit for grant of stay of auction.

(iii) The Tribunal has no power to pass any interim mandatory order relating to restoration of possession or restoration of management before the finalisation of the proceedings under Section 17 of the Securitisation Act, and (iv)All such grounds, which rendered the action of the bank/financial institution illegal, can be raised in the proceedings under Section 17 of the Securitisation Act before the Debt Recovery Tribunal. It is for the Debt Recovery Tribunal to decide in each case whether the action of the bank/financial institution was in accordance with the provisions of the said Act and legally sustainable."

22. Learned counsel for the petitioners has placed reliance on a judgment of the Punjab-Haryana High Court in the case of ***Arun Kumar Arora and another vs. Union of India and***

others reported in AIR 2006 P H 211. Before the Punjab-Haryana High Court the argument was raised by the petitioners that physical possession of the mortgaged property could be taken only after the adjudication is done under Section 17 of the Act and that Section 14 would come into play only when the matter has been adjudicated upon by the Debt Recovery Tribunal or when after the sale of the property, actual possession is required to be given to the purchaser. In the case before the Punjab-Haryana High Court notice under Section 13(2) was issued on 22nd May, 2003 after which only partial payment was made, hence the Bank inovked its power under Section 13(4) of the Act on 12th March, 2004 in pursuance of which notice for possession was affixed on the shop and physical possession of half portion of the shop was taken. On 24th May, 2004 an application under Section 17(1) of the 2002 Act was filed. The Debt Recovery Tribunal passed an order on 5th September, 2005 directing that the applicant should not be deprived of the possession specially when he has cleared all the dues in the account of M/s Pratap Trading Company. The said order was challenged and the appellate Tribunal directed the Debt Recovery Tribunal to decide the main application. The Debt Recovery Tribunal ordered the Bank to open the seal of the portion of the premises actual possession of which was taken. Against the order of the Debt Recovery Tribunal appeal was filed before the appellate Tribunal which was allowed on 22nd February, 2006. The order of the appellate Tribunal was under challenge before the Punjab-Haryana High Court. The Punjab-Haryana High Court after considering the submissions has laid down following in paragraph 18 of the judgment:-

*"**18.** This Court in the case of M/s Kalyani Sales Company and another (supra) had taken note of the judgment of the Hon'ble Supreme in Mardia Chemcials Ltd 's case (supra) and thereafter had come to the conclusion that the secured creditor is entitled to take the symbolic possession of the property Under Section 13(4) of the Securitisation Act, 2002, so that application, Under Section 17 xof the Act, does not become illusory or meaningless. The judgment in M/s Kalyani Sales Company's case (supra) applies to the present case, as the right of the petitioners to have adjudication of the matter, is sought to be defeated by taking physical possession of the property. The learned Debts Recovery Tribunal was right in ordering that the possession be delivered back to the petitioners during the pendency of the application Under Section 17 of the Act, as the petitioners were admittedly in physical possession of the property and running their business from the said property, Section 14 of the Securitisation Act, 2002 cannot be interpreted to defeat the rights granted to a party, who Under Section 17 of the Act is entitled to have their objections adjudicated. A reading of Section 14 of the Securitisation Act, 2002 itself makes it clear that it is only when the possession of asset is required to be taken by the secured creditor or the same is required to be sold or transferred by the secured creditor under the provisions of the Act, it is then that an application can be made. Section 14 of the Act has to be read with the provisions of Section 34 and 17 of the Act and cannot be interpreted to defeat the right of the parties Under Section 17 of the Act, as is sought to be done by the Bank and, therefore, we do not agree with the contention raised by the respondent-Bank or with the findings recorded by the Debts Recovery Appellate Tribunal that the possession has been taken*

in consonance with the law laid down by this Court.

23. From the judgment of Punjab-Haryana High Court, it is clear that it was held by the Punjab-Haryana High Court that reading of Section 14 of the 2002 Act itself makes it clear that it is only when the possession of asset is required to be taken by the secured creditor or the same is required to be sold or transferred by the secured creditor under the provisions of the 2002 Act, it is then that an application can be made. Thus the Punjab-Haryana High Court has also held that application under Section 14 of the 2002 Act can be made when possession is to be taken or asset has to be sold. In the present case the judgment in ***Arun Kumar Arora's*** do not help the petitioners since in the present case application under Section 14 was filed after sale of mortgaged asset and much after the issuance of sale certificate and further the application under Section 17 was filed by the petitioners after sale of the mortgaged asset. Moreso, the Full Bench judgment of the Madras High Court has already laid down in ***Lakshmi Shanker Mills'*** case (supra), as noted above, that there would be no automatic stay on filing of an application under Section 17 of the 2002 Act. We are in full agreement with the Full Bench judgment of the Madras High Court in ***Lakshmi Shanker Mills***' case (supra).

24. In view of the aforesaid discussions, we are of the view that by mere filing an application under Section 17 of the 2002 Act, there is no embargo on the Bank from proceeding under the 2002 Act.

25. As observed above, against the order of Debt Recovery Tribunal rejecting the application under Section 17 of the 2002 Act, the petitioners have statutory remedy under Section 18 of the 2002 Act. We, however, provide that in the event petitioners files an appeal within 30 days from today, the same be entertained and decided on merits.

26. Subject to above, the writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.12.2012

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 59570 of 2009

Shyam Manohar Gupta ...Petitioner
Versus
State of U.P. & others ...Respondents

Counsel for the Petitioner:
Sri Vinod Sinha
Sri Mahesh Sharma

Counsel for the Respondents:
C.S.C.

U.P. Collection Amin Service Rule 1974 Rule 5 (1)-regularization of service-petitioner working as season collection Amin-claim for regularization rejected by Single Judge as become overage-Special Appeal Court by setting aside the judgement issued direction to consider the regularization-Second inning collector rejected the claim saying the recovery less than 70 %-again quashed the order with finding of fact about recovery more than 70 %-and in third inning again rejected on ground of collection made by the petitioner is less than 70 % in the year 2006-2009-held-mode of taking decision very shocking when claim relates to year 1990 and the collection found more than 70 %-respondent deliberately denying the claim-thus petition allowed with cost of

Rs. 16,000/ with direction of regularization within four weeks

Held: Para-7

No useful purpose would be served in remitting matter back to the authority to decide the matter afresh since the Court finds that this is the fourth round of litigation and that there is a deliberate attempt on the part of the respondents to deny the claim for one reason or the other. The fact remains that in the judgment of the Court dated 28th July, 2008 passed in Writ Petition No. 50758 of 2004, the petitioner had been categorised in 'A' category and had made a recovery of more than 70% which had never been disputed by the respondents and consequently, the Court is of the opinion, that no useful purpose would be served in remitting the matter to the respondents to decide the matter afresh.

(Delivered by Hon'ble Tarun Agarwala, J.)

1. Heard the learned counsel for the parties.

2. The petitioner is working as a Seasonal Collection Amin in Tehsil Salempur, District Deoria since February, 1985. The petitioner applied for regularization of his services under the U.P. Collection Amin Service Rules 1974. When his claim was not considered, he preferred Writ Petition No. 17935 of 1996 which was dismissed against which a Special Appeal No. 378 of 1997 was filed which was allowed by a judgment dated 29th December, 2001. The Division Bench held that Rule 5(1) of the Rules of 1974 was not considered by the learned Single Judge nor by the authority and consequently, the Court remitted the matter to the authority to reconsider the matter afresh. The Court also observed that the petitioner cannot be non suited on the ground that he had become overage and consequently, if the age comes in the way of the regularization, the same shall be deemed to have been waived.

3. Pursuant to the said order, the District Magistrate again passed an order dated 24th May, 2004 rejecting the claim of the petitioner on the ground that no recovery was made by the petitioner in the last four faslis and that it was not upto 70%. The petitioner, being aggrieved, filed Writ Petition No. 50758 of 2004 which was again allowed and, the Collector was directed to decide the matter afresh. The Court found that the petitioner had made more than 70% recovery and was categorised in 'A' category and, in the absence of any counter affidavit being filed, the impugned order could not be sustained and was quashed.

4. Pursuant to the direction of the Writ Court, the District Magistrate has again passed the impugned order dated 31st March, 2009 rejecting the claim of the petitioner on the ground that for the years 2006-09, the petitioner has made a recovery of less than 70% and therefore, he has not entitled to be regularized under Rule 5(1) of the Rules. The petitioner, being aggrieved, by the aforesaid order, has filed the present writ petition.

5. From the aforesaid, it is clear that this is the fourth round of litigation and that the petitioner's claim is being rejected for one reason or the other, basically on the ground that he has made a recovery of less than 70%. The court fails to understand as to how the recovery of the years 2006-2009 is now being taken into consideration. The petitioner had made a claim for regularization of the services as far back in the early 1990s which claim was rejected. The Writ Court allowed the petition and

remanded the matter back. Consequently, the claim of the petitioner for regularization was required to be considered in respect of the earlier faslis and the present years was not required to be considered.

6. The Court further finds that persons similarly situated to the petitioner whose claim was earlier rejected were granted the relief and were regularised with retrospective effect, but in the petitioner's case the relief has been denied. The Court gets a feeling that the respondents are deliberately denying the relief to the petitioner and consequently, for the aforesaid reasons, the impugned order cannot be sustained and is quashed. The writ petition is allowed.

7. No useful purpose would be served in remitting matter back to the authority to decide the matter afresh since the Court finds that this is the fourth round of litigation and that there is a deliberate attempt on the part of the respondents to deny the claim for one reason or the other. The fact remains that in the judgment of the Court dated 28th July, 2008 passed in Writ Petition No. 50758 of 2004, the petitioner had been categorised in 'A' category and had made a recovery of more than 70% which had never been disputed by the respondents and consequently, the Court is of the opinion, that no useful purpose would be served in remitting the matter to the respondents to decide the matter afresh. The Court is of the opinion, that the time has come to issue a positive mandamus. The Court, consequently, issues a writ of mandamus commanding the respondents to issue an order of regularization of the service of the petitioner under the Rules of 1974 on the post of Seasonal Collection Amin. This order is required to be passed within four weeks from the date of production of a certified copy of this order. In view of the fact that the petitioner is fighting for his right for the past 16 years, the Court directs that he is entitled for cost which the Court computes at Rs. 16,000/- which shall also be paid by the respondents to the petitioner within the aforesaid period.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.12.2012

BEFORE
THE HON'BLE RAN VIJAI SINGH, J.

Civil Misc. Writ Petition No. 60568 of 2012

Alimuddin and others ...Petitioner
Versus
D.D.C. And Others ...Respondents

Counsel for the Petitioner:
Sri K.P.S. Yadav
Sri Deepak Singh Yadav

Counsel for the Respondents:
C.S.C.
Sri Bijendra Kumar Mishra
Sri Sanjiv Kumar Shukla

Constitution of India, Article 226-review-once the delay condonation application-rejected by S.O.C.-such order can not be recalled-in absence of power of Review-D.D.C. While allowing revision set-a-side both orders-remanded back before S.O.C. For fresh consideration-amounts to confer the power of review contrary to statutory provisions-remand order quashed.

Held: Para-14

So far as the order of Deputy Director of Consolidation is concerned, although the Deputy Director of Consolidation has set aside both the orders dated 15.02.2010 and 17.02.2010 passed by the Settlement Officer, Consolidation, but remanded the matter back to the

Settlement Officer, Consolidation for deciding the review application on merit, which is impermissible as the consolidation courts/authorities have no statutory power to review its own judgment unless it is an outcome of concealment of fact or fraud.

Case Law discussed:

1997 (88) RD 562; AIR 1975 SC 1409; AIR 1999 SC 1124; 2002 (48) ALR 319 (SC); 2009 (106) RD 98; (2004) 3 UPLBEC 2731; 2005 (6) AAWC 5958; 2011 (8) ADJ 493

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

1. Through this writ petition, the petitioenrs have prayed for issuing a writ of certiorari quashing the order dated 17.10.2012, passed by Deputy Director of Consolidation in Revision No. 815/874 (Sultana Begum Vs. Alimuddin and others), by which the Deputy Director of Consolidation has allowed the revision and remitted the matter back to the Settlement Officer, Consolidation for deciding the recall/review application dated 29.12.2009, after providing opportunity of hearing to all parties of the proceeding.

2. The facts giving rise to this case are that, the order dated 19.12.1973, passed by Consolidation Officer, Pushp Nagar, Azamgarh was made subject matter of Appeal No. 2492/2877 of 2009 (Alimuddin and others Vs. Khursheed and others). The appeal was time barred by 36 years, therefore, it was accompanied by an application for condonation of delay. The Settlement Officer, Consolidation, after hearing the learned counsel for the appellant, has rejected the application for condoning the delay vide order dated 26.12.2009.

3. The petitioners, herein, have filed an application dated 29.12.2009 for recall of the order dated 26.12.2009 on the ground that the aforesaid order was passed ex parte and the Settlement Officer, Consolidation has allowed the same vide order dated 15.02.2010, holding that the aforesaid order was an ex parte order, and fixed 17.02.2010. On that day, he condoned the delay and allowed the application for condonation of delay as well as appeal, both. This order was subject matter of the Revision No. 815/874 (Sultana Begum Vs. Alimuddin and others).

4. Shri K.P. S. Yadav, learned counsel appearing for the petitioners contends that the Deputy Director of Consolidation has erred in allowing the revision and quashing the order dated 15.02.2010 and 17.02.2010, passed by Settlement Officer, Consolidation. In his submissions the order dated 26.12.2009 was not an ex parte order and the Settlement Officer, Consolidation has exceeded his jurisdiction in condoning the delay and allowing the appeal.

5. The submissions of the learned counsel for the petitioners have been refuted by Shri Brijendra Kumar Mishra and Shri Sanjiv Kumar Shukla, learned counsel appearing for respondents on the ground that once the application filed under Section 5 of Limitation Act was rejected after hearing learned counsel for the appellant, then there was no occasion for the Settlement Officer Consolidation to hold that this order was an ex parte order as against the appellant, and taking note of that, recalling the order dated 26.12.2009 after condoning the delay and allowing the appeal.

6. I have heard the learned counsel for the parties and perused the record.

7. It is not in dispute that the Appeal No. 2492 (Alimuddin and others Vs.

Khursheed and others) was filed against the judgment and order dated 19.12.1973, passed by the Consolidation Officer Pushp Nagar, Azamgarh, after 36 years along with an application for condonation of delay. It is also not in dispute that the aforesaid application was rejected by the Settlement Officer, Consolidation after hearing the learned counsel for the appellant. Further, the recalling of the order dated 26.12.2009 on the instance of the petitioners and allowing the appeal after condoning the delay on 17.02.2010 are also not in dispute.

8. The lawyers are engaged in the Court and they pursue the matter before the Court on engagement by the parties. Appendix H to the Code of Civil Procedure, 1908 provides the format for engagement of a counsel in the Court of law. The aforesaid format is reproduced hereunder:-

"VAKALATNAMA

In the Court.....Suit/Miscellaneous case/Civil Appeal/Execution Case No.....of 19..../20.....,fixed for Plaintiff/Appellant/Applicant/D.H.....Defendant/Respondent/Opposite Party/J.D. Vakalatnama of Plaintiff/Appellant Applicant/D.H./Defendant/Respondent/Opposite Party/J.D.

In the case noted above Sri....., each of Sarvasri.....Advocate, is hereby appointed as counsel, to appeals, plead and act on behalf of the undersigned, in any manner, he thinks it proper, either himself or through any other Advocate, and in particular to do the following, namely,-

To receive any process of Court (including any notice from any appellate or revisional Court), to file any applications, petitions or pleadings, to file, produce or receive back any documents, to withdraw or compromise the proceedings, to refer any matter to arbitration, to deposit or withdraw any moneys, to execute any decree or order, to certify payment, and receive any money due under such decree or order.

The undersigned should be bound by all whatsoever may be done in the aforesaid case (including any appeal or revision therefrom) for and on behalf of the undersigned by any of the said counsel.

Signature.....

Name in full.....

Date.....

Attesting Witness:

Name in full.....

Address.....

Date.....

Accepted/Accepted on the strength of the signature of the attesting witnesses."

9. From the perusal of the conditions and undertaking given by the client, as contained in the aforesaid format, it is apparent that each and every proceeding conducted on behalf of the party before the Court be treated to be conducted on behalf of the client.

10. Therefore, I am of the view that the restoration application, for recall of the order dated 26.12.2009, on the instance of the petitioners, that they were not heard

when the order dated 26.12.2009 was passed, was not maintainable at all, because the counsel engaged by the appellant had power to argue the matter. It is not the case of the petitioners that they have never engaged the counsel and the counsel was not heard before the Settlement Officer, Consolidation when the application under Section 5 was rejected.

11. In the submissions of the learned counsel for respondents, the order dated 15.02.2010 and 17.02.2010, both, were passed ex parte, without notice to them, which require to be corrected. From the perusal of the impugned orders, it nowhere reflect that the parties have been heard. Therefore, also, the orders are vitiated as the same has been passed in breach of the principles of natural justice.

12. It is also noticeable that under the Uttar Pradesh Consolidation of Holdings Act, 1953, there is no provision of review and the consolidation courts cannot review its own order unless the order has been obtained by playing fraud or concealment of material fact. Reference may be given to Full Bench of this Court in ***Smt Shiv Raji & Ors. Vs. Deputy Director of Consolidation & Ors.,*** 1997 (88) RD 562.

13. Here, in this case, once the application under Section 5 was rejected by the Settlement Officer, Consolidation after hearing the counsel, it was not open for the Settlement Officer, Consolidation to entertain the recall/review application and set aside the earlier order condoning the delay. Therefore, also, the orders passed by the Settlement Officer, Consolidation dated 15.02.2010 and 17.02.2010 were bad in law and without jurisdiction.

14. So far as the order of Deputy Director of Consolidation is concerned, although the Deputy Director of Consolidation has set aside both the orders dated 15.02.2010 and 17.02.2010 passed by the Settlement Officer, Consolidation, but remanded the matter back to the Settlement Officer, Consolidation for deciding the review application on merit, which is impermissible as the consolidation courts/authorities have no statutory power to review its own judgment unless it is an outcome of concealment of fact or fraud.

15. The matter may be examined from another angle also. The Apex Court in ***P. Venkateswarlu Vs. Motor and General Traders,*** AIR 1975 SC 1409; ***Ashwinkumar K. Patel Vs. Upendra J. Patel and others,*** AIR 1999 SC 1124; ***P. Purushottam Reddy and another Vs. Pratap Steels Ltd.,*** 2002 (48) ALR 319 (SC); and learned Single Judge of this Court in ***Raj Narain and others Vs. Deputy Director of Consolidation,*** reported in 2009(106) RD 98 held that if the entire material was available before the Deputy Director of Consolidation, instead of remanding the matter, he should himself have considered the matter on merit, and the order of remand was held to be unsustainable.

16. The effect of the impugned order of remand amounts to conferment of the jurisdiction upon the Settlement Officer, Consolidation, which is beyond power under the Act. It is well settled that the jurisdiction can neither be conferred, nor assumed, nor presumed, nor acquired by acquiescence of the parties vide ***Committee of Management of Ganga Khand Inter College, Khera Dayal Nagar, Aligarh & Anr. Regional Joint Director of Education, Agra & Ors.***, (2004) 3 UPLBEC 2731;

Munna Lal Singh & Anr. Vs. State of U.P. & Ors., 2005 (6) AWC 5958; and ***Committee of Management, Sri Yadvesh Inter College & Anr.State of U.P. & Ors***., 2011 (8) ADJ 493. Therefore, the order of the Deputy Director of Consolidation remanding the matter is unsustainable and the writ petition is dismissed.

17. However, the liberty is given to the petitioners to challenge the order dated 26.12.2009 before the appropriate Court. In case any such case is instituted/filed along with a certified copy of the order of this Court, the same shall be decided by the Court/Authority concerned, in accordance with law, on its own merit.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.01.2013

BEFORE
THE HON'BLE RAN VIJAI SINGH, J.

Civil Misc. Writ Petition No. 65543 of 2012

Yadram and others ...Petitioners
Versus
D.D.C. And Others ...Respondents

Counsel for the Petitioner:
Sri G.P. Singh

Counsel for the Respondents:
C.S.C.

U.P. Consolidation of holding Act Section 48-Jurisdiction to entertained revision-against the order passed by S.O.C. Meerut-although appeal filed before S.O.C. Gautam Buddh Nagar-subsequently transfer to S.O.C. Meerut-whether the D.D.C. Gautam Buddh Nagar or D.D.C. Gautam Buddh Nagar camp Bulandshahr has jurisdiction ?-held-the revision would be maintainable before the D.D.C. of District where appeal was initially filed.

Held: Para-11

Following the judgment in Darbari Lal (supra) another learned single Judge of this Court has also taken the same view in Prashuram (supra). In Prashuram(supra) all other contrary decisions have been considered and distinguished and to my knowledge this judgment still holds the field. So far as judgment in *Haider Ali (Supra)* is concerned, as has been noticed the learned single Judge himself has stayed the further proceedings pursuant to the judgment rendered in that case.

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

1. Through this writ petition, the petitioners have prayed for issuing writ of certiorari quashing the order dated 27.06.2012, passed by the Deputy Director of Consolidation, Bulandshahr, Camp Gautam Buddh Nagar (In short DDC), by which the revision filed by the petitioners has been dismissed on the ground that the DDC, Bulandshahr, Camp Gautam Buddh Nagar has no jurisdiction to entertain the revision with the further direction to the revisionists to avail the remedy before the appropriate court.

2. The facts giving rise to this case are that, it appears, against the judgment and order dated 05.03.2011, passed by Consolidation Officer, Gautam Buddh Nagar in Case No. 45/63, an appeal was filed before the Settlement Officer, Consolidation, Gautam Buddh Nagar (in short SOC), which was numbered as Appeal No. 81 of 2006. The said appeal was transferred, on the Transfer Application No. 77 of 2011, filed under Rule 65-A (2) of the Uttar Pradesh Consolidation of Holdings Rules, 1954 before SOC, Meerut, by the

order of the Joint Director of Consolidation on 28.04.2011.

3. After transfer of the appeal, the decision rendered in the appeal by the SOC, Meerut on 04.07.2011 was Challenged through revision filed by the petitioners/ revisionists before the DDC, Gautam Budh Nagar. The DDC, Gautam Buddh Nagar dismissed the revision on the ground that the revision would be maintainable before the DDC of the district of which district's SOC has decided the appeal.

4. Learned counsel for the petitioners has vehemently contended that the view taken by the DDC is illegal. In his submissions, the revision would lie before the DDC of the district in whose jurisdiction land in dispute is situated and not before the DDC of the district of which SOC has decided the appeal. In his submissions, the transfer order was passed in certain circumstances, and the transfer of the matter to another district will not confer the jurisdiction of the revisional court also at the place where the appeal was transferred.

5. Learned counsel for the petitioners has placed reliance upon the judgments of this Court in the case of ***Ramdas Rai*** Vs. ***Deputy Director of Consolidation, Deoria and others,*** 1994 RD 62; and ***Haider Ali*** Vs. ***State of U.P. and others,*** 2012 (115) RD 695.

6. In the case of ***Ramdas Rai (Supra)***, it appears, an appeal was instituted at Gorakhpur and the Consolidation Commissioner, U.P. directed the SOC, Gorakhpur to hold a camp at Deoria and decide the appeal. The appeal was decided at Deoria by the SOC, Gorakhpur on the direction of the Consolidation Commissioner. The revisions were filed before the DDC, Deoria.

7. The other side has taken objection that the DDC, Deoria will have no jurisdiction to entertain the revision, as the order in appeal had been passed by the SOC, Gorakhpur, holding a camp at Deoria and not by SOC, Deoria.

8. The objection taken by the other side was sustained and it has been held by this Court that the DDC, Deoria will have no jurisdiction to entertain the revision against the appellate order passed by the DDC, Gorakhpur, camp at Deoria. Therefore, the decision cited by the learned counsel for the petitioners is of no help.

9. So far as the decision rendered in **Haider Ali** (supra) is concerned, learned single Judge of this Court taking note of the decision in **Prashuram vs. Deputy Director of Consolidation, Ballia** [2006 (100) RD 746] has held that revision would lie before the DDC of the district where the appeal had been orignally filed and not before the DDC of the transferee district. It may be noticed that later on the learned single Judge has reviewed his judgment and stayed all further proceedings pursuant to the judgment of this Court dated 30.11.2011 taking note of paragraph 8 of the judgment in ***Prashuram (supra).***

10. In the case of ***Darbari Lal*** vs. D.D.C. Jalaun [1989 RD 304] another learned single Judge of this Court has held that the revision would lie before the DDC of the district of which district 's SOC has decided the appeal. For appreciation relevant paragraph of the aforesaid judgment is reproduced hereinbelow:

"In view of the above definition and Rule 111, I think that the contentions raised on behalf of the petitiner have force. The said Rule of the Act emphasises the officers of the Director as competent authorities to entertain the revision petition. Therefore, in the facts and circumstances of the present case, I think that the revision petitioner against the order of the appellate authority of the Kanpur should have been preferred in the district of Kanpur. The reason of the revisional court for entertaining the revision petition on the ground that only appeal has been transferred to Kanpur for decision and no other proceedings for ever does not appear to me as correct. It is well known that the order of the original officer merges in the order of the appellate authoirty, therefore, it was incumbent upon the revisional court to have addressed itself to the question wherther the appellate authority was usbordinate to the revisional court in the facts and circumstances of the present. To my mind the appellate authority was of District Kanpur, therefore the revisional court of Jalaun cannot have jurisdictiodn to look into the illegality, irregularity or impropriety committed by the appellate authority of Kanpur....."
(emphasis supplied)

11. Following the judgment in **Darbari Lal** (supra) another learned single Judge of this Court has also taken the same view in **Prashuram** (supra). In **Prashuram**(supra) all other contrary decisions have been considered and distinguished and to my knowledge this judgment still holds the field. So far as judgment in ***Haider Ali (Supra)*** is concerned, as has been noticed the learned single Judge himself has stayed the further proceedings pursuant to the judgment rendered in that case.

12. In view of the foregoing discussions and law laid down by this court in the aforesaid cases, no infirmity can be attached with the order impugned, passed by the Deputy Director of Consolidation, Bulandshahr, Camp Gautam Budh Nagar.

13. The writ petition lacks merit and is hereby dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.01.2013

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Civil Misc. Writ Petition No. 68144 of 2012

U.P. Rajya Karmchari Kalyan Nigam
...Petitioner
Versus
District Judge, Kanpur Nagar And Others
...Respondents

Counsel for the Petitioner:
Sri Nripendra Singh

Counsel for the Respondents:
.....

Arbitration and Conciliation Act 1996, Section 34 readwith Micro, Small and Medium Enterprises Development Act, 2006, Section 19-award made by industry facilitation council-appeal without deposit 75 % of award-held-appeal can not be entertained-petition dismissed.

Held: Para-9 and 10

A conjoint reading of the above provisions makes it clear that an appeal or an application for setting aside the award made by the Industry Facilitation Council can only be entertained if the applicant deposits 75% of the amount awarded. This condition of deposit is in addition to the conditions or procedure

laid down under Section 34 of the 1996 Act.

Accordingly, the application of the petitioner for setting aside the award cannot be entertained unless 75% of the amount awarded is deposited. The court below is, therefore, not justified in permitting any lesser amount to be deposited.

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

1. The petitioner has preferred this writ petition against the order of the District Judge dated 30.7.2012 by which he has been directed to deposit the admitted amount of award i.e. Rs.7,49,598/- for the purposes of hearing of application for setting aside the award.

2. Heard Sri Nripendra Mishra, learned counsel for the petitioner.

3. It appears that the respondent No.2 made a claim against the petitioner which was referred under Section 6(2) of the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertaking Act, 1993 (in short "1993 Act") to the Industry Facilitation Council for the purposes of arbitration. Pursuant to the reference an award was made on 19.10.2010 awarding Rs.7,49,598/- and interest for the period 1.1.1997 to 30.10.2000 amounting to Rs.10,50,564/- to respondent No.2. Petitioner applied for setting aside the said award before the District Judge. It is on the above application, on the objection by the respondent No.2 that the application can not be entertained unless the petitioner deposits 75% of the amount awarded, that the District Judge has passed the impugned order directing the petitioner to at least deposit the admitted amount as awarded.

4. The submission of Sri Nripendra Mishra, learned counsel for the petitioner is that no condition to deposit any amount can be imposed as the application for setting aside the award is under Section 34 of the Arbitration and Conciliation Act, 1996 which does not provide for deposit of any part of the awarded amount as a condition for maintaining an application.

5. The arbitration proceedings were drawn pursuant to the reference made under Section 6(2) of the 1993 Act. Section 6(2) of the said Act apart from providing for referring the dispute to an arbitrator provides that the provisions of Arbitration and Conciliation Act, 1996 (in short "1996 Act") shall apply as if it is an arbitration pursuant to an arbitration agreement under the 1996 Act.

6. Section 7 of the 1993 Act provides for the mandatory deposit of 75% of amount awarded as a condition precedent for appealing against the award.

7. The 1993 Act has been repealed by Section 32 of the Micro, Small and Medium Enterprises Development Act, 2006. The said Act vide Section 19 provides that an application for setting aside a decree, award or any order made under the Act by the Council shall not be entertained unless the applicant/appellant deposits 75% of the amount in terms of the decree/award.

8. The provisions of Section 34 of the 1996 Act are to be read along with the provisions of the aforesaid both the Acts which in addition to the procedure prescribed under Section 34 of the 1996 Act provides for deposit of 75% of the amount of the award as a condition precedent for entertaining the application for setting aside the award.

9. A conjoint reading of the above provisions makes it clear that an appeal or an application for setting aside the award made by the Industry Facilitation Council can only be entertained if the applicant deposits 75% of the amount awarded. This condition of deposit is in addition to the conditions or procedure laid down under Section 34 of the 1996 Act.

10. Accordingly, the application of the petitioner for setting aside the award cannot be entertained unless 75% of the amount awarded is deposited. The court below is, therefore, not justified in permitting any lesser amount to be deposited.

11. The writ petition is dismissed with the direction to the court below to proceed with the decision of the application only on deposit of 75% of the decreed amount by the petitioner.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.01.2013

BEFORE
THE HON'BLE SIBGHAT ULLAH KHAN, J.

Civil Misc. Writ Petition No. 68340 of 2006

U.P. Rajya Vidyut Utpadan Nigam Ltd.
...Petitioner
Versus
Bhagwati Prasad Gupta And Another
...Respondents

Counsel for the Petitioner:
Sri Arvind Kumar

Counsel for the Respondents:
C.S.C.
Sri Mahendra Kumar Mishra

Constitution of India, Article 226-Labour Court Award-direction of reinstatement and to treat the long gap of absence from duty as medical leave-reliance placed upon some receipts of UPC without application-even the medical certificate obtained from private doctor-held-the receipts of UPC as well as such medical certificate can be easily procured by interested person-obsoletely no explanation for long term period of absence for 18 years-held-award not sustainable-quashed.

Held: Para-7

U.P.C. is not believable at all in view of above Supreme Court authorities. It is quite clear that respondent No.1 was working somewhere else. He could not show that he was prevented by sufficient cause from attending his duties for 18 years.

Case Law discussed:
1994 (4) SCC 445 (para-6); AIR 2000 SC 433

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

1. Heard Sri Arvind Kumar, learned counsel for the petitioner and Sri Mahendra Kumar Mishra, learned counsel for legal representatives of workman respondent No.1.

2. This writ petition is directed against award dated 20.09.2006 given by Presiding Officer, Labour Court (III), U.P. Kanpur in Adjudication Case No.102 of 1996. The matter which was referred to the labour court was as to whether the action of petitioner employer terminating the services of its workman respondent No.1 w.e.f. 24.09.1993 was just and valid or not.

3. The workman himself admitted that he was appointed in the year 1968, however since 03.02.1975, he was suffering from mental disease hence he could not appear to work for 18 years and

after full recovery he appeared along with medical and fitness certificate on 24.07.1993 but he was not taken back in service. Labour Court has mentioned that petitioner filed some Under Postal Certificate (U.P.C.) receipts of 1975, 1976, 1977, 1989, 1990, 1991 and 1992. Labour court has itself mentioned that plaintiff did not file copy of any application which may have been sent through U.P.C. in between 1977 to 1989. There was not even an allegation that some information through U.P.C. was sent for 12 years (between 1977 and 1989). What was the medical certificate has not been mentioned in the award. Sending letter/ application through U.P.C. does not raise presumption of service. In this regard, reference may be made to **Shiv Kumar Vs. State of Haryana, 1994 (4) SCC 445** (para-6) wherein the notices by the management to workman were sent through certificate of posting which fact was disputed and in that context Supreme Court observed "We have not felt safe to decide the controversy at hand on the basis of the certificates produced before us, as it is not difficult to get such postal seals at any point of time." The said authority has been quoted with approval in **Fakir Mohd. Vs. Sita Ram, AIR 2002 SC 433**. What the Supreme Court has said in the above authority regarding U.P.C. can also be said about medical certificates of private doctors produced by interested parties. Unscrupulous private doctors may issue such certificates at any time showing any type of complicated undetectable disease.

4. The labour court directed reinstatement and further directed that leave shall be sanctioned in accordance swith law. Through interim order dated 18.12.2006 passed in this writ petition execution of the impugned award was stayed. The workman has died and substituted by his legal representatives.

5. Supreme Court in A.M.U. Aligarh Vs. M.A. Khan, AIR 2000 SC 2783 has held that even though unauthorised absence is a misconduct requiring opportunity of hearing for termination on the said ground, however if a person challenges such termination in a writ petition then he must show that in case opportunity of hearing had been provided to him what plausible cause he would have shown. Same principle applies when such termination is challenged in any other forum like labour court.

6. Copy of letter/ information allegedly sent through U.P.C. was not filed before labour court. Precise nature of illness and doctor's name was not mentioned. Doctor's prescriptions and receipts of purchasing the medicines were also not filed. Neither in the written statement copy of which is Annexure-4 to the writ petition nor in oral deposition of respondent No.1, Annexure-8 to the writ petition any particulars were given. Even this much has not been mentioned that respondent No.1 was under whose treatment.

7. U.P.C. is not believable at all in view of above Supreme Court authorities. It is quite clear that respondent No.1 was working somewhere else. He could not show that he was prevented by sufficient cause from attending his duties for 18 years.

8. Accordingly, writ petition is allowed. Impugned award is set aside.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.01.2013

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 72991 of 2010

Mohd. Wali Jan ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri N. K. Chaturvedi

Counsel for the Respondents:
C. S. C.

Constitution of India, Article 226-claim of interest on belated release of retiral benefits-the department asked the petitioner to deposit certain amount of loss caused by petitioner-offer made by petitioner to recover said amount from his retirement-benefits-even then payment not made within time-held-the dereliction of duty in part of respondent in not releasing the amount-direction issued to pay interest @6 % per annum within two month.

Held: Para-6

Admittedly, retirement benefits was required to be paid and the same was not released upon the retirement of the petitioner. The respondents were aware that the petitioner would retire on a particular date and was required to process the retirement dues on or before the date of retirement to enable the petitioner to get the post retirement dues. This court also finds that the petitioner had made a request that the loss suffered by the department may also be adjusted and the balance amount may be released thereafter. Even though a specific request was made the same remained un-addressed and no effort was made by the department to release the balance amount and the same was released only when the contempt proceedings were drawn against the respondents.

Case Law discussed:
[(2008) 1 UPLBEC 301]

(Delivered by Hon'ble Tarun Agarwala, J.)

1. Heard the learned counsel for the parties.

2. The petitioner has filed the present writ petition for payment of interest at the rate of 18% per annum on belated release of the retirement benefits.

3. The petitioner contended that he retired as a Marketing Inspector on 30th June 2004 and his post retirement benefits were not released. The petitioner accordingly filed Writ Petition No.54996 of 2008 which was disposed of by order dated 3rd November 2008 directing the respondents to decide the petitioner's representation.

4. It transpires that the department did not release the post retirement dues on the ground that the petitioner had caused a loss of Rs.5,10,604/- and that such amount was liable to be recovered from the petitioner. Even though the petitioner disputed this amount, the petitioner, in order to avoid any controversy, requested the department to recover the amount of the alleged loss from the post retirement dues and release the balance amount. In spite of this specific request being made, the respondent did not release the amount and when the petitioner filed contempt proceedings, the respondents released an amount of Rs.9593 by cheque dated 10th September 2009, Rs.4,93,723/- by cheque dated 10th September 2009 and another sum of Rs.17,868/- by cheque dated 10th

September 2009. The petitioner thereafter filed the present writ petition praying that on account of belated payments being made, the petitioner is entitled for interest at the rate of 18% per annum.

5. In ***S.K. Dua Vs. State of Haryana and another, [(2008) 1, UPLBEC 301],*** the said employees retired from service and filed writ petition claiming interest for 4 years on the amount on retirement benefits. The said writ petition was dismissed by the Punjab and Haryana High Court, against which Special Leave Petition was filed, the Supreme Court allowed the Special Leave Petition setting aside the judgment of the High Court holding that the appellant was entitled to the retirement benefits in accordance with law and was also entitled for interest on such amount. The aforesaid decision is squarely applicable to the facts and circumstances of the present case.

6. Admittedly, retirement benefits was required to be paid and the same was not released upon the retirement of the petitioner. The respondents were aware that the petitioner would retire on a particular date and was required to process the retirement dues on or before the date of retirement to enable the petitioner to get the post retirement dues. This court also finds that the petitioner had made a request that the loss suffered by the department may also be adjusted and the balance amount may be released thereafter. Even though a specific request was made the same remained un-addressed and no effort was made by the department to release the balance amount and the same was released only when the contempt proceedings were drawn against the respondents.

7. In the light of the aforesaid, the Court finds that there has been a dereliction of duty on the part of the respondents in not releasing the amount within a reasonable period.

8. In view of above, the writ petition is allowed and a writ of mandamus is issued commanding the respondents to pay interest on belated payments at the rate of 6% per annum within two months from the date of production of a certified copy of this order.
