0ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.03.2013

BEFORE
THE HON'BLE ASHOK PAL SINGH, J.

Rent Control No. 77 of 2012

Zahid Husain ...Petitioner
Versus
Additional Distt. Judge Court No. 16 Lucknow and another ...Respondents

Counsel for the Petitioner:
M.A. Siddiqui

Counsel for the Respondents:
Manish Kumar
Ausaf Ahmad Khan

U.P. Urban Building (Regulation of letting of Rent) Act 1972-Rule-22-d-applicability of the provision of order 6 Rule 17(as amended by Act no. 22 of 2002)-for proposed amendment-one has show in spite of due diligence-not able to raise those fact before commencement of trail-in absence of pleading in writ petition as well as before trail court-except repetition of facts-held-proposed amendment nothing but simple a device to delay proceeding-rightly rejected.

Held: Para-10

The impugned order passed by the lower court also discloses that there is a specific finding recorded by the lower court that the proposed amendment was merely the repetition of the facts already mentioned in the written statement. As such it was not at all necessary for deciding the real controversy between the parties.

(Delivered by Hon'ble Ashok Pal Singh, J)

1. The instant writ petition has been filed by the petitioner for quashing the order dated 08.08 2012 passed by the learned Addl.District Judge, Court No.16, Lucknow in the the Rent Appeal No.18 of 2012 Zahid Husain Versus Sant Swaroop Nigam whereby his amendment application for seeking amendment in his written statement filed before the trial court has been dismissed.

2. I have heard Shri M.A.Siddiqui, learned counsel for the petitioner and Shri Ausaf Ahmad Khan, learned counsel for the respondent and perused the record.

3. Considering the nature of the dispute involved, the revision with the consent of the learned counsels is being decided finally at admission stage itself.

4. Submission of the learned counsel for the petitioner is that a liberal view should be taken by the Court in allowing the amendment application. The lower court has acted illegally and with material irregularity in dismissing his amendment application for making amendment in the written statement filed before the trial court.

5. On the other hand, it has been submitted by the learned counsel for the respondents that the lower court has rightly dismissed the amendment application of the petitioner in as much as the proposed amendment was only a repetition of what had already been averred before the trial court in the original written statement. His further submission is that the said amendment application was given only to delay the disposal of the appeal and the eviction proceedings taken up against the petitioner.

6. Admittedly, the present proceedings before the lower court arose out of the proceedings under U.P.Act no.13 of 1972 (in short referred to as 'Act' hereinafter). Undisputedly, by virtue of Rule 22-d of the Rules framed thereunder, the provisions of Code of Civil Procedure applies in respect of the power to allow an amendment application.

7. The provisions for amendment in the pleadings have been provided in the Code of Civil Procedure in its Order 6 Rule 17 which after its amendment by Act no.22 of 2002 with effect from 01.07.2002 read as under :-

"17. Amendment of pleadings:- The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties;

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

8. The plain reading of the aforesaid provisions of Order 6 Rule 17 makes it clear that not only the nature of proposed amendment should be necessary for determining the real question in controversy between the parties but it must also be shown that in spite of due diligence, the party was not able to raise the matter before the commencement of the trial.

9. In the memo of the writ petition not a single word is there on behalf of the petitioner as to why he could not have raised the matter covered by proposed amendment before commencement of the trial.

10. The impugned order passed by the lower court also discloses that there is a specific finding recorded by the lower court that the proposed amendment was merely the repetition of the facts already mentioned in the written statement. As such it was not at all necessary for deciding the real controversy between the parties.

11. From the facts and circumstances of the case, it also appears that the amendment application moved by the petitioner in appeal for making amendment in the written statement which was filed before the trial court was nothing but simply a device to delay the further proceedings of the case.

12. In the above facts and circumstances, no illegality or infirmity is found to have been caused by the lower court in passing the impugned order.

13. The writ petition, therefore, being devoid of any merits, is hereby dismissed with costs.

RIVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.02.2013

BEFORE
THE HON'BLE S.C. AGARWAL,J.

Criminal Revision No. 217 of 2013

Pawan Kumar and others. ..**Revisionists**
Versus
State of U.P. And another...Opposite Parties

Counsel for the Petitioners:
Md. Imran Khan

Counsel for the Respondents:
A.G.A.

Criminal Procedure Code=Section-397/401-Revision- Against rejection of discharge Application-on ground-for same allegation two prosecution can not be -held-in view of provisions contained in Section 210(2) no bar-both can go simultaneously-revision dismissed-with liberty to move application before magistrate itself.

Held: Para-9

From the aforesaid provision, it is clear that on the basis of same facts, a complaint as well as the police case can both be tried together as State case and there is no bar against criminal case being prosecuted by complainant. It would be appropriate that the revisionists shall move an application before the Magistrate concerned making an appropriate prayer in terms of Section 210(2) Cr.P.C.

(Delivered by Hon'ble S.C. Agarwal, J)

1. Supplementary affidavit filed today is taken on record.

2. Heard learned counsel for revisionists and learned AGA for the State.

3. There is no need to issue notice to opposite party no.2, Smt. Namita, the complainant.

4. This revision under Section 397, 401 Cr.P.C. is directed against the order dated 20.11.2012 passed by Judicial Magistrate, Court No.2, Muzzafarnagar in Crl. Complaint Case No.2/9 of 2012 (Smt. Namita Vs. Pawan Kumar and ors) under Sections 498A, 323, 504, 506 IPC and 3/4 D.P. Act, P.S. Meerapur, District whereby the application under Section 245 (2) Cr.P.C. praying for discharge has been rejected.

5. The grievance of the revisionists is that in respect of the same incident and on the basis of same cause of action, the complaint case has been filed and First Information Report was also lodged against the revisionists wherein, after investigation, charge sheet has been submitted by police.

6. The contention is that two prosecutions on the same grounds cannot proceed simultaneously and the Magistrate ought to have discharge the revisionists in the complaint case.

7. Learned AGA supported the impugned orders. There is no bar in the Court of criminal procedure for trial of an accused in a police case as well as in a complaint case on the basis of same facts.

8. This fact has been taken care of by Section 210(2) Cr.P.C. which provides as under:-

" If a report is made by the Investigating Officer police Officer under Section 173 and on such report cognizance of any offence is taken by the Magistrate against any person which an accused in the complaint case, the Magistrate shall inquire into or try together the complaint case and case arising out of police report as if both the cases were instituted on a police report."

9. From the aforesaid provision, it is clear that on the basis of same facts, a complaint as well as the police case can both be tried together as State case and

there is no bar against criminal case being prosecuted by complainant. It would be appropriate that the revisionists shall move an application before the Magistrate concerned making an appropriate prayer in terms of Section 210(2) Cr.P.C.

10. As far as the question of discharge is concerned, there is sufficient material in the statement as recorded under Sections 200 and 202 Cr.P.C. to warrant trial of the revisionists for the offences for which they have been summoned.

11. No case for discharge is made out. The application for discharge has been rightly rejected. I find no good ground to interfere in the matter.

12. The revision is dismissed with liberty to the revisionists to move an application under Section 210(2) Cr.P.C. before the Magistrate concerned.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.03.2013.

BEFORE
THE HON'BLE PRAKASH KRISHNA, J.
THE HON'BLE RAM SURAT RAM (MAURYA), J.

Civil Misc. Writ Petition (TAX) No. 362 OF 2011.

Civil Aviation Training College, Bamrauli, Allahabad ...Petitioner

Versus

The State of U.P. And others ...Respondents

Counsel for the Petitioner:
Sri S. Shekhar, Sri V.K. Singh

Counsel for the Respondents:
C.S.C.
Sri Rakesh Bahadur
Sri S.K. Gupta

U.P. Municipal Corporation Act 1959- Section 175(1)readwith U.P. Water Supply and Sewage Act 1975- demand of water tax-petitioner being airport authority-imparting training in field airport management, air traffic control and navigation surveillance services including dwelling, houses, offices, hotels, hospitals etc. spread over about 16 hundred ares.-Gate of institutions situated at distance of 5.80 meter from the point of walking distance-demand of water tax as building existed withing hundred meters radius of water supply point-petitioner having own source of water and power supply-hence-no question of payment of water tax at 12.5% of annual letting value of property-the petitioner's request to identify the building with the described radius-remain untouched-held-without joint inspection demand of water tax at highest rate-not proper-demand notice quashed-necessary direction given.

Held: Para-31

One acre consists of 4,840 sq. yards and is equivalent to 4046.856 sq. meters. The area of the plot is 116 acres which is equivalent to 561440 sq. yards = 4,69,435.296 sq. meters. In pursuance of the direction given in the earlier writ petition by this Court, a joint spot inspection was carried on 28th December, 2010 by the officials of the respondents and in the presence of the officials of the petitioner. It finds mention in para 5 of the impugned order that the entrance gate of the petitioner's campus is at 5.80 meters from the water stand point and the water tax has been levied on this premises alone. This itself is suggestive of the fact that only a very small portion/insignificant area of the petitioner's campus falls within the

prescribed radius. It was urged before us that the petitioners have no grievance for payment of water tax for the land and building or part of the building falling within the prescribed radius. It was argued that the request to identify the buildings and land falling within the prescribed radius was made during joint inspection but no heed was paid. It is, therefore, desirable that again a joint inspection may be carried on in the light of the observations made above and the payment of water tax be modified suitably.

Case Law discussed:
AIR 1962 Alld. 83; AIR 1965 SC 895; .AIR 1982 Alld.406; (2000) 3 AWC 2139; .AIR 1999 SC 264; AIR 1999 SC 277; AIR 1999 SC 277; (1996) 2 SCC 572.

(Delivered by Hon'ble Prakash Krishna, J)

1. The petitioner, a Civil Aviation Training College, claims that it was initially established by the Ministry of Civil Aviation, Government of India as an institution owned by Central Government. The Parliament enacted Airports Authority Act, 1994 and now the petitioner is an institution under the Airports Authority of India. It claims that, in fact, the petitioner is an organization of Central Government and is totally owned and financially controlled by the Central Government. It is imparting training to the persons in the fields of Airports Management, Air Traffic Control and Navigation Surveillance Services and is an unique Institution in whole of the country. It has a huge compound spread over in 116 acres of land. In the said compound there are number of separate and independent buildings including dwelling houses, offices, hostels, hospitals, residential buildings and the building required for training to the students. It claims that each and every building of the petitioner in the said compound is independent and separate building. Further, the petitioner has not taken any water connection. The petitioner has its own source of water. It has been further pleaded that the petitioner has itself provided all the civic amenities on its own to the entire campus by laying down the roads, water supply, sewerage etc.

2. The petitioner is aggrieved by the action of respondents namely Municipal Authority and that of General Manager, Jal Kal Vibhag, Nagar Nigam, Allahabad (Water Works), Allahabad, asking the petitioner to pay water tax for the period 1st of April, 2009 and onwards. Notice dated 21st of September, 2010 issued by the respondent no.2 asking the petitioner to deposit the water tax, is under challenge. By means of the present petition, quashing of the said notice dated 21st September, 2010 and the order dated 9.2.2011 rejecting the representation of the petitioner against the said notice, has been sought for. Also a Writ of Mandamus declaring the notification dated 9th April, 2003 filed, as Annexure-8 to the writ petition, as ultra-vires has been claimed besides the other incidental and ancillary reliefs.

3. Disputing the claim of the petitioner, the Nagar Nigam has filed a counter affidavit wherein it is pleaded that the water tax has been levied as per the provisions of the U.P. Municipal Corporation Act, 1959 (hereinafter to referred as Act 1959) and the U.P. Water Supply and Sewage Act, 1975 (hereinafter to referred as the Act, 1975). The action has been sought to be justified on the ground that the campus of the petitioner constitutes one unit and in any case, part

of the campus is within 100 meters radius of the water supply point. It has further been averred that whether the petitioner has taken water connection or not, is wholly irrelevant. The water tax has been charged at the rate 12.5% of the annual letting value of the building as determined by the Nagar Nigam. Further, the Explanation-1 to Section 175 of U.P. Municipal Corporation Act, 1959 justifies their action. It has been further stated that the earlier writ petition filed by the petitioner questioning the annual rental value of the building having been dismissed, the present writ petition is liable to be dismissed.

4. The State of U.P. has filed a separate counter affidavit which is confined to the question of legality of the impugned notification. It has been stated that the fixation of the rate of water tax at the optimum permissible rate is justified as the cost of operation and maintenance of water supply is much more. The income from all sources of Jal Kal Vibhag, Nagar Nigam, Allahabad is estimated at 49.82 crores as against the estimated expenses of Rs.53.52 crores. It has been stated that the notified rate of water tax at Rs.12.5 per cent shall be even lower than the estimated expenses of the respondent (Jal Kal Vibhag) for the year 2012-2013 and thus, it cannot be said that the rate of tax at 12.5 per cent of the annual letting value is in any manner arbitrary.

5. The petitioner in the rejoinder affidavit has reasserted and reaffirmed its stand as taken in the writ petition.

6. Heard Sri V.K. Singh, learned senior counsel along with Sri S. Shekhar for the petitioner, Sri Rakesh Bahadur for the contesting respondent nos.1, 2 and 3 and Sri S.P. Kesarwani, Additional Chief Standing Counsel for the other respondents.

7. At the very outset, we may deal with one preliminary objection with regard to the maintainability of the writ petition raised by Sri Rakesh Bahadur, Advocate for the respondent nos.1, 2 and 3. He submits that the petitioner had earlier filed a writ petition being writ petition no.440 of 2011 challenging the valuation of property done by the respondents. The said writ petition was dismissed. The submission is that the petitioners have filed statutory appeal against the valuation of the property and as such, the present writ petition is not maintainable. In reply, the learned counsel for the petitioners invited our attention towards the following order passed by the Apex Court:-

"Learned Attorney General appearing for the petitioner seeks permission to withdraw this petition with a liberty to the petitioner to approach the High Court with an application for review. Permission is granted. The petition is dismissed as withdrawn with the liberty as prayed for. We request the High Court to dispose of the entire matter as expeditiously as possible."

8. The said order was passed on a Special Leave Petition filed by the petitioners against the order dated 14th of March, 2012 by which the interim relief to the petitioners was denied by this Court. Taking into consideration that the pleadings are complete and the Apex Court has desired to dispose of the entire matter and the fact that only two legal issues have been sought to be raised through the present petition, we propose

to decide the writ petition on merits after overruling the objection raised by the contesting respondent nos.1, 2 and 3.

9. Suffice it to say that this is a second round of litigation with regard to the water tax liability of the petitioner before this Court. Earlier, the petitioner had filed a writ petition no.1496 of 2010 challenging the legality and validity of the imposition of water tax and its recovery which was decided by the judgment dated 29th October, 2010 directing the General Manager, Jal Sansthan, Allahabad to decide the representation of the petitioner in this regard. Consequent to the said judgment, the General Manager, Jal Sansthan, has decided the representation of the petitioners by rejecting it by the order impugned in the present writ petition. In this factual matrix, we do not find any merit in the preliminary objections of the contesting respondent nos.1, 2 and 3.

10. Coming to the merits of the case, the learned senior counsel for the petitioners, has raised the following two points for consideration:-

1. There is no liability to pay the water tax in respect of the buildings and the land which fall beyond the radius of 100 meters from the water stand point of the respondent. The water tax has been levied on the premises that the entrance gate of the petitioners' institution is at a distance of 5.80 meters from the water stand point of the respondent and the several separate and independent buildings are being treated as one building. The submission in brief is that the petitioners' campus is spread over in 116 acres of land. Only a small/insignificant part of the land and some building which fall within the radius of 100 meters from the said fixed point, may be liable to water tax and not the other buildings and land which are independent and beyond the fixed radius of 100 meters, will be subjected to water tax.

2. The notification dated 9th of April, 2003 filed as Annexure-8 to the writ petition providing the rate of water tax at the fixed rate of 12.5 per cent which is maximum, is arbitrary. The submission is that the Act provides levy of tax in the range of 6 per cent to 12.5 per cent. No reason has been assigned for not levying the water tax at a lesser rate.

11. The learned counsel for the respondent nos.1, 2 and 3 supports the levy of water tax on the ground that on the own showing of the petitioners, the entire buildings residential, non residential, hostels, school, hospital etc. are situate in one compound. The submission is that even a part of the said compound falls within the radius of 100 meters from the water stand point, on a true and proper interpretation of section 175 of the U.P. Municipal Corporation Act, 1959 together with the Explanation attached thereto, the impugned levy is justified. Sri S.P. Kesarwani justifies the imposition of tax at the maximum rate with the help of estimated income and expenditure account as finds mention in the counter affidavit.

12. Considered the respective submissions of the learned counsel for the parties and perused the record. The levy of water tax by local authority has been subject matter of litigation before this Court many times. Earlier, the vires of such action was challenged on the ground of incompetency of the state legislature to

levy such tax. The matter was examined by a Division Bench of this Court in **Raza Buland Sugar Co. Ltd Vs. Municlpal Board, Rampur: AIR 1962 Alld.** 83 with reference to the provisions of the U.P. Municipalities Act, 1916 wherein the levy of water tax has been held valid by holding that the water tax is a tax on land or building and the State Government has power under the Entry No.49 in List II of Seventh Schedule of the Constitution of India to make laws in respect thereof. The matter was carried further in appeal unsuccessfully before the Apex Court in **Raza Buland Sugar Co. Ltd. vs. Municipal Board, Rampur, AIR 1965 SC 895.**

13. In **Kendriya Nagarik Samiti Kanpur Vs. Jal Sansthan, Kanpur, AIR 1982 Alld. 406**, a case under the Act of 1975, a Division Bench has held that subject matter of water tax is not water charges. It is, in reality, tax on land and buildings though called water tax. Levy of such water tax is covered by the Entry No.49 of List-II of Seventh Schedule. The validity of Section 52 of the Act, 1975 challenged on the ground of excessive delegation was repelled.

14. Similar view was taken in the case of Lucknow **Grih Swami Parishad Vs. State of U.P. and others, (2000) 3 AWC 2139.**

15. It will not be out of place to mention here that although in the writ petition it has been raised that on the petitioner no water tax can be levied in view of the Article 285 of the Constitution of India, but no such plea was convassed before us nor was pressed presumably in view of the authoritative pronouncement of the Apex Court holding otherwise.

16. Before entering into the controversy raised in the present writ petition, it is desirable to note certain statutory provisions for proper appreciation of the controversy on hand. The State of U.P. enacted the U.P. Water Supply and sewerage Act, 1975 (U.P. Act No.43 of 1975) to provide for the establishment of Corporation, Authorities and Organizations for development and regulation of water supply and sewerage services and all the matters connected therewith. Prior to enactment of the Act, 1975, under which Jal Sansthan has been constituted, property taxes (which include a general tax, water tax, drainage tax etc.) were levied under section 173 of the U.P. Nagar Mahapalika Adhiniyam, 1959. Under the Act, 1975 among the functions entrusted to Jal Sansthan are to plan, promote and execute schemes of and operate an efficient system of water supply vide section 24 (I) of the Act. Power to levy taxes, fees and charges are dealt with under Chapter VI. Section 52 which is relevant for our purposes is reproduced below:-

"52. **Taxes liveable,**--(1) For the purposes of this Act, a Jal Sansthan shall levy, on premises situated within its area:

(a) where the area is covered by the water supply services of Jal Sansthan, a water tax; and

(b) where the area is covered by the sewerage services of Jal Sansthan, a sewerage tax.

(2) The taxes mentioned in sub-section (1) shall 1[in a local area other than a city] be levied at such rate which in

the case of water tax shall be not less than 6 per cent and not more than 14 per cent and in the case of sewerage tax shall be not less than 2 per cent and not more than 4 per cent of the assessed annual value of the premises as the Government may, from time to time after considering the recommendation of the Nigam, by notification in the Gazette, declare.

2[(3) The taxes mentioned in sub-section (1), shall, in a city, be levied at such rate which in the case of water tax shall not be less than 7.5 per cent and not more than 12.5 per cent and in the case of sewerage tax shall not be less than 2.5 per cent and not more than 5 per cent of the annual value of the premises determined under the Uttar Pradesh Municipal Corporations Act, 1959, as the State Government may, from time to time, after considering the recommendation of the Nigam, by notification in the Gazette, declare.]

17. Relevant portion of section 55 providing restriction on levy of taxes mentioned in section 52 is reproduced below:-

"Section 55. Restriction on Levy of Taxes— The levy of taxes mentioned in section 52 shall be subject to the following restrictions, namely**—**

a..

b. the water tax shall not be levied on any premises -

(i) of which no part is situate within the radius prescribed from the nearest stand post or other water works at which the water is made available to the public by the Jal Sansthan or

(ii)..

c..

18. The crux of the petitioners' argument is that section 52 levies water tax 'on premises' situate within its area. Reading it together with restriction as provided under section 55, the water tax shall not be levied on any premises of which no part is situate within the radius prescribed. The radius prescribed under Rule-2 of the Jal Sansthan (Radius Regarding the Levy of Water Tax) Rules, 1993 is 100 meters. The word "premises' has been defined under section 2(18) of the Act, 1975 as "premises' means any land or building. The petitioner submits that on a conjoint reading of sections 52 and 55 of the Act, 1975 only separate building or part of the buildings and/or land falling within the radius of 100 meters would be subjected to water tax liability. The word "building' has not been defined in the Act, 1975. The submission is that the building as is understood in common parlance should be taken into consideration.

19. The word "building' has been defined in the U.P. Municipal Corporation Act, 1959 vide section 2(6) which reads as follows:-

(6) "Building" includes a house, out-house, stable, shed, hut and other enclosure or structure whether of masonry, bricks, wood, mud, metal or any other material whatever, whether used as a human dwelling or otherwise, and also includes verandahs, fixed platforms, plinths, door-steps, walls including compound walls and fencing and the like but does not include a tent or other such portable temporary structures.

20. It also defines "land' vide section 2(33) which reads as follows:-

(33) "land" includes land which is being built upon or is built upon or is covered with water, benefits to arise out of and things attached to the earth or permanently fastened to anything attached to the earth and rights created by legislative enactment over any street.

21. At this juncture, we may notice the argument of the respondent nos.1, 2 and 3. He submits that the provision relating to water tax would be governed by section 175 of the U.P. Municipal Corporation Act, 1959. For the sake of convenience the said section is reproduced below:-

3[175. [Restrictions on imposition of water tax] - The imposition of a tax under clause (b) of sub-section (1) of Section 173 shall be subject to the restriction that the tax shall not be imposed -

(i) on any land exclusively for agricultural purposes, unless the water is supplied by the Corporation for such purposes; or

(ii) on a plot of land or building the annual value whereof does not exceed rupees three hundred and sixty and to which no water is supplied by the Corporation; or

(iii) on any plot or building, no part of which is within the radius prescribed for the City, from the nearest stand-pipe or other waterworks whereat water is made available to the public by the Corporation.

Explanation. - For the purposes of this section -

(a) "**building'** shall include the compound, if any, thereof, and, where there are several buildings in a common compound, all such buildings, and the common compound;

(b) "a plot of land' means any piece of land held by a single occupier, or held in common by several co-occupiers, whereof no one portion is entirely separated from any other portion by the land of another occupier or of other occupiers or by public property.]

22. Elaborating the argument, the learned counsel for the respondents submits that in view of the peculiar definition given to "building' in the Explanation reproduced above, the entire campus of the petitioners being surrounded by a boundary wall though for security purposes is a "common compound'. Even if a small part of the said compound falls within the prescribed radius of 100 meters, the liability to pay water tax shall be on the annual letting value of the whole compound or in other words on the compound itself. To put it differently, the division of building or buildings or parts whereof within and beyond the radius of 100 meters from the water stand point is immaterial.

23. Now, the arguments of the learned counsel for the parties give rise to the two aspects of the case. Firstly, whether the levy of water tax will be governed by the provisions of the U.P. Act, 1975 or the Act, 1959. As according to counsel for the respondents, both the Acts operate in the same field. However, the counsel for the petitioner submitted that the U.P. Act, 1975 being a special Act and has been enacted subsequently, will have an overriding effect. Pointedly, a query was put to the learned counsel for the contesting respondent nos.1, 2 and 3 as to why the provisions of the U.P. Act, 1975 should not prevail being Special Act over the Act, 1959. But he could not give any reply. He continued to harp and rely

on section 175 of the Act, 1959. Besides the fact that the U.P. Water Supply and Sewerage Act, 1975 (Act of 1975) is a Special Act, there is definite indication therein which shows that the Act of 1975 will have precedence.

24. Chapter -VI of Act, 1975 deals with tax, fees and charges and contains sections 52 to 64. Section 58 of Act, 1975 has made applicable certain provisions of Act, 1959. The provisions of section 178, 214 etc. of the U.P. Nagar Mahapalika Adhiniyam, 1959 shall mutatis mutandis apply in relation to tax mentioned in section 52, as they apply to the property described in section 173 of Act, 1959. It, by necessary implication excludes section 175 which contains besides the other things a special meaning to word "building' for the purposes of imposition of water tax. This brings us to the point that section 175 which has been heavily relied upon by the learned counsel for respondents has not been made applicable to the Act, 1975. In other words, the word "premises' which means land or building occurring in section 52 of Act, 1975 would apply. Interestingly while preparing the judgement, we could lay our hands on two Supreme Court judgments which should have been placed by the counsel for the parties but they failed. They are --

1. Municipal Board Saharanpur Vs. Imperial Tobacco of India Limited and another, AIR 1999 SC 264; and

2. **Municipal Board Saharanpur Vs. Shahdara (Delhi), Saharanpur Light Railway Co. Limited, AIR 1999 SC 277.**

25. These cases were decided with reference to the provisions of the U.P. Municipalities Act, 1916 which is similar to section 175 of Act, 1959. Section 129 of the U.P. Municipalities Act, 1916 dealing with restriction in the imposition of water tax, definition of building and compound as defined in section 2 sub sections (2) and (5) of the U.P. Municipalities Act, for the sake of convenience, are also reproduced herein below:-

Restriction in the imposition of water-tax is found in Section 129 of the Act, 1916. The said provision, as it stood at the relevant time, reads as under :

"129[Restriction in the imposition of water-tax] The imposition of a tax under clause (x) of sub-section (i) of Section 128 shall be subject to the following restrictions on the imposition of namely, water-tax.

a)that the tax shall not be imposed on land exclusively used for agricultural purposes, or where the unit of assessment is a plot of land or a building as hereinafter defined, on any such plot or building of which no part is within a radius, to be fixed by rule in this behalf for each Municipality, from the nearest stand-pipe or other water-work whereas at water is made available to the public by the board; and

b) that the tax is imposed solely with the object of defraying the expenses connected with construction, maintenance, extension of improvement of municipal water-works and that all moneys derived therefrom shall be expended solely on the aforesaid object.

Explanation - In this Section-

"(a) "building" shall include the compound (if any) thereof and, where there are several buildings in a common compound, all such buildings and the **common compound**;

(b) "a plot of land" means any piece of land held by a Single occupier, or held in common by several co-occupiers, whereof no one portion is entirely separated from any other portion by the land of another occupier or of other co-occupiers or by public property."

The terms "building" and " compound" are defined by Section 2, sub-sections (2) and (5) respectively as under : " Section 2. "Building" means a house, outhouse, stable, shed, hut or other enclosure or structure whether of masonry bricks, wood, mud, metal or any other material whatsoever, whether used as a human dwelling or otherwise, and includes any verandah, platform, plinth, staircase, doorstep, wall including compound wall other than a boundary wall of the garden or agricultural land not appurtenant to a house but does not include a tent or other such portable temporary shelter.

5. "Compound" means land, whether enclosed or not which is the appurtenance of a building or the common appurtenance of several buildings".

26. The Apex Court in the case of **Municipal Board, Saharanpur** (supra) the Court proceeded to find the meaning of words "common compound' not defined anywhere in the said Act. After considering the Explanation which enacts a separate definition of the terms "building and land' for the purposes of section 129, the Court held that in view of the peculiar definition of "building and land' for the purposes of levy of water tax in the said Act, the words "common compound'--Where there are several buildings situate in a common compound will include all such buildings in the common compound together and will be treated forming one building for the purposes of finding out of the permissible radius from the nearest water stand point.

27. A close reading of the said decision would show that it is based on the special and separate definition of terms "building and land' for the purposes of section 175 of Act, 1959. The Explanation attached to the section states in so many words that "building' shall include such compound (if any) thereof and, where there are several buildings in a common compound, all such buildings and the common compound.

28. In view of the discussion in the earlier part of this judgment we have held that the controversy in hand will be governed by the provisions of sections 52 and 55 of the Act, 1975 and to the exclusion of section 175 of Act, 1959, the principal of law laid down in the aforesaid decision may not be applicable here. We are called upon to decide the controversy on the touch stone of "premises' as contained in section 52 bereft of any such Explanation as contained either in section 129 of the Municipalities Act or the Explanation as attached to section 175 of the U.P. Municipal Corporation Act, 1959 (Act of 1959). The word "premises' in view of section 2(18) of the Act, 1975 means any land or building. The word "building' as defined in Act of 1959 reproduced above gives an extended and artificial definition for the purposes of section 175, will not be applicable.

29. Our above view finds support from the judgement of Apex Court in **M.B. Saharanpur vs. Shahdara (Delhi), Saharanpur Light Rail Co. Ltd., AIR 1999 SC 277**, wherein the Court interpreted the 'words' 'Buildings' and 'compound' with reference to their definition as defined in the Act, 1916, in the definition clause, though for the purposes of annual letting value of building, is germane for the present purposes, as it is based on the exclusion of specified definition of 'building' as contained in section 128 of Act, 1916. The relevant portion from para 7 is extracted below:-

"On a conjoint reading of these provisions therefore, it becomes clear that before the appellant Board can impose house tax under Section 140(a) on any property situated within its municipal limits if it is a "building" the unit of tax would be the building concerned including its compound wall and the compound wall would also cover within it the land situated in the said compound provided it is appurtenant to the building or a "compound" appurtenant to the several buildings. It is, therefore, obvious that if the "common compound" in which the housing complex belonging to the common owner is situated is not an appurtenance to several buildings within that complex, then the said land cannot be said to be a part and parcel of the building for the purpose of house tax. For imposing house tax on buildings under Section 140(1)(a) it has to be shown that the buildings with their common appurtenant land or the land in common appurtenance to several buildings situated nearby are available for imposing such a tax thereon. It is only such appurtenant land which can form part of the buildings for attracting house tax assessment proceedings. But if the "common compound" in which such buildings with appurtenant lands are situated also includes land which cannot be said to be a common appurtenance to several buildings situated therein or separately appurtenant to any given building, such land would be outside the sweep of the term "building". Such land, however, on its own could be legitimately made the subject matter of separate levy of house tax as an independent unit being open land. As seen from Section 140(1)(b) itself as the Board can impose the tax on annual value of lands which may not be covered by the sweep of the definition of the term "building". Once that conclusion is reached, it becomes obvious that all the buildings situated along with their appurtenant lands in one "common compound" belonging to the same owner cannot be treated as one unit for the purpose of imposing house tax under Section 128 (1)(i). The reasoning of the High Court in this connection cannot be found fault with on the scheme of the Act. It is pertinent to note that "common compound" which is relevant for the water-tax as per Section 129 of the Act to which we have made a detailed reference while deciding the companion appeal No. 1218 of 1976 is conspicuously absent in connection with imposition of house tax on the annual value of buildings or lands or both as found in Section 128 (1)(i). We, therefore, endorse the reasoning of the Division Bench of the High Court which rejected this contention of the appellant Board. Point No.2 is therefore answered in the negative against the appellant and in favour of the respondent."

30. It is not in dispute that the permissible radius for imposition of such water tax is 100 meters from the water stand point. Section 55 (b) (i) provides that water tax shall not be levied on any premises of which no part is situate within the prescribed radius. The premises being land and building, only such land and building or part thereof which falls within the prescribed radius i.e. 100 meters will be subject matter of water tax. Where several buildings as the case herein are spread over a vast piece of land measuring 116 acres, it is difficult to hold that the buildings which are independent and being not within the prescribed radius and they situate on land falling beyond the prescribed radius would be treated as part of those buildings which fall within the prescribed radius, for levy of water tax.

31. One acre consists of 4,840 sq. yards and is equivalent to 4046.856 sq. meters. The area of the plot is 116 acres which is equivalent to 561440 sq. yards = 4,69,435.296 sq. meters. In pursuance of the direction given in the earlier writ petition by this Court, a joint spot inspection was carried on 28th December, 2010 by the officials of the respondents and in the presence of the officials of the petitioner. It finds mention in para 5 of the impugned order that the entrance gate of the petitioner's campus is at 5.80 meters from the water stand point and the water tax has been levied on this premises alone. This itself is suggestive of the fact that only a very small portion/insignificant area of the petitioner's campus falls within the prescribed radius. It was urged before us that the petitioners have no grievance for payment of water tax for the land and building or part of the building falling within the prescribed radius. It was argued that the request to identify the buildings and land falling within the prescribed radius was made during joint inspection but no heed was paid. It is, therefore, desirable that again a joint inspection may be carried on in the light of the observations made above and the payment of water tax be modified suitably.

32. To clarify, it may be added that only such land which is lying in front or side of the building or the back courtyard necessary for the enjoyment of the building and utilized by the residents of the building as of right shall be included as part of the building.

33. Viewed as above, we find sufficient force in the submission of the petitioner and the point no.1 is decided accordingly in its favour as indicated above.

34. Now, we take up the second point with regard to the validity of notification. The learned counsel for the petitioner could urge only this much that when a slab of rate of tax has been prescribed by the statute, unless it is shown otherwise it is not open to levy the water tax at the maximum rate. Submission is that the State Government has issued the impugned notification dated 9th of April, 2003 authorizing the Jal Sansthan, Allahabad to levy water tax at the rate of 12.5 per cent on the annual letting value of the property without any application of mind. Elaborating the argument, it was submitted that the notification is wholly unreasonable, illegal and arbitrary as it does not provide for the distinction between the user and non user of water at all. The Act provides

water tax at the varying rate from 7.5 per cent to 12.5 per cent, the water tax should have been fixed depending upon the supply or use of water. In reply, the learned Additional Chief Standing Counsel invited our attention to paragraphs-7 (iii), (vi), (vii) and (viii) of the counter affidavit. For the sake of convenience these paragraphs are reproduced below:-

(iii) "Section 52 of the Act was amended by Section 2 of U.P. Act No.16 of 1999. Prior to the aforesaid amendment a Notification No.222/ukS-2-86-3(18) WSR-85 dated 01.04.1986 was issued under Section 52 of the Act declaring rate of water tax at 14% after considering the recommendation of the Jal Nigam established under Section 3 of the Act. Section 14 also provides for function of the Jal Nigam which includes advising on the tariff, taxes and charges of water supply in the areas of Jal Sansthan and local bodies. Thus the rate of 14% under Section 52 of the Act was declared by the aforesaid Notification dated 1.4.1986 on the recommendation of Jal Nigam. A true copy of the Notification No.222/ukS-2-86-3(18)WSR-85 dated 01.04.1986, is annexed herewith and is marked as Annexure No.CA-2 to the counter affidavit.

(iv) ....

(v)...

(vi) Section 44 provides that a Jal Sansthan shall from time to time so fix and adjust its rate of taxes and charges under this Act as to enable it to meet, as soon as feasible, the cost of its operation, maintenance and debt service and where practicable to achieve an economical return on its fixed assets. As per budget of 2012-13 the income from all sources of Jalkal Vibhag, Nagar Nigam, Allahabad is estimated at 49.82 crores as against the estimated expenses of 53.52 crores. Thus at the notified rate of water tax of 12.5% the estimated income shall be even lower than the estimated expenses of Jalkal Vibhag for the year 2012-13. Thus the rate of tax of 12.5% is not arbitrary and it is well within the limits prescribed under the Act.

(vii) It is also relevant to mention that in the year 1986 Allahabad was included in the financial assistance scheme of the World Bank for improvement in water facility. The financial assistance has been made admissible with the condition that Jal Sansthan shall augment its financial resources to meet its expenses. Thus from this point of view also the rate of tax under the impugned notification dated 9.4.2003 is wholly reasonable and not arbitrary.

(viii) It is well settled law that there is always presumption in favour of constitutional validity of a provision. The petitioners have completely failed to rebut this strong presumption."

35. The above quoted paragraphs fully justify the levy of water tax at the maximum permissible limit.

36. In Kendriya Nagarik Samiti (supra) it has been held that the opening words of section "for the purposes of this Act' give a clear direction about the object of the tax. Jal Sansthan is empowered to raise resources by way of tax for carrying out the purposes of this Act. It cannot be done for any purpose unconnected with the Act. The limit to which the tax may be levied has also been specified by providing that the water tax and sewerage

tax may be levied on the assessed annual value of the premises. The source of revenue is, thus, clearly indicated. A further safeguard has been provided by laying down that the recommendations of the Jal Sansthan has to be considered by the government before notifying the levy of taxes. The reasonableness of tax has also been ensured by fixing the maximum limits. Earlier, we are informed, the maximum rate was 14 per cent which has been reduced to 12.5 per cent of the annual letting value of the building.

37. Before closing the judgment we may reproduce the following passage from the judgment of the Apex Court in **Delhi Water Supply & sewerage Disposal Undertaking and another Vs. State of Haryana and others, (1996) 2 SCC 572**--"Water is a gift of nature. Human hand cannot be permitted to convert this bounty into a curse, an oppression. The primary use to which the water is put being drinking, it would be mocking the nature to force the people who live on the bank of a river to remain thirsty."

38. The management for potable water needs meticulous handling and requires an excellent mechanism particularly when it is becoming scarce day by day (See **Lucknow Grih Swami Parishad)** (supra).

39. Viewed as above, we do not find any merit in the second point of the petitioner. The said point is decided by holding that the impugned notification is valid.

40. Consequently, the writ petition succeeds and is allowed in part. The demand notice dated 21.9.2010, Annexure-1 and the order dated 9.2.2011 as contained in annexure-5 of the writ petition are hereby quashed. The respondent authorities are required to revise the water tax bill in the light of the observations made above after having a joint inspection if they so desire and with the association of the officials of the petitioner, issue a fresh demand bill preferably within a period of one month. We have been informed that the petitioners have paid the amount under the impugned bill; if that is so, the excess amount shall be refunded along with interest at the rate of 6 per cent per annum from the date of deposit till the date of actual payment.

41. No order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.03.2013

BEFORE
THE HON'BLE RAKESH TIWARI, J.
THE HON'BLE ANIL KUMAR SHARMA, J.

First Appeal from Order No. 611 of 2013

United India Insurance Company Ltd ...Petitioner
Versus
Smt. Suman and others ..Respondents

Counsel for the Petitioner:
Sri S.K. Mehrotra

Motor Vehicle Act 1988- Section 147- Tractor trolly used for carrying wooden log-deceased standing by side of tractor-due to fall of an wooden log-sustained injury-caused death-whether liability fixed upon insurance company proper?-held-'yes'-in absence of any material the wooden log used for commercial purpose or carring agricultural product-tractor possessing all valid papers with valid

driving license-Tribunal rightly fixed liability of insurance Company-Appeal dismissed.

Held: Para-37

It is clear from the provisions of the Act and Rules framed under the Motor Vehicles Act that once the trolley attached with the tractor has become part of the tractor, it does not require a separate insurance under Section 146 of the Act but only a separate registration in case where the tractor/trolley combination is being used for commercial purpose. The accident in the instant case is said to have taken place when one of the wooden log loaded on the trolley fell upon Jagdish, who succumbed to the injuries caused by fall of the said log. In fact Jagdish was standing by the side of the trolley and neither was a passing on it nor the accident took place on a public road. The owner of the tractor had a valid papers i.e. registration, permit and fitness certificate etc. and its driver also was possessing valid and effective driving licence, therefore, in the facts and circumstances of the case, the appellant Insurance Company has rightly been found liable to pay amount of compensation as per the award.

Case Law discussed:
2007(3)T.A.C. 20 (S.C.); 1997(1) TAC-100; AIR 2004 Supreme Court 4338; (2005)7SCC-364; (2007)SCC 56; (2003) 2 SCC-223; 2008(4)ALJ(NOC)802(ALL); 2004(8)SCC-697;(2005) ACC-423; 2005 ACJ-721;(CIVIL) No. 16 of 2004; (2003)1 SCC-223

(Delivered by Hon'ble Rakesh Tiwari, J)

1. Heard Sri S.K. Mehrotra, learned counsel for the appellant and perused the impugned award.

2. This First Appeal From Order has been filed against the judgment and award dated 5.12.2012 passed by the Motor Accident Claims Tribunal/ Additional District Judge, Court No.2, Kanpur Dehat in M.A.C.P. No. 411 of 2011, Smt. Suman and another versus Laxmi Chandra and another, whereby compensation of Rs. 4,21,000/- together with interest at the rate 6% per annum was awarded to the claimant-respondents.

3. The appellant has challenged the impugned award on the ground that the driver of tractor no. UP-78, BY-8577 was driving it in a rash and negligent manner, is erroneous and that Jagdish (since deceased) had not suffered any injuries from the said tractor, hence the claim petition before the Motor Accident Claims Tribunal was not maintainable against the appellant.

4. It is argued in the alternative that admittedly wooden logs were loaded in the trailer attached with the tractor for transportation, hence the tractor was being used for commercial purpose in breach of the terms and conditions of insurance policy and for this reason too there is no liability of the appellant-Insurance Company for making payment of compensation to the claimant-respondents. The findings of the Tribunal being in teeth of the terms and conditions of Insurance policy are liable to be set aside.

5. According to the learned counsel for the appellant, trailer attached with the tractor was not insured as no premium for it has been paid. He argues that without appreciating this material aspect the Tribunal has illegally held that the trailer does not require insurance, which finding, being against the provisions of Section 146 of the Motor Vehicles Act, 1988 is liable to be quashed.

6. Learned counsel for the appellant has relied upon a judgment rendered by the Apex Court in **Oriental Insurance Company Ltd. versus Brij Mohan and others, 2007(3) T.A.C.20 (S.C.)** in support of his contention that trailer and trolley ought to be separately insured, if used for commercial purpose.

7. Before considering the relevant provisions of the Act vis-a-vis the facts of the case, the law enunciated by the Apex Court in this regard may be looked into as it appears that law in respect of insurance of trolley or tractor and its registration is not finally settled and there are different views expressed by the Apex Court in this regard. Some High Courts and the Apex Court in some of the judgments have held that it is mandatory for the tractor and trolley in a tractor/trailer combination to be registered and insured separately as this combination can be brought within the definition of "Goods Carriage".

8. The questions considered by the various High Courts and the Apex Court in this regard are:-

(a) whether trailer is a motor vehicle

(b) whether non-insurance of trailer would take away the liability of the Insurance Company and in which cases ?.

9. Having heard Sri S.K. Mehrotra, learned counsel for the appellant at length we find that "semi-trailer" "trailer" "tractor" "transport vehicle" and " goods carriage" are defined in Sections 2(14), 2(39), 2(44), 2(46) and 2 (47) of the Act, respectively thus:-

"2(14) " Goods carriage" means any motor vehicle constructed or adapted for use solely for the carriage of goods, or any motor vehicle not so constructed or adapted when used for the carriage of goods;

2(39) " semi-trailer" means a vehicle not mechanically propelled (other than a trailer), which is intended to be connected to a motor vehicle and which is so constructed that a portion of it is super imposed on, and a part of whose weight is borne by, that motor vehicle;

2(44) " tractor" means a motor vehicle which is not itself constructed to carry any load (other than equipment used for the purpose of propulsion); but excludes a road roller;

2(46) " trailer" means any vehicle, other than a semi-trailer and a side-car, drawn or intended to be drawn by a motor vehicle."

2(47) " transport vehicle" means a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle;

10. The Karnataka High Court in **1997(1) TAC-100, Oriental Insurance Co. Ltd. versus N. Chandrashekaran and others** has held that in the event Insurance policy prohibits use of tractor for drawing an uninsured trailer attached to it, then no right accrues to the insurer to avoid its liability as such a combination was a "motor vehicle" within the meaning of word defined in the Act.

11. In paragraphs 16 and 17 of the judgment rendered by the Apex Court in **National Insurance Co. Ltd. versus Chinnamma and others, AIR 2004, Supreme Court-4338** the Court held that

a tractor fitted with a trailer may or may not be used as goods carriage. This aspect of the matter has been discussed in said paragraphs thus:

" 16. Furthermore, a tractor is not even a goods carriage. The "goods carriage" has been defined in Section 2(14) to mean "any motor vehicle constructed or adapted for use solely for the carriage of goods, or any motor vehicle not so constructed or adapted when used for the carriage of goods" whereas "tractor" has been defined in Section 2(44) to mean "a motor vehicle which is not itself constructed to carry any load (other than equipment used for the purpose of propulsion); but excludes a road-roller". The "trailer" has been defined in Section 2(46) to mean "any vehicle, other than a semi-trailer and a side-car, drawn or intended to be drawn by a motor vehicle".

17. A tractor fitted with a trailer may or may not answer the definition of goods carriage contained in Section 2(14) of the Motor Vehicles Act. The tractor was meant to be used for agricultural purposes. The trailer attached to the tractor, thus, necessarily is required to he used for agricultural purposes, unless registered otherwise. It may be, as has been contended by Mrs. K. Sharda Devi, that carriage of vegetables being agricultural produce would lead to an inference that the tractor was being used for agricultural purposes but the same by itself would not be construed to mean that the tractor and trailer can he used for carnage of goods by another person for his business activities. The deceased was a businessman. He used to deal in vegetables. After he purchased the vegetables, he was to transport the same to market for the purpose of sale thereof and not for any agricultural purpose. The tractor and trailer, therefore, were not being used for agricultural purposes. However, even if it be assumed that the trailer would answer the description of the "goods carriage" as contained in Section 2(14) of the Motor Vehicles Act, the case would be covered by the decisions of this Court in Asha Rani (supra) and other decisions following the same, as the accident had taken place on 24.11.1991, i.e.., much prior to coming into force of 1994 amendment"

12. **In Natwar Parikh & Co. Ltd. versus State of Karnataka and others, (2005) 7 SCC-364**, the Apex Court while dealing with the provisions of Karnataka Motor Vehicles Taxation Act, 1957 held that categorization of vehicles for taxation under the aforesaid Act depends upon use of motor vehicles on a given occasion, irrespective of whether adapted for that purpose or not. On facts of that case, the Court held that categorization of tractor-trailer as the "goods carriage" had rightly been made by the taxation authority based on its use on the given occasion.

13. In paragraph 19 of the judgment the Court made it clear that the provisions of the Katnataka Motor Vehicles Taxation Act, 1957 is to be construed on its own force and not with reference to the provisions of the Motor Vehicles Act, 1988. Therefore, the case is distinguishable as it itself provides that the findings recorded are not to be read with reference to the provisions of the Motor Vehicles Act.

14. The Apex Court in the case of **Oriental Insurance Co. Ltd. versus Brij Mohan and others, (2007) SCC-56**

relied upon by the learned counsel for the appellant has made a distinction between the "goods carriage" intended and being used for agricultural purpose and one used for commercial purpose noticing the judgment in **Asha Rani (2003) 2 SCC-223** wherein it was held that-

" as the provisions of Section 147 of the Act do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger travelling in a goods vehicle, the insurers would not be liable therefor. Furthermore, by reason of the 1994 amendment to the Act the liability of the owner of the vehicle to insure it compulsorily was enlarged only to cover the owner of the goods or his authorized representative carried in the vehicle. The intention of Parliament was not that the words "any person" occurring in Section 147 cover all persons who were travelling in a goods carriage in any capacity whatsoever.

Finally, the tractor was insured only for the purpose of carrying out agricultural works. In cross-examination the Insurance Company had merely accepted the suggestion that cutting earth and levelling the field with earth would be "agricultural work" but respondent no.1 himself had categorically stated in his claim petition before the Tribunal that the earth had been dug up and was being carried in the trolley to the brick kiln. Evidently, the earth was meant to be used only for the purpose of manufacturing bricks. Digging of earth for the purpose of manufacture of bricks cannot amount to carrying out of "agricultural work."

15. The Apex Court considering the effect of deviation for the purpose for which the vehicle was insured held that claim petitioner a labourer injured while travelling in trolley attached to tractor carrying earth to brick kiln but neither was the trolley insured in addition to the tractor nor was the tractor being used for "agricultural work" the only purpose for which the tractor was insured when the appellant received the injuries was commercial.

16. The Apex Court in that case, in exercise of its extra-ordinary powers under Article 141 of the Constitution of India directed that the award may be satisfied by the appellant Insurance Company but it would be entitled to realize the same from the owner of the tractor-trolley where-for it would not be necessary to initiate any separate proceedings for recovery of the amount as provided for in the Act.

17. The Division Bench of Allahabad High Court in re: **Markandey Singh versus Smt. Chanmuni Devi and another, 2008 (4) ALJ (NOC)802 (ALL)** decided liability of the Insurance Company in a motor accident claim holding that a motor vehicle can be used for social, domestic and pleasure purpose and insured's own business. However, when the driver used it as public vehicle, there was violation of the terms of the agreement for Insurance Company as such only owner and driver can be fastened joint and several liability to indemnify the injured.

18. From above discussion it appears that law enunciated by the Apex Court generally is that a tractor-trailer combination would constitute a motor vehicle and even a "Goods Carriage" under Section 2(47) if it is used as a vehicle for use in commercial purpose of

transporting goods and would fall under Section 2(14) as a "Goods Carriage" for the reason that both, chassis and trailer attached would fall within the meaning of expression Motor Vehicle, hence in such a case, trailer attached to the tractor is to be separately registered and insured, but if at the relevant time it is not being used for any commercial purpose the trailer does not require separate insurance and registration.

19. In this regard sections 146 and 147 of the Motor Vehicles Act, 1988, which provide for registration of the tractor and the tractor separately may also be looked into. These sections provide only for separate registration of trolley attached with tractor if used for commercial purpose but not for separate insurance which led the Courts to interpret these two provisions having divergent views.

20. Insurance of Motor Vehicles against third party risk falls under Chapter XI of the Motor Vehicles Act, 1988 which contains Sections 145 to Section 164. In this regard, sections 145, 146 and 147 of the Act are ones with which we are primarily concerned in this case for the purpose of consideration of aforesaid two questions. Section 147 is definition clause, which states the requirement of policies and limits of liability whereas section 146 of the Act provides necessity for insurance against third party risk.

21. Section 146 of the Act broadly mandates that a motor vehicle shall not be used except as a passenger vehicle by any person, in a public place unless the vehicle is covered by third party risk policy of insurance as required in the said chapter. The section is prohibitary in nature making insurance a mandatory pre requisite for the owner to have his vehicle insured before he can exercise his right to be indemnified by the Insurance Company in respect of an accident causing death or injury to the third party whereas Section 147 imposes certain restrictions in respect of use of a particular type of vehicle, which may provide for class of persons covered by it vis-a-vis their liability towards third party in the event of death or injury caused by a motor vehicle. Therefore, the scope of these sections is to be given a liberal interpretation in order to provide a meaningful and practical applicability to claimant (s) in order to fulfill the object of the legislation.

22. That brings us to the question as to whether in the instant case the Insurance Company can be made liable to pay the compensation. Admittedly, the vehicle in question insured with the Insurance Company was tractor alone. The sitting capacity of the vehicle was only one. It was meant to be used only for agricultural purpose and not for carrying of passengers on public road. Therefore, the Rule position may also be seen as applicable to State of Uttar Pradesh.

23. Rules 170,171, 173 & 175 of The Uttar Pradesh Motor Vehicles Rules, 1998, provide only for registration of vehicle. Rule 170 prohibits attachment of trailer to motor vehicles which shall be drawn in a public place if the laden weight of the trolley exceeds the limits provided therein and that the State Transport Authority may, by general or special resolution containing reasons therefor and subject to such conditions, as may be specified therein, prohibit or restrict the attachment of trailers or any

particular type of trailers generally onany specified route or area, to any motor vehicle or class of motor vehicles.

24. Rule 171 is in respect to Trailers fitted with tractors and provides that no tractor shall draw on a public road, a trailer exceeding half a ton in weight unladen and fitted with solid steel wheels less than 60 centimetres in diameter whereas Rule 173 provides for attendants on trailers.

25. Rule 175 pertains to Goods carriage, drawing of trailer or semi-trailer which provides that the holder of a goods carriage permit may use the vehicle for the drawing of any trailer or semi-trailer not owned by him, subject, to the condition that such goods carriage and the trailer or semi-trailer fulfills the requirements of these rules.

26. A trailer by itself is not a motor vehicle i.e. goods vehicle nor a passenger vehicle. The trailer if attached to a tractor is also not meant to carry any passenger or any load except in accordance with law as stated above. When a trailer is attached to the tractor, the tractor-trailer combination may or may not be used as goods carriage. The question whether the tractor becomes a goods vehicle when a trailer has been attached to it has been left open by the Apex Court in **National Insurance Co. versus V. Chinnamma, 2004(8) SCC-697** stating that a tractor is meant for agricultural purpose and fitted with a trailer may or may not answer the definition of goods carriage contained in the Motor Vehicles Act. The trailer attached to the tractor, thus, necessarily is required to be used for agricultural purposes.

27. The Apex Court dealing with the question as to where the vehicle was admittedly insured for carrying **some type of passengers, who could be carried in the vehicle or not** laid down the principle in **(i) National Insurance Company versus Bommithi Subbhayamma III (2005) ACC-423,2005, ACJ-721, (ii) National Insurance Company Ltd. Versus Baljit Kaur and others Appeal (Civil) No. 16 of 2004 decided on 6.1.2005, (iii) National Insurance Company Ltd. versus Ajit Kumar and others, (iv) New India Assurance Company Ltd. versus Asha Rani and others, (2003) 1 SCC-223**.

28. Section 61 of the Act under Chapter IV provides application of the Chapter to trailers which contains Sections 39 to 53 and their registration etc. whereas Section 146 of the Act provides for insurance of the motor vehicle. Perusal of Section 61 shows that trolley/trailer must have a separate registration but Section 146 of the Act does not provide for separate insurance of tractor and trolley. A semi-trailer is different from tractor-trolly as it is a part of the motor vehicle or the tractor itself whereas a trolley/trailer may become a part of the tractor if attached to it, which is at the option of the user of the tractor. The legislature, therefore, in its wisdom has not provided for separate insurance of tractor-trolley though it provides for a separate registration of the trolley if used for commercial purpose. This appears for the reason that a trolley without any motor/engine fitted for its propulsion would not be a motor vehicle itself unless attached to a tractor or external source of such kind. The registration of tractor-trolley depends solely upon the intention and actual use of tractor-trolley

combination and even in that case neither the Act nor the Rules provide for separate insurance merely because the cover policy provides a column in this regard for insurance of trailer which may be registered for commercial purpose would not make it mandatory upon the tractor owner to pay insurance premium for trolley or trailer being used for agriculture or domestic purpose or for his own use under the provisions of the Act as neither the Act nor Rules provide for insurance for use of trailer for agriculture or personal purpose.

29. If hypothesis of the Insurance Company that a trailer has to be separately insured in every circumstance is accepted then every agricultural equipment attached with the tractor to trail it including a trailer or trolley would require a separate insurance for which there is no provision made in the Act by the legislature.

30. India is an agricultural country whose farmers are poor. The legislature in its wisdom did not think it prudent to cover the agricultural equipments including trolley or even a trailer being used for agricultural purposes under the insurance policy unless proved otherwise that it is or was being used for commercial purpose for the reason that use of Trolley/trailer & tractor combination by farmers to carry grains/fertilizer etc. for domestic and agricultural purposes cannot be considered as it commercial purpose and saddled with liability of insurance as a commercial vehicle such as "goods carriage". Further, after imposition of ceiling the farmer's land had been reduced and no farmer can afford a tractor if he cultivates his agricultural land only. He can render his services along with tractor to other farmers to help in their cultivation may be for some consideration.

31. As regards use of trolley/trailer for domestic purpose is concerned, it all depends upon the intention of the user and its actual use. Such tractor-trolley attachment is put to particularly when the tractor is registered as motor vehicle and if a trailer attached with the tractor carries agricultural produce for sale in 'Mandi' or for any other commercial purpose without trolley being registered for commercial purpose and insured separately for this purpose, it would be in violation of the terms and conditions of the insurance policy.

32. In case of a dispute about the use of the trolley, for domestic purpose or for commercial purpose the onus would be upon the person/party which disputes that tractor-trolley combination was being used for commercial purpose at the relevant time of accident and not domestic or for agricultural purpose. In our considered opinion, the trolley is liable to be insured if it is used for commercial purposes and not for agricultural or domestic purpose, therefore, the insurance of trolley/trailer attached to a tractor depends upon the intention and its actual use, therefore, it will not take away the liability of the Insurance Company until and unless it is proved that the trolley was being used for commercial purposes. If the tractor is not insured for commercial purposes, the trolley attached to it or any other vehicle acquires the status of the vehicle to which it is attached i.e. for domestic or agricultural purposes etc.

33. In the instant case, the appellant had not discharged its burden of proof that trolley/tractor attached with trailer was-

(i) on public road at the time of accident; and

(ii) it was being used for commercial purpose.

34. There is no evidence on record from which it could be established by the appellant-United India Insurance Company Ltd. that the tractor-trolley was in fact being used on public road for commercial purposes at the relevant time. The specific case of the appellant is that trolley attached with the tractor in question is said to have been loaded with logs in the jungle and when the tractor was started, one of the logs fell upon Jagdish, who was standing near the stationary tractor/trolley. He died due to the injury caused by the fall of wooden log from the tractor-trolley.

35. The Tribunal has relied upon the evidence of P.W.2 in its judgment from which it appears that tractor-trolley was not being used for commercial purpose and no contra evidence has been adduced by the appellant showing that in the instant case the tractor was being used for commercial purposes.

36. If the tractor attached with the trolley was to be used for transportation of wooden logs from the jungle, which is an agriculture produce for sale or commercial purpose, then the appellant ought to have established to whom the wooden logs were being delivered and for what purpose, otherwise in absence of any such evidence for rejecting the claim of the appellant it has to be held that tractor being a motor vehicle registered and insured for agricultural purpose was being used for transportation of agricultural goods i.e. the logs on trolley attached with it for domestic use.

37. It is clear from the provisions of the Act and Rules framed under the Motor Vehicles Act that once the trolley attached with the tractor has become part of the tractor, it does not require a separate insurance under Section 146 of the Act but only a separate registration in case where the tractor/trolley combination is being used for commercial purpose. The accident in the instant case is said to have taken place when one of the wooden log loaded on the trolley fell upon Jagdish, who succumbed to the injuries caused by fall of the said log. In fact Jagdish was standing by the side of the trolley and neither was a passing on it nor the accident took place on a public road. The owner of the tractor had a valid papers i.e. registration, permit and fitness certificate etc. and its driver also was possessing valid and effective driving licence, therefore, in the facts and circumstances of the case, the appellant Insurance Company has rightly been found liable to pay amount of compensation as per the award.

38. The appellant Insurance Company has failed to establish that tractor-trolley was being used as a commercial vehicle for commercial purpose at the time of accident and the accident had occurred on a public road.

39. As stated above, the Apex Court in the case of National Insurance Co. Ltd. versus V. Chinnamma & others (surpa) has left open the question as to whether

the tractor becomes a good vehicle when a trailer has been attached to it.

40. The law cited by the counsel for the appellant is not applicable to the facts of this case. In our considered opinion, the Tribunal has not committed any error in law or on facts in holding that appellant is liable to pay the amount to the claimants under the award.

41. For all the reasons stated above, the appeal is dismissed.

42. Statutory amount deposited by the appellant in this Court be remitted to the Tribunal concerned within two weeks from today for adjustment and disbursement to the claimants in accordance with the award.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.03.2013

BEFORE
THE HON'BLE ANIL KUMAR, J.

Misc. Single No. 652 of 1998

Dedaur Inter College Dedaur Raebareli ...Petitioner
Versus
Addl. Collector (Admn.) Raebareli & others ...Respondents

Counsel for the Petitioner:
Sri G.S. Nigam

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

(A) Uttar Pradesh Bhudan Ygya Act, 1952-Section 14- Whether Private Inter College can be treated "Landless Agricultural Labours" for grant of Patta? Held-"No" such action treating landless person-viod ab 'initio'.

Held: Para-32

In view of the above said fact and taking into consideration the provisions in respect to grant of patta/ lease under Section 14 of the Act , the petitioner does not falls within the ambit and scope of the definition of 'landless person' to whom patta/ lease can be granted under the said section, initial grant of patta/ lease in favour of the petitioner by Bhoodan Yagya Samiti treating it as 'landless person' is an act which is void ab initio because the petitioner is not eligible for the same under Section 14 of the Act in view of the movement started by Acharya Vinoba Bahave known as "Bhoodan Yagya Movement" in which the Zamindars etc. donated their lands to Acharyaji and thereafter the said lands came with Bhoodan Yagaya Simiti, and the same was to be granted as per the mandate provided by the legislature under Section 14 of the Act, so keeping in view the said facts the arguments advanced by learned counsel for the petitioner and taking into aid the provisions of Section 195 read with Section 198 (i-a) of the U.P.Z.A. & L.R. Act, the said argument has got no force , hence rejected.

(B)Constitution Of India:Art. 226-Principle of Natural Justice-where action of granting lease itself 'ab initio viod'-observance of Principle of Natural Justice-held-meaning-less.

Held: Para-37

The arguments advanced by learned counsel for the petitioner that prior to passing of the impugned order, no opportunity of hearing has been given to the petitioner, so the said action on the part of respondents is in violation of principles of natural justice , has got no force in view of the facts stated herein above specially on two conditions; (a)

where the facts are admitted/ undisputed or (b) nothing unfair can be inferred by non-observance of natural justice , lease / patta cannot be granted to the petitioner/ institution under Section 14 of the Act, because it does not fall under the category of landless person, hence the petitioner cannot derive any benefit on the arguments in question and on the basis of judgments rendered in the case of Ramji Dass and others (supra) and Ram Dhani Singh (supra).

Case Law discussed:
1978, ARC, 496; 1996 RD 374; 2002(1) AWC 84; 2012 (6) ADJ 21; 2012 (11) SC 321; AIR 1988 SC 2239; 1988 RD 363

(Delivered by Hon'ble Anil Kumar, J)

1. Heard Sri G.S. Nigam and Sri Abhishit Saran Nigam, learned counsel for the petitioner, Sri Pankaj Patel, learned Additional Chief Standing Counsel and perused the record.

2. Petitioner/Dedaur Inter College, Dedaur, Raebareli (hereinafter referred to as an ' Institution') is a recognized educational institution governed by the provisions as provided under U.P. Intermediate Act, 1921, imparting education upto intermediate classes in various subjects including Science, Commerce and Arts. In order to impart education in Botany subject , a request has been made by the Management Committee of the institution to opposite party no.5/ Bhoodan Yagya Samiti, Raebareli for allotment of a land.

3. Accordingly in the year 1968 a patta/lease granted in favour of the institution in respect to plots no. 39/0.041 Hec., 434/0.481 hectare, 435/0.275 hectare, 449/0.278 hectare, 451/0.041 hectare and 452/0.461 hectare (hereinafter referred to as ' land in question').

4. In the mutation case on 24.2.1998 an order was passed in favour of the petitioner recording the said land in the name of institution in the revenue record (Khatauni of fasli years 1375-1377), as Bhumidhar with transferable rights .

5. On 18.4.1996, the petitioner by way of rumour in the village , came to know that land in question has been allotted to some other person by opposite party no.4 / Gram Panchyat, Nagdilpur, District Raebareli . So after engaging a Counsel , petitioner inspected the revenue record in the office of the Collector, Rae bareli and it came to knowledge that the lease/ patta granted in favour of the petitioner/ institution, has been canceled on 29.6.1991 by opposite party no.1 / Additional Collector(Administration), Raebarli.

6. Accordingly as per the legal advise given to the institution, an application dated 26.9.1991 was moved for setting aside the ex parte order dated 29.6.1991 alongwith an application for condonation of delay, before opposite party no.2/ Collector, Rae bareli. After hearing the learned counsel for the petitioner as well as District Government Counsel, opposite party no.2 / Collector Rae Bareil rejected the said application by order dated 8.12.1997 (Annexure no.7) . In view of the above said factual background, present writ petition has been filed for quashing the orders dated 29.6.1991 and 8.12.1997 passed by opposite party nos. 1 and 2 respectively.

SUBMISSION OF LEARNED COUNSEL FOR THE PETITIONER

(a) Learned counsel for the petitioner while challenging the impugned orders

submits that the land in question has been granted by way of patta/ lease in favour of the petitioner by opposite party no.5/ Bhoodan Yagya Samiti, Rae bareli in the year 1968 treating the institution as ' landless person' as per the provisions as provided under Section 14 of the Uttar Pradesh Boodan Yagna Act, 1952 (hereinafter referred to as an 'Act') subsequently, it was recorded in the revenue record as Bhumidhari land with transferable rights of the institution.

7. Power to cancel the grant of patta/lease has been introduced in Act by way of Section 15-A through U.P. Act no.10 of 1975 with effect from 21.1.1975 by which the Collector has been given powers to cancel the grant after making an inquiry on the ground that grant was irregular and was obtained by grantee by misrepresentation or fraud

8. Further, sub Section (2) of Section 15-A provides that notice of every proceeding under sub section (1) shall be given to the Committee and sub section (3) provides that no order shall be passed under sub section (1) except after giving an opportunity of being heard to the grantee. In the instant case, no opportunity of hearing has been provided to the petitioner before passing the order of cancellation dated 29.6.1991.

9. For the first time the said order came to the knowledge of the petitioner on 18.4.1996 thereafter on inspection it also came to the knowledge of the petitioner that prior to the passing of the order of cancellation , a notice has allegedly said to be served on 23.7.1990 upon the Pradhan Adhyapak of the institution. The said facts are totally incorrect, so with application for recall of the said order, an affidavit of Sri Ram Manohar, the then Manager of the Institution, has been filed stating therein that the service of the notice prior to passing of the order dated 29.6.1991 has been made on the Pradhan Adhyapak of the institution, is incorrect fact and his signature on the notice is forged as he has already retired from service but ignoring the said facts opposite party no.2 passed the order dated 8.12.1997 rejecting the application for recall of the ex parte order dated 29.6.1991, so the impugned order on the part of opposite party no.2 is arbitrary in nature.

10. Further, the opposite party no.1 in the order dated 29.6.1991 has not mentioned that any notice has been served on Bhoodan Yagna Samiti which is mandatory under sub section (2) of Section 15-A of the Act so the action on the part of opposite party no.1 thereby passing the order of cancellation dated 29.6.1991 without hearing the Bhoodan Yagna Samiti as well as the petitioner and declaring that the land in question shall vest with opposite party no.4/Gram Panchayat, Nagdilpur, Pargana Tehsil and District Rae bareli after cancellation of patta , is an action in contravention of principles of natural justice, contrary to law, cannot sustain, so the impugned orders dated 29.6.1991 and 8.12.1997 passed by opposite party nos. 1 and 2 liable to be set aside in view of the law as laid down by Hon'ble the Supreme Court in the case of **Ramji Das and others Vs. Mohan Singh, 1978, ARC ,496** as well as the decision of this Court in the case of **Ram Dhani Singh Vs. State of U.P. and others, 1996 RD 374.**

11. Further, during the course of arguments a question has been put to the

learned counsel for the petitioner that whether the institution is entitled to get patta/ lease as per the provisions of Section 14 of the Act (as stood at the relevant time) on the ground that the institution is a 'landless person'.

12. Submission which has been made by the learned counsel for the petitioner to the said query that in the present case patta/ lease granted to the petitioner/institution in the year 1968 under Section 14 of the Act by the Bhoodan Yagya Simiti, authorized to grant the same treating as 'landless person'.

13. And 'landless person' has not been defined in the Act. So as per the provisions of Section 2(f) (i to iii) of the Act quoted below:-

"Section 2(f) words and expressions not defined in this Act shall have the meaning assigned to them-

(i) in areas referred to in sub clause (I) of clause (c) in the U.P. Zamindari Abolition and Land Reforms Act, 1950

(ii) in areas referred to in sub-clause(ii) of the said clause in the U.P. Tenancy Act, 1939;

(iii) in other areas, in the law relating to land tenure applicable to the land."

14. The meaning of ' landless person' shall be the same as given under Section 198 of U.P. Zimindari Abolition and Land Reforms Act, 1950 by way of amendment in corporated by U.P. Act no. 1 of 1951, the relevant provisions quoted as under:-

“Amendment of Section 198 of U.P. Act I of 1951- In section 198 of the Principal Act-

(I) in sub-section (i)-

(a) the word and figures" or 237" shall be deleted",

(b) before clause (a) the following shall be added as a new clause (i-a) -

"(i-a) a recognized Educational Institution for the purpose connected with instruction in agriculture, horticulture or animal husbandry;"

15. In view of above said facts, it is submitted by learned counsel for the petitioner that taking into consideration the provisions as provided under Section 195 and 198 (i-a) of the U.P. Zamindari Abolition and Land Reforms Act, 1950 as well as the provisions of Section 14 of the Act, the lease/patta in favour of the petitioner has rightly been rightly by opposite party no.5 treating it as ' landless person'.

16. Learned counsel for the petitioner further submits that as there is no limitation provided for cancellation / grant of patta under the Act so keeping in view the provisions of Article 137 of the Limitation Act as well as Section 198(6) of the U.P. Z.A.& L.R. Act after expiry of 23 years from the date of grant of patta/ lease in favour of the petitioner by opposite party no.5/ Boodan Yagya Samiti, Raebareli, the said patta cannot be cancelled by order dated 29.6.1991 by opposite party no.1 as such the said order passed by opposite party no.1 is without jurisdiction , contrary to law, liable to be

set aside and the writ petition may be allowed.

SUBMISSION OF LEARNED STATE COUNSEL

17. Sri Pankaj Patel, learned State counsel while supporting the impugned orders under challenge in the writ petition, submits that as per the provisions of Section 14 of the Act , patta/lease can be granted only to landless person so initially granted in favour of the petitioner by opposite party no.5 / Bhoodan Yagya Samiti, Rae bareli in the year 1968, is void ab initio, as the petitioner is not entitled for the same for imparting education to the students in Botany subject, in addition to the subjects already taught by the institution up to intermediate classes . In this regard he placed reliance on the following judgments:-

1. Yog Sansthan Vs.Collector, Moradabad and others,2002(1) AWC 84.

2. Dayanand Sury Englo Sanskrat Higher Secondary School Vs. State of U.P. and others, 2012 (6) ADJ 21.

3. State of Uttarakhand and others Vs. Guru Ram Das Educational Trust Society, 2012(11) SC 321.

18. Sri Pankaj Patel, learned Additional Chief Standing Counsel argued that in view of the provisions of Section 198 (i-a) of the U.P.Z.A.& L.R. Act(as stood at the relevant point of time) the petitioner/ institution is not entitled for grant of patta as it is not a Educational Institution for a purpose connected with instructions in agriculture, horticulture or animal husbandry so initially grant of lease/ patta in favour of the petitioner by opposite party no.5 is void initio act under Section 14 of the Act as such there is no illegality or infirmity in the impugned order dated 29.6.1991 passed by opposite party no.1 canceling the lease/patta..

19. Learned State Counsel further submits that so far as the arguments advanced by learned counsel for the petitioner that opposite party no.1 has got no jurisdiction to cancel the patta as per Section 15 of the Act , has got no force in view of the law as laid down by Hon'ble Apex Court in the case of **U.P. Bhoodan Yagna Samiti, U.P. Vs. Braj Kishore and others , AIR 1988 SC 2239.**

20. Lastly, it has been submitted on behalf of the respondents that so far as the arguments advanced by learned counsel for the petitioner that after lapse of period of 23 years from the date of grant of patta/ lease in favour of the petitioner by opposite party no.5, cannot be cancelled in view of the provisions as provided under Section 198(6) of the U.P.Z.A.& L.R. Act and Article 137 of the Limitation Act , is misconceived arguments because there is no limitation provided for cancellation of the same under Section 15 of the Act keeping in view the said fact as well as the fact that the petitioner is not entitled to get the patta under Section 14 of the Act as it does not fall within the definition of 'landless person', so initial grant of patta in the year 1968 by opposite party no.5 is void initio, hence there is no illegality or infirmity in the impugned orders under challenge in the present writ petition,accordingly the present writ petition is liable to be dismissed.

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

22. Aim and object for enacting the Act 1952 as as under:-

"In the last cold weather Acharya Vinoba Bhave started the Bhoodan Yagna movement with a view to obtain land so that it could be distributed among the landless person of the State. The response of the people of the State very encouraging. The Zamindars as well as the tenants donated their land to Acharyaji. There were, however, certain legal difficulties. The donations made by the Zimindars were defective according to the provisions of Section 28 of the U.P. Zamindari Abolition and land Reforms Act, 1950. The tenants did not possess any right to transfer their land by gift. The Bill is intended to remove these and certain other legal difficulties and to ensure the achievement of the object of this movement. Both in regard to the donations of land to the Bhoodan Yagna and its distribution to the landless person."

23. Thus, the intention of the legislature in framing the U.P. Bhoodan Yagna Act, 1952 is to grant land to landless person who are bedded to the soil or who have attachment with the soil in any form and who have know about the soil. Philosophy that the land must go to the tiller has been implemented in so many countries and reasonably in India to implement preamble of the Constitution i.e. to achieve social justice and to secure distributive justice under Article 38 of the Constitution of India.

24. Hon'ble the Supreme Court in the case of **U.P. Bhoodan Yagna Samiti Vs. Graj Kishore and others, 1988 RD 363** has held as under:-

" It is now well settled that in order to interpret a law one must understand the background and the purpose for which the law was enacted. And in this context as indicated earlier if one has bothered to understand the common phrase use in the Bhoodan Movement as 'Bhomihin Kissan' which has been translated into English to mean ' landless persons' there would have been no difficultly but apart from it even as contended by learned counsel that it was clearly indicated by Section 15 that the allotment could only be made in accordance with the scheme of Bhoodan and the movement of Sri Vinoba Bhave, it would be worthwhile to quote from 'Vinoba and His Mission' by Suresh Ram Printed with an introduction by Sri Jaya Prakash Narain and foreword by Dr. S. Radhakrishnan. In this work, statement of annual Sarvodaya conference at Sevapuri has been quoted as under:-

"The fundamental principle of the Bhoodan Yagna Movement is that all children of the soil have an equal right over the Mother Earth, in the same way as those born of a mother have over her. It is, therefore, essential that the entire land of the country should be equitably redistributed a new providing roughly at least five acre of dry land or one acre of wet land to every family. The Sarvodaya Samaj, by appealing to the good sense of people , should prepare their minds for this equitable distribution and acquire within the next two years at least 25 lakhs of acres of land from about five acres per village. This land will be distributed to those landless labourers who are versed in agriculture, want to take to it, and have no other means of subsistence."

25. In order to decide the controversy involved in the present case , the necessary of Section 14, 15 and 15-A of the Act are as under:-

"14. **Grant of land to landless person**.- [(1)] The Committee or such other authority or person as the Committee with the approval of the State Government , specify either generally or in respect to any area, may , in the manner prescribed , grant lands which have vested in it to the [landless agricultural labourers] and the grantee of the land shall-

(I) where the land is situate in any state which has vested in the State Government under and in accordance with section 4 of the U.P. Zamindari Abolition and Land Reforms Act, 1950, acquire in such land the right and the liabilities of a [bhumidhar with non-transferable rights] and the grantee of the land shall

(II) where it is situate in any other area, acquire therein such rights and liabilities and subject to such conditions, restrictions and limitations as may be prescribed and shall have effect, any law to the contrary notwithstanding.

[(2)] Where the committee or other authority or person as aforesaid fails to grant any land in accordance with sub-section (1) within a period of three years from the date of vesting of such land in the committee or from the date of commencement of the Uttar Pradesh Bhoodan Yagna (Amendment) Act, 1975, whichever is later, the Collector may himself grant such land to the landless agricultural labourers in the manner prescribed, and thereupon the grantee shall acquire the rights and liabilities mentioned in sub-section (1) as if the grant were made by the committee itself.

(3)[***]

(4) In making grant of land under this section, the committee or other authority or person as aforesaid or the Collector, as the case may be , shall observe the following principles:

(a) At least fifty percent of the land available for grant shall be granted to persons belonging to the Scheduled Casts, Scheduled Tribes and persons belonging to the Kol, Pathari, Khairwar, Baiga, Dharikar, Panika and Gond Tribes and such other tribes as the State Government on the recommendation of the committee may notify in this behalf;

(b) The land situate in one village shall , as for as possible, be granted to persons residing in that very village.

15. Grant to be made in accordance with Bhoodan Yagna Scheme.- All grants shall be made as for as may be in accordance with the Scheme of Bhoodan Yagna.

15-A.Cancellation of certain grants.- (1) The Collector may of his own motion and shall on the report of the committee or on the application of any person aggrieved by the grant of any land made under Section 14, whether before or after the commencement of the Uttar Pradesh Bhoodan Yagna(Amendment) Act, 1975 inquire into such grant, and if he is satisfied that the grant was irregular or was obtained by the grantee by misrepresentation or fraud, he may-

(I)cancel the grant, and on such cancellation , notwithstanding anything contained in Section 14 or in any other law for the time being in force , the rights, title and interest of the grantee or any person claiming through him in such land

shall cease, and the land shall revert to the committee; and

(ii) direct delivery of possession of such land to the committee after ejectment of every person holding or retaining possession thereof, and may for that purpose use or cause to the used such force as may be necessary.

(2) Notice of every proceeding under sub-section(1) shall be given to the committee , and any representation made by the committee in relation thereto shall be taken into consideration by the Collector.

(3) No order shall be passed under sub-section (1) except after giving an opportunity of being heard to the grantee or any person known to the Collector to be claiming under him.

(4) The order of the Collector passed under sub-section (1) shall be final and conclusive."

26. Before amendment of Section 14 by the Uttar Pradesh Bhoodan Yagna(Amendment) Act, 1975 the word which existed therein was "landless person" but by way of said amendment same has been substituted by " landless agricultural labourers" .

27. Rule 14 of the Uttar Pradesh Bhoodan Yagna Rules, 1953 provides as under:-

"**14 Rights to liabilities of persons to whom land is granted.**-(1) The Bhoodan Yagna Committee shall execute a donation deed which may be in the form as in Appendix VII.

(2) The grantee of land in the areas to which the U.P. Zamindari Abolition and Land Reforms Act, 1950, does not apply shall acquire such right and liabilities as the committee may confer under the law. The grantee shall be subject to the following conditions, restrictions , and limitations:

(a) the grantee shall pay the rent to the Committee in such installments and on such dates as the Committee may specify;

(b) the grantee shall not be entitled to sublet or transfer the land; and

(c) the grantee shall not be entitled to use the land for any purpose other than for which it was granted."

28. In the instant matter , the core question to be decided is whether the institution (Dedaur Inter College, Dadaur, Rae Bareli) imparting education upto Intermediate classes as per the provisions as provided under U.P. Intermediate Education Act , 1921, can be granted the land for extension of Botany classes by opposite party no.5 under Section 14 of the Act by way of lease/ patta treating it as 'landless person'.

29. Hon'ble the Supreme Court in the case of **U.P. Bhoodan Yagna Samiti, U.P. (supra)** in respect to grant of patta/lease under Section 14 of the Act held as under:-

"It was contended by learned counsel appearing for the petitioner (Bhoodan Yagna Samiti) that although Sec. 14 quoted above does not clearly indicate what the law meant by landless persons but in view of the scheme of Bhooden

Yagna the movement which Acharya Vinoba Bhave and later Jaya Prakash Narain carried out and the purpose of the movement clearly indicated that when in Sec. 14 allotment was contemplated in favour of landless persons it only meant those landless persons whose main source of livelihood was agriculture and who were agriculturists residing in the village where the land is situated and who has no land in their name at that time. It never meant that all those rich persons who are residing in the cities and have properties in their possession but who are technically landless persons as they did not have any agricultural land in their name in the tehsil or the village where the land was situated or acquired by the Bhoodan Samiti that it could be allotted in their favour. This was not the purpose or the philosophy of Bhoodan Yagna and therefore it was contended that such a view which has been taken by the learned Judges of the High Court is contrary to law and the interpretation put by the High Court on the language of Sec 14 could not be justified. It was contended that landless person has to be interpreted in the background of the law which was enacted and the movement and the philosophy behind the movement which was the basis of the enactment of this law and it is only in that background that these words landless persons could be properly interpreted.

At the time when Acharya Vinoba Bhave started his movement of Bhoodan Yagna our rural society had a peculiar diversity. There were some who owned or had leasehold rights in vast tracks of agricultural lands whereas on the other hand there were those who were working on agriculture as labourers in the fields and depending on what little they got from their masters. Sometimes they were even bound down to their masters and therefore had to lead miserable life. It was this problem in rural India which attracted the attention of Acharya Vinoba Bhave followed by Shri Jaya Prakash Narain and they secured large donations of land from big land holders and the scheme of the Bhoodan Yagna movement was to distribute this land to those Bhoomihin Kissan who were living on agriculture but had no land of their own and it was to make this effective and statutory that this law was enacted and in this context it is clear that if one had noticed even the slogan of the Acharya Vinoba Bhave s movement or its basis and the purpose it would have clearly indicated the problem which was to be remedied by this enactment and if this was looked into for the purpose of interpretation of the term landless persons no Court could have come to the conclusion which has been arrived at in the impugned judgment.

This principle of interpretation was not enunciated only for interpretation of law but it was enunciated for interpretating any piece of literature and it meant that when you have to give meaning to anything in writing then you must understand the real meaning. You can only understand the real meaning by understanding the reference, context, the circumstances in which it was stated and the problems or the situations which were intended to be met by what was said and it is only when you take into consideration all this background, circumstances and the problems which have to be tackled that you could really understand the real meaning of the words. This exactly is the principle which deserves to be considered.

When we are dealing with the phrase landless persons these words are from English language and therefore I am reminded of what Lord Denning said about it. Lord Denning in The Discipline of Law at Page No. 12 observed as under:

Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticized. A Judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were PG NO 868 drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsmen. He must set to work on the constructive task of finding the intention of Parliament.

And it is clear that when one has to look to the intention of the Legislature, one has to look to the circumstances under which the law was enacted. The Preamble of the law, the mischief which was intended to be remedied by the enactment of the statute and in this context, Lord Denning, in the same book at Page No. 10, observed as under:

At one time the Judges used to limit themselves to the bare reading of the Statute itself-to go simply by the words, giving them their grammatical meaning and that was all. That view was prevalent in the l9th century and still has some supporters today. But it is wrong in principle. The Statute as it appears to those who have to obey it--and to those who have to advise them what to do about it; in short, to lawyers like yourselves. Now the eccentrics cut off from all that is happening around them. The Statute comes to them as men of affairs--who have their own feeling for the meaning of the words and know the reason why the Act was passed--just as if it had been fully set out in a preamble. So it has been held very rightly that you can enquire into the mischief which gave rise to the Statute--to see what was the evil which it was sought to remedy."

It is now well settled that in order to interpret a law one must under-stand the background and the purpose for which the law was enacted. And in this context as indicated earlier if one has bothered to under-stand the common phrase used in the Bhoodan Movement as Bhoomihin Kissan which has been translated into English to mean landless persons there would have been no difficulty but apart from it even as contended by learned counsel that it was clearly indicated by Sec. 15 that the allotments could only be made in accordance with the scheme of Bhoodan Yagna. In order to understand the scheme of Bhoodan and the movement of Shri Vinoba Bhave, it would be worthwhile to quote from Vinoba And His Mission by Suresh Ram printed with an introduction by Shri Jaya Prakash Narain and foreword by Dr. S. RadhaKrishnan. In this work, statement of annual Sarvodya Conference at Sevapuri has been quoted as under: PG NO 869

The fundamental principle of the Bhoodan Yagna movement is that all children of the soil have an equal right over the Mother Earth, in the same way as those born of a mother have over her. It is, therefore, essential that the entire land of the country should be equitably redistributed anew, providing roughly at least five acres of dry land or one acre of wet land to every family. The Sarvodaya Samaj, by appealing to the good sense of the people, should prepare their minds for this equitable distribution and acquire within the next two years at least 25 lakhs of acres of land from about five lakhs of our villages on the rough basis of five acres per village. This land will be distributed to those landless labourers who are versed in agriculture, want to take to it, and have no other means of subsistence. "

This would clearly indicate the purpose of the scheme of Bhoodan Yagna and it is clear that Sec. 15 provided that all allotments in accordance with Sec. 14 could only be done under the scheme of the Bhoodan Yagna.

This Court in the case of **Dayanand Sury Sanskrat High Secondary School (supra)** where that facts of the case were that the land has been allotted under Section 14 of the Act to the institution known as Dayanand Sury Sanskrat High Secondary School, a recognized institution under U.P. Intermediate Education Act, imparting education including the subject of agriculture and is not earning livelihood through agriculture under the capacity of 'landless person' the Apex Court held that the land cannot be allotted , the relevant portion is quoted as under:-

"Section 14 of the Act empowers the Bhoodan Yagna Committee for Uttar Pradesh, a body corporate having a perpetual succession (hereinafter referred as Committee) established and constituted under Sections 3 and 4 of the Act to grant lands vested in it to the "landless persons" now replaced by word "landless agricultural labourers" vide U.P. Act No.10 of 1975 with the approval of the State Government.

In Matoley Vs. State of U.P. and another 1986 ALJ 645 a Division Bench of this Court held that "in order to find whether a particular grant made in favour of a person under the provisions of Bhoodan Yagna Act is regular or not, the provisions of the Act as they stood at the time of making of the grant have to be looked into." The grant made to a person fulfilling conditions required at the relevant time, cannot be cancelled on account of introduction of new conditions in the Act subsequently.

The aforesaid decision has been followed by this court in the Case of Bhagwati Prasad and others Vs. Additional Collector 2003 (95) RD 278 and Ram Swarup Vs. Collector, Fatehpur and others 2003 (95) RD 320.

At the relevant time, committee was authorized to make grants in favour of "landless persons."

The primary question which falls for consideration therefore, is whether the petitioner as an Institution was a 'person' eligible for allotment of land under the Act.

Sri P.N. Saxena, learned counsel for the petitioner on the strength of the

definition of the person contained in the General Clauses Act/ U.P. General Clauses Act and on the basis of illustrations of the U.P. Imposition of Land Holdings Act, 1953 and the U.P. Z.A. & L.R. Act, 1950 contended that the meaning of the 'person' has to be construed in a wider sense so as to include a juristic person and as such petitioner was entitle to receive grant under the Act.

The illustrations cited by the counsel for the petitioner to support his argument that the word 'person' in the Act refers to a legal person or that it include within its fold even a juristic person cannot be accepted as under different Acts different meanings have been assigned to the word 'person'. As for example The Citizenship Act, 1955 in Section 2(f) defines the 'person' so as not to include any company or association or body of individuals. Similarly according to Section 2(g) of the Representation of People Act, 1950 person does not include a body of persons. Therefore, the definition of a 'person' in one Act cannot be straight away applied to another Acts as it may carry a different meaning. Accordingly, the definition or the meaning assigned to the word 'person' either under the U.P. Imposition of Holdings Act, 1953 or under the U.P.Z.A. & L.R. Act, 1950 cannot be imported and applied in context with the present Act.

The word 'person' has not been defined in the Act.

In general usage, a human being is a person which usually refers to a natural person.

According to Chambers 12th Century Discretionary person is an individual; a living soul; a human being.

Concise Oxford English Dictionary (Indian Edition) defines 'person' as a human being regarded as an individual.

Usually, the word 'person' canotes a natural person, a human being who has the capacity for rights and duties.

This is a narrower and a simple dictionary meaning of the word 'person.'

Legally the word 'person' includes both a natural person and an artificial person that is an individual who is a citizen of India, a company, or a body of individuals and includes even the government departments, organizations established or constituted by government, local authority, cooperative societies or any other society under the Societies Registrations Act, a firm, a Hindu Undivided Family and every artificial judicial person.

Section 3(42) of the General Clauses Act, 1897 defines the 'person' in a wider legal sense and provides that person shall include any company or artificial, or body of individuals, whether incorporated or not.

A similar and identical definition of a person exists under Section 4(33) of the U.P. General Clauses Act, 1994.

Section 4-A(1) of the General Clauses Act provides that definitions given in Section 3 of the said Act shall apply to all Indian Laws unless there is anything repugnant in the subject or context. In other words, the definitions

contained in the General Clauses Act, 1897 are applicable generally unless a contrary intention or a different meaning in context thereto is provided in a particular enactment.

Similarly Section 4-A of the U.P. General Clauses Act provides that the definitions given in the said Act shall apply unless the context otherwise require.

In view of above provisions of the General Clauses Act, 1897 and U.P. General Clauses Act, 1994 though ordinarily the definitions contained in the aforesaid Acts would be applicable but where the Act which necessitates the interpretation provides a different meaning either specifically or impliedly the meaning so assigned in the Act shall be followed.

This court in the case of Yog Sansthan Vs. Collector, Moradabad and others 2002 (93) RD 13 in considering the meaning of the word 'person' for the purposes of allotment of land for housing sites under Section 122-C of the U.P.Z.A. & L.R., Act 1950 concluded that the definition of the 'person' given in U.P. General Clauses Act, 1904 cannot be applied as the word 'person' used in context refers only to a natural person.

Now before applying the definition of the 'person' contained in the above two Acts it is relevant and important to examine the context in which the word 'person' has been used in Section 14 of the Act.

Section 15 of the Act lays down that all grants shall be made as far as may be in accordance with the Bhoodan Yagna Scheme. Further Section 14 of the Act vest the committee with the power of making grants in accordance with the Bhoodan Yagna Scheme to landless person (now landless agricultural labourers). Thus grants/allotments of land under the Act are to be made only in accordance with Bhoodan Yagna Scheme to landless persons.

Bhoodan movement or the land donation movement is a voluntary land reform movement which was started by Acharya Vinoba Bhave in 1951. The movement was started in Pochampally village in Andhra Pradesh where Vedre Ramachandra Reddy was the first person to donate part of his land. The mission of the movement was to persuade wealthy land owners to voluntary give part of their land to lower caste persons. Acharya Vinoba Bhave walked across India on foot, to persuade landowners to give up a piece of their land. Later the emphasis was to persuade land owners/landlords to give some land to their poor and downtrodden neighbours. The movement was a part of a comprehensive bigger movement 'Sarvodaya' that is rise of all socio economic and political order. It was in the nature of a experiment towards social, economic and justice. So from the nature of the scheme of the Bhoodan Movement the emphasis was to get land in donation from rich landlords and to distribute it amongst the poor and downtrodden landless persons in order to establish a socio economic order.

In U.P. Bhoodan Yagna Samiti Vs. Braj Kishore 1988 RD 363 (SC) a similar controversy whether the grant made by the committee in favour of the respondents was in accordance with law

had arisen before the Supreme Court. Their lordships of the Supreme Court by applying the principle that in interpreting the intention of the legislature the entire writing/document be read from beginning to end in drawing conclusion considered the entire Bhoodan Yagna scheme and came to the conclusion that the fundamental principal of the Bhoodan movement is that all children of the soil have an equal right over the mother earth, in the same way as those born of a mother have over her. The Apex Court quoting from 'Vinoba And His Mission, a book by Suresh Ram went on to say that the object of the Bhoodan Movement is to distribute land received in donation to those landless louberers who are versed in agriculture, want to take it, and have no other means of subsistence."

In short, the scheme of Bhoodan and the Act postulates distribution of land only to natural persons or human beings and not to any institution society or any other juristic person. The meaning to the word 'person' used therein has to be assigned as per the above purpose only. In the context the word 'person' has been used in the Act, makes the definition of the person given in the General Clauses Act impliedly in applicable. The word 'person' in the Act has been used in a narrower sense and not in its broader or legal sense. The use of the word 'person' in the legal sense would actually frustrate/the laudable object of the Act and would deprive the actual tillers from receiving land. Thus, by necessary implication in reference to the context of the Act the word 'person' is differently used and the definition as contained in the two General Clauses Act would not be applicable.

In view of above, I am of the opinion that the meaning of the word 'person' used in Section 14 of the Act has to be construed in a narrower sense in the context of the Bhoodan scheme which envisaged for giving land to the tillers of the soil excluding all juristic persons from its ambit.

Petitioner is not a natural 'person' and is not the tiller of the land versed in agriculture or dependent upon it.

In view of above, order of Collector dated 21.10.2011 apart from other grounds, rightly cancels the grant made to the petitioner in exercise of powers under Section 15 of the Act.

The writ petition as such lacks merit and is dismissed."

31. Recently in the case of State of **Uttarakhand and others Vs. Guru Ram Das Educational Society** (Supra) the Apex Court held as under:-

"It may be immediately noticed that the expression used in Section 154(1) is "....to any person where the transferee shall, as a result of such sale or gift, become entitled to land which together with land, if any, held by his family will in the aggregate, exceed 5.0586 hectares (12.50 acres) in Uttar Pradesh." (emphasis supplied) A close look at the above expression would show that the Legislature intended to cover only natural person. It is so because the words 'any person' are followed in the sentence by the words 'his family'. 'Family' is explained in the explanation appended to Section 154 which means the transferee, his or her wife or husband, as the case may be, and minor children and where

transferee is a minor, his or her parents. This makes it clear that a legal person is not intended to be included in the expression 'any person'. The word 'person', in law, may include both a natural person and a legal person. Sometimes it is restricted to the former. Having regard to the text of Section 154(1) and also the scheme of that provision, there remains no doubt that the expression 'any person' refers to a natural person and not an artificial person. This is fortified by the fact that in 1997 the Legislature inserted Explanation by U.P. Act No. 20 of 1997 declaring that in Sub-section (1) the expression 'person' shall include and be deemed to have been included on June 15, 1976 a 'Co-operative Society. Had the expression 'person' included artificial person, no explanation was necessary. Since the expression 'person' in Section 154 did not include legal or artificial person, the Legislature brought in Co-operative society by way of an Explanation. The Explanation came to be added in 1997 in a declaratory form to retrospectively bring 'Co-operative society' within the meaning of expression 'any person'.(see: State of Rajasthan and others Vs. Aanjaney Organic Harbel Pvt. Limited, 2012 AIOL 406)"

32. In view of the above said fact and taking into consideration the provisions in respect to grant of patta/ lease under Section 14 of the Act , the petitioner does not falls within the ambit and scope of the definition of 'landless person' to whom patta/ lease can be granted under the said section, initial grant of patta/ lease in favour of the petitioner by Bhoodan Yagya Samiti treating it as 'landless person' is an act which is void ab initio because the petitioner is not eligible for the same under Section 14 of the Act in view of the movement started by Acharya Vinoba Bahave known as "Bhoodan Yagya Movement" in which the Zamindars etc. donated their lands to Acharyaji and thereafter the said lands came with Bhoodan Yagaya Simiti, and the same was to be granted as per the mandate provided by the legislature under Section 14 of the Act, so keeping in view the said facts the arguments advanced by learned counsel for the petitioner and taking into aid the provisions of Section 195 read with Section 198 (i-a) of the U.P.Z.A. & L.R. Act, the said argument has got no force , hence rejected.

33. The next arguments advanced by learned counsel for the petitioner that without providing any opportunity to the petitioner by means of order dated 29.6.1991 passed by opposite party no.1 , patta/lease granted in favour of the institution / petitioner has been canceled, hence the action on the part of opposite party no.1 is in violation of principles of natural justice , thus liable to be set aside as also got no force because the petitioner is not eligible/entitled to get lease / patta under Section 14 of the Act as it does not fall under the category of landless person so keeping in view the said facts and the aim and object of the rule of audi alteram partem which ensure that there would not be failure of justice.

34. While applying this rule which is the primary principle of natural justice the court or the authority must always bear in mind the ultimate and overriding objective underlying the said rule, namely: (a) to ensure a fair hearing and (b) to ensure that there is no failure of justice.

35. However, There may be situations where the interest of State or public interest may call for a curtailing of the rule for audi alteram partem. In such situations the court may have to place public/State interest with the requirement of natural justice and arrive at an appropriate decision as the rule of natural justice, namely, nemo judex in causa sua and audi alteram partem, have now a definite meaning and connotation in law, and their content and implications are well-understood and firmly established, they are nonetheless not statutory rules.

36. Further, each of these rules yields to a changes with the exigencies of different situations. They do not apply in the same manner to situations which are not alike. These rules are not cast in a rigid mould nor can they be put in a legal strait-jacket. They are not immutable but flexible. These rules can be adopted and modified by statues and statutory rules and also by the Courts/Tribunal/ Administrative Authorities etc. to decide a particular matter. Some of the situations which demand the exclusion of the rules of natural justice by reason of diverse factors like time, place, the apprehended danger and so on are as under:-

(1)Where a statue either expressly or by necessary implication excludes application of natural justice;

(2)Where the action is legislative in character, plenary or subordinate;

(3)Where the doctrine of necessity applies;

(4)Where the facts are admitted or undisputed;

(5)Where the inquiry is of a confidential nature;

(6)Where preventive action is to be taken;

(7)Where prompt and urgent action is necessary;

(8)Where nothing unfair can be inferred by non-observance of natural justice.

37. The arguments advanced by learned counsel for the petitioner that prior to passing of the impugned order, no opportunity of hearing has been given to the petitioner, so the said action on the part of respondents is in violation of principles of natural justice , has got no force in view of the facts stated herein above specially on two conditions; (a) where the facts are admitted/ undisputed or (b) nothing unfair can be inferred by non-observance of natural justice , lease / patta cannot be granted to the petitioner/ institution under Section 14 of the Act, because it does not fall under the category of landless person, hence the petitioner cannot derive any benefit on the arguments in question and on the basis of judgments rendered in the case of **Ramji Dass and others** (supra) and **Ram Dhani Singh (supra).**

38. So far as the arguments which advanced by learned counsel for the petitioner that opposite party no.1 has got not authority whatsoever to cancel the patta/ lease in favour of the petitioner in view of the provisions as provided under Section 15 of the Act, is also misconceived rather contrary to law as laid down by Hon'ble Supreme Court in

the Case of **U.P. Bhoodan Yagna Samiti , U.P.** (Supra).

39. Last arguments which advanced by learned counsel for the petitioner that after expiry of a period of 23 years from the date of grant of patta in favour of the petitioner , the same cannot be canceled by way of order dated 29.6.1991 passed by opposite party no.1 in view of the provisions as provided under Section 198(6) of the U.P.Z.A.& L.R. Act or Article 137 of the Limitation Act, has got no force because admittedly in the present case there is no limitation in respect to cancellation of patta as provided under Uttar Pradesh Bhoodan Yagna Act and once it is established that initial grant of patta/ lease of the petitioner by opposite party no.5 is passed is void ab initio then it can be cancelled by invoking the provisions as provided under the Act , so the arguments advanced by learned counsel for the petitioner has also got no force and is rejected.

40. For the foregoing reasons, the writ petition lacks merit and is dismissed accordingly.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.03.2013

BEFORE
THE HON'BLE RAJES KUMAR,J.

First Appeal from Order No. 737 of 1987.

United India Insurance Co. Ltd....Petitioner
Versus
Smt. Prabhawati Devi and others ...Respondents

Counsel for the Petitioner:
Sri A.B. Saran
Sri Mohan Srivastava

Counsel for the Respondents:
Sri R.S.Misra
Sri Ramesh Chandra Tiwari
Sri S.Shukla

Motor Vehicle Act-1988Section 173-Liability of Insurance Company-accident took place on 12.30 pm on 6th March-83-Vehicle insured at 4.30 pm on same day-held-effective from date and time of insured-admittedly vehicle not insured on 12.30 pm-no liability of Insurance company can be fastend-Appeal allowed-however appellant to deposit entire amount with liberty to recover from owner of vehicle.

Held: Para-5
The Apex Court in the case of New India Assurance Company Limited vs. Bhagwati Devi (Supra), relying upon the earlier decision of the Apex Court in the case of National Insurance Co. Ltd. v. Jikubkai Nathuji Dabhi, has held that the principle deduced is, thus, clear that should there be no contract to the contrary, an insurance policy becomes operative from the previous midnight, when bought during the day following. However, in case if there is mention of a specific time for its purchase then a special contract to the contrary comes into being and the policy would be effective from the mentioned time. In the present case, admittedly, in the Insurance Cover Note, time, that is, 4:00 PM dated 6th March, 1986 was mentioned. Therefore, in view of the law laid down by the Apex Court, referred hereinabove, the Insurance Policy was in operation from 4:00 PM on 6th March, 1986 and not from the midnight of the said date. Since the accident occurred at 12:30 PM on 6th March, 1986, at the relevant time, the vehicle was not insured with the appellant and, thus, the appellant cannot be held liable to indemnify the liability of the owner of the vehicle.

Case Law discussed:
1998 Law Suit (SC) 178

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

1. Heard Sri Mohan Srivastava, learned counsel for the appellant as well as Sarvasri Ramesh Chandra Tiwari and S. Shukla, appearing on behalf of the respondent nos. 1 and 3. Respondent no.2 is represented by Sri R.S. Misra.

2. The appellant is the insurer of Jeep No. UPQ-1791, which was involved in an accident occurred on 6.3.1986 at 12:30 PM in which Jitendra, aged about seven years, died. The Tribunal awarded the compensation at Rs.27,000/= and the owner of the vehicle as well as Insurance Company have been held liable. It has further been held by the Tribunal that since the vehicle was insured, the Insurance Company is liable to indemnify the liability of the owner of the vehicle and is liable to pay the compensation.

3. Learned counsel for the appellant submitted that as per the Insurance Cover Note, the vehicle was insured at 4:00 PM on 6th March, 1986, while the accident occurred at 12:30 PM on 6th March, 1986, when the vehicle was not insured. He submitted that since in the insurance policy, specific time, that is, 4:00 PM was mentioned, therefore, the policy came in operation after 4:00 PM on 6th March, 1986 and not from the midnight of 6th March, 1986. Since the vehicle was not insured at the time of accident, therefore, the Insurance Company cannot be held liable to pay the compensation. In support of the contention, he relied upon the decision of the Apex Court in the case of **New India Assurance Company Limited vs. Bhagwati Devi, reported in 1998 Law Suit (SC)178.**

4. find substance in the argument of learned counsel for the appellant

5. The Apex Court in the case of New **India Assurance Company Limited vs. Bhagwati Devi (Supra),** relying upon the earlier decision of the Apex Court in the case of **National Insurance Co. Ltd. v. Jikubkai Nathuji Dabhi**, has held that the principle deduced is, thus, clear that should there be no contract to the contrary, an insurance policy becomes operative from the previous midnight, when bought during the day following. However, in case if there is mention of a specific time for its purchase then a special contract to the contrary comes into being and the policy would be effective from the mentioned time. In the present case, admittedly, in the Insurance Cover Note, time, that is, 4:00 PM dated 6th March, 1986 was mentioned. Therefore, in view of the law laid down by the Apex Court, referred hereinabove, the Insurance Policy was in operation from 4:00 PM on 6th March, 1986 and not from the midnight of the said date. Since the accident occurred at 12:30 PM on 6th March, 1986, at the relevant time, the vehicle was not insured with the appellant and, thus, the appellant cannot be held liable to indemnify the liability of the owner of the vehicle.

6. In the result, the Appeal is allowed. The order of the Tribunal dated 25th July, 1987 is modified to the extent that the Insurance Company is not liable to indemnify the liability of the owner of the vehicle. However, the Insurance Company shall pay the amount of compensation, but has the right to recover the same from the owner of the vehicle. The appellant is directed to deposit the entire outstanding amount in the concerned Tribunal within two months and the Tribunal is directed to release the

same to the claimant within a month thereafter.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.03.2013

BEFORE
THE HON'BLE DEVI PRASAD SINGH, J.
THE HON'BLE ZAKI ULLAH KHAN, J.

Service Bench No. 1022 of 2011

Ranjit Singh and others ...Petitioners
Versus
State of U.P. ...Respondent

Counsel for the Petitioners:
Sri H.G.S.Parihar

Counsel for the Respondent:
C.S.C
Sri W.U.Ahmad

Constitution of India Art.226- **Disengagement contractual appointment as teacher for MBA course-continued for last Seven years-no allegation of misconduct or inefficiency-no Service Rules or Regulation governing service condition-existing university being within meaning of instrumenty of state-can not be allow to adopt hiring and firing policy-petitioner entitled to work till continuation of course or scheme-honorarium be paid subject to satisfactory discharge of duty.**

Held: Para-10

In academic matters where teachers are engaged by the University may be on contractual basis under the scheme or course which is likely to continue for years to come, ordinarily such engagement should not be terminated in case the conduct and work of the person engaged is satisfactory. It is not a case where work and conduct of the petitioners are not satisfactory rather it appears that petitioners have discharged their obligation with bright service record.

Case Law discussed:
(1985)4 SCC 43; Civil Appeal Nos. 419-426 of 2004; AIR 1978 SC 597; AIR 1971 SC 530; AIR 1985 SC 218; AIR 1980 SC 1707; (1992) 4 SCC 363; (1993) 2 SCC 386; (2004) 2 SCC 362; AIR 2005 SC 3315; AIR 2005 SC 2499; (2005) 7 SCC 234.

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

1. Heard learned counsel for the petitioner Shri H.G.S.Parihar, learned counsel for the respondent Shri W.U.Ahmad as well as learned Standing counsel. Perused the records.

2. Instant petition has been preferred under Article 226 of the Constitution of India by the petitioner on account of hiring and firing policy adopted by the respondent University to engage teachers for MBA course under self-financing scheme under the grant of contractual assignment. Admittedly, the petitioners were appointed in the year 2003 and 2006 on contractual basis for the period of eleven month to impart education to the students of the respondent University (Institute of Business Studies) on fixed salary. They have been continuing in service from the very inception of Establishment though it was for eleven month. However, respondent took a decision to dispense with the services of petitioners and make a fresh recruitment for the respective courses. Feeling aggrieved with the decision taken by the respondent University, the petitioners had approached this court.

3. Shri W.U.Ahmad learned counsel for the respondent, while defending the

action of the respondent University submits that no right accrues to the appointees who were appointed on contract basis. He further submits that under self-financing course teachers are engaged keeping in view the strength of the student.

4. It is admitted fact between the parties that petitioners have been engaged by the University in the year 2003 and 2006 respectively. They have been continuing in service. No material has been brought on record by the respondent University with regard to any misconduct or inefficiency of petitioner in discharging their obligation. Petitioners have been discharging duty since several years in respondents University under self-financing scheme. What prompted the respondents to disengage the petitioners is not borne out from the record. However, Shri W.U.Ahmad asserted that respondent University has got right to choose teachers since the nature of job is contractual. It is not disputed that there is no Service Rules or Regulation governing the service condition but fact remains that respondent University is a State within the meaning of Article 12 of the Constitution of India. It has got no right to act arbitrarily or in an unfair manner. University has got right to engage teachers itself under self- financing course by its choice but teachers working in the University since several years without any complaint, ordinarily their services may be renewed. How the University may be permitted to engage new teachers every year for Scheme? When respective course was started in the institutions of the University and constitues then reason for fresh recruitment is not borne out from the records. It is always expected that the University shall act in a just and fair manner and not abuse their power in the matter of engagement and appointment when right to livelihood is fundamental right protected by Article 21 of the Constitution of India.

5. Long back in the case of **Rattan Lal and others Vs. State of Haryana and others** reported in **(1985) 4 SCC 43**, Hon'ble Supreme Court deprecated the hiring and firing policy in the colleges and University. In a recent judgement decided by Hon'ble Supreme court by **judgement and order dated 20.2.2013 in Civil Appeal Nos. 419-426 of 2004, Balmer Lawrie and company ltd. and others Vs. Partha Sarathi Sen Roy and others,** similar plea was raised. It was stated that the appellant before the Apex Court was the employee of subsidiary company and not the Indo-Burma Petroleum Co. Ltd. Accordingly, apart from a plea that the appellant before Hon'ble Supreme Court was not State within the meaning of Article 12 of the Constitution of India the other plea was raised that being contractual appointment it was not open for the appellant to raise grievances on account of termination of services.

6. Their Lordship held that the subsidiary company falling under the deep and pervasive control of the appellant shall not be different entity and shall be State within the meaning of Article 12 of the Constitution of India. It is further held by Hon'ble Supreme Court that rules governing the employment conferring power with regard to hiring and firing is not justifiable and cannot be enforced. After discussing catena of judgements Hon'ble Supreme Court ruled that any rule, regulation or circular issued/framed in contravention of the

constitutional mandate cannot be enforced. Power conferring on the authority to engage new incumbent at the specified interval is not sustainable. Accordingly, Hon'ble Supreme Court allowed the appeal and directed to pay salary to the extent of 60 per cent admissible under Rule. Relevant portion from the judgement of Balmer Lawrie (supra) Hon'ble Supreme Court is reproduced as under:-

"Undoubtedly, the High Court has not dealt with the issue on merits with respect to the termination of the services of the respondents herein. However, considering the fact that such termination took place several decades ago, and litigation in respect of the same remained pending not only before the High Court, but also before this Court, it is desirable that the dispute come to quietus. Therefore, we have dealt with the case on merits. In keeping with this, we cannot approved the "hire and fire" policy adopted by the appellant company, and the terms and conditions incorporated in the Manual of Officers in 1976, cannot be held to be justifiable, and the same being arbitrary, cannot be enforced."

7. In the present case, argument advanced by the learned counsel for the University that Institute of Business is a separate entity seems to be misconceived argument. It is admitted by the learned counsel for the respondent University that Institute of Business Management is a part and parcel of University and certain autonomy has been given to it. It is the University which makes appointment on the contractual basis. Accordingly, it cannot be said that respondent no. 4 is not a State within a meaning of Article 12 of the Constitution of India. It is well settled proposition of law that State or its authorities, in the present case university (authorities), are supposed to discharge their obligation in a just and fair manner. Any unfair activity on their part shall be hit by Article 14 of the Constitution of India vide **AIR 1978 SC 597, Smt. Maneka Gandhi Vs. Union of India and another**. More so when it is well settled proposition of law that right of life and livelihood are the fundamental right protected by Article 21 of the Constitution of India.

8. Learned counsel for the respondent has relied upon a case reported in (1992) 4 SCC 33, Director, Institute of Management Development, U.P. Vs. Pushpa Srivastava (Smt.) where right of continuance in service opposed on account of contractual/adhoc appointment which was done for the period of six months. Case is entirely seems to be passed on different facts and circumstances. In the present case, petitioners have been continuing in service since last several years though the original engagement is for eleven months and courses still continue.

9. In the case of Pushpa Srivastava (supra) appointment was for six months and the scheme in which the incumbent was appointed seems came to an end. Accordingly, Hon'ble Supreme Court held that after end of contractual assignment no right accrue to the incumbent. It is well settled proposition of law that judgment should be read in reference to context vide **H.H. Maharajadhiraja Madhav Rao Jivaji Rao Scindia Bahadur & others. Vs. Union of India, AIR 1971 SC 530; M/s. Amar Nath Om Parkash & others. Vs. State of Punjab & others AIR 1985 SC 218; Rajpur Ruda Meha**

& others Vs. State of Gurajat, AIR 1980 SC 1707; C.I.T. Vs. Sun Engineering Works (P) Ltd., (1992) 4 SCC 363; Sarv Shramik Sangh, Bombay Vs. Indian Hume Pipe Co. Ltd. & Anr., (1993) 2 SCC 386; Haryana Financial Corporation & Anr. Vs. M/s. Jagdamba Oil Mills & Anr., AIR 2002 SC 834; Mehboob Dawod Shaikh Vs. State of Maharastra, (2004) 2 SCC 362; ICICI Bank & Anr. Vs. Municipal Corporation of Greater Bombay & others: AIR 2005 SC 3315; M/s. Makhija Construction and Enggr. Pvt. Ltd. Vs. Indore Development Authority & others: AIR 2005 SC 2499; and Shin-Etsu Chemical Co. Ltd. Vs. Aksh Optifibre Ltd. & Anr.: (2005) 7 SCC 234. The case of Pushpa Srivastava (supra) seems to be on different facts and circumstances.

10. In academic matters where teachers are engaged by the University may be on contractual basis under the scheme or course which is likely to continue for years to come, ordinarily such engagement should not be terminated in case the conduct and work of the person engaged is satisfactory. It is not a case where work and conduct of the petitioners are not satisfactory rather it appears that petitioners have discharged their obligation with bright service record.

11. In view of above, we allow the writ petition. A writ in the nature of mandamus is issued directing the respondents to continue the petitioner in service for academic session 2013 and 2014 and pay him honorarium/salary as the case may be in accordance to Rules. Petitioners shall be permitted to continue in service till continuance of course or the scheme, as the case may be and be paid honorarium subject to satisfactory discharge of duties.

12. Writ petition is allowed accordingly.

13. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.03.2013

BEFORE
THE HON'BLE DEVI PRASAD SINGH, J.
THE HON'BLE ZAKI ULLAH KHAN, J.

Service Bench No. 1035 of 2011

Dr. Arvind Kumar Singh and others ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Savita Jain
I.P.Singh

Counsel for the Respondents:
C.S.C.

<u>Constitution of India,Art.-226-</u>Payment of salary-post of physics, chemistry and mathematic-sanctioned on 01.07.1999 permanent sanction w.e.f. 08.08.1996 granted payment of salary denied in view of G.O. 21.08.2000-by which Government prohibited to sanction new post-held-any G.O. Has prospective force-once recognition granted-as aided institution-claim for salary can not be denied-order impugned quashed - necessary directions issued.

Held: Para-8

In view of the settled proposition of law the Director of Higher Education seems to be not justified in rejecting the payment of the salary. The impugned order at the face of record, seems to be

passed incorrectly interpreting the Government Order dated 21.08.2000. Moreover, since the controversy has been settled by this Court (supra) the impugned order seems to not sustainable. In view of the above, the impugned order suffers from substantial illegality and is not sustainable. The writ petition deserves to be allowed.

Case Law discussed:
AIR 1996 SC 1; (2000)2 SCC 42; 2011 AIR SCW 1332; (2008) 3 SCC 641

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

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

2. This is a writ petition under Article 226 of the Constitution of India, against the impugned order dated 25.03.2011 passed by Director of Higher Education, U.P. Allahabad, declining to sanction post of the subject namely Physics, Chemistry and Mathematics on the ground that the State Government vide Government order dated 21.08.2000, provided that the State shall not provide any financial grant with regard to the new posts or sanction posts for appointment of teacher and staffs.

3. Brief facts of the present controversy is that the opposite party no. 5, Ranvir Ranvijay Post Graduate College, Amethi, District-Sultanpur was granted temporary recognition for three subjects namely Physics, Chemistry and Mathematics in Bachelor of Science (B.Sc.) course from 01.07.1993 for the period of three years. By an order dated 08.08.1996, the State Government granted permanent sanction to impart education in the three subjects (supra). Admittedly, the respondents Post Graduate College is a Government aided college and against the posts sanctioned by the State Government, the salary is paid by the Government itself. All the teachers and staff of the respondents Post Graduate College are paid salary from the public exchequer by the State Government.

4. While passing the impugned order the shelter has been taken of the Government order dated 21.08.2000. While adjudicating the similar controversy, considering the Government Order dated 21.08.2000, the Division Bench of this Court of which one of us (Hon'ble Mr. Justice Devi Prasad Singh) was a Member, had settled the controversy at rest and held that the Government Order dated 21.08.2000 is prospective in nature. It has been further held after considering the catena of judgment of Supreme Court that the Government cannot compromise with regard on the schedule of education on account of paucity of fund. In case the Government sanction the post then it shall be incumbent upon the Government to pay the salary. The relevant portion of the judgment of this Court in the case of Dr. Suresh Kumar Pandey (supra) is reproduced as under:

"38. In the case reported in **AIR 1996 SC 1: State of Maharashtra. Vs. Manubhai Pragji Vashi and others**, their lordships of Hon'ble Supreme Court ruled that State have got no right to discriminate on the ground of paucity of fund while providing grant-in-aid. No hostile treatment can be imparted while dealing with educational institutions for any reason whatsoever. To quote relevant portion of para 9 of the said judgment:-

"9. ... One facet of education cannot be selected for hostile discriminatory

treatment, whatever may be the other laudable activities pursued by the Government in the matter of education or its discretion to assign the order of priorities in different spheres of education."

39. In a case reported case in **(2000) 2 SCC 42: Chandigarh Administration and others. Vs. Rajni Vali (Mrs) and others**, their lordships of Hon'ble Supreme Court held that purpose of grant-in-aid is to ensure smooth running of institution and the standard of teaching should not suffer on account of paucity of fund. To quote relevant portion:-

"It is a constitutional mandate that the State shall ensure proper education to the students on whom the future of the society depends. In line with this principle, the State has enacted statutes and framed rules and regulations to control/regulate establishment and running of private schools at different levels. The State Government provides grant-in-aid to private schools with a view to ensure smooth running of the institution and to ensure that the standard of teaching does not suffer on account of paucity of funds. It needs no emphasis that appointment of qualified and efficient teachers is a sine qua non for maintaining high standards of teaching in any educational institution."

40. In another case reported in **2011 AIR SCW 1332: State of Orissa & Anr. Vs. Mamta Mohanty**, their lordships of Hon'ble Supreme Court reiterated the aforesaid proposition holding that paucity of fund cannot be a ground for State to compromise the quality of its education. Relevant portion from the case of Mamta Mohanty (supra), is reproduced as under:-

"17. ... Paucity of funds cannot be a ground for the State not to provide quality education to its future citizens. It is for this reason that in order to maintain the standard of education the State Government provides grant-in-aid to private schools to ensure the smooth running of the institutions so that the standard of teaching may not suffer for want of funds."

5. Admittedly, the State Government is making payment of salary to other teachers and staffs who were appointed prior to year 2000 against the sanctioned posts. There appears to be no reason on the part of the Government to decline to pay the salary to the teachers and staffs under the garb of Government order issued in the year 2000. While concluding the controversy in the case of Dr. Suresh Kumar Pandey a mandamus was issued by the Division Bench of this Court with certain observations. The relevant portion from the judgment and the finding recorded is reproduced as under:

"53. We have noticed that not only in the respondent's college, but in other colleges of the State of U.P., the students are admitted without following the norms prescribed by the Statute as well as the UGC. Accordingly, we are of the view that the Government should look into it and appropriate orders/circulars should be issued immediately commanding different universities and colleges aided as well as non-aided, containing following directions:-

(I) No student shall be admitted in the college and universities beyond the sanctioned strength.

(ii) Director of Higher Education or the State Government as the case may be,

shall sanction the teachers keeping in view the sanctioned strength of the students in the recognized courses of the universities, colleges receiving grant-in-aid and pay salary.

(iii) All those courses which are open under self-financing scheme, the universities as well as colleges shall at least pay minimum pay scale admissible to teachers in accordance with Rules. The services of teachers appointed under the self-financing scheme, should be permitted to continue till continuance of course or satisfactory discharge of duty.

(iv) Since 2000 and onward, the Government has stopped the grant-in-aid and sanction of new course, even then Government shall ensure that Committee of Managements do not exploit the teachers and pay reasonable salary in contractual and ad hoc appointments in the recognized and affiliated colleges.

(v) Keeping in view the strength of students sanctioned prior to August, 2000, by the State Government, the Committee of management of Government aided colleges receiving grant-in-aid, be informed to send their proposal keeping in view the teacher-student ratio within specified period for sanctioning of posts for respective course by the Government."

6. Subject to the aforesaid observations the Division Bench (Supra) had further issued a mandamus directing the State Government to provide the teacher and staffs against the post sanctioned prior to the year 2000, the operative portion of the judgment is reproduce hereinbelow:

"57. In view of the above, the writ petition deserves to be allowed. We allow the writ petition with following directions:-

(I). Accordingly, the writ petition is allowed. A writ in the nature of certiorari is issued quashing the impugned order dated 6.2.2012 passed by the Vice-Chancellor of the University, as contained in Annexure No.1 to the writ petition, with all consequential benefits. The Vice-Chancellor of the University is directed to pass a fresh order keeping in view the observations made in the body of the judgment with regard to petitioner's service career expeditiously say, within a period of one month from the date of receipt of a certified copy of this judgment and till then, status quo shall be maintained in terms of the interim orders passed by this Court.

(II). A writ in the nature of mandamus is issued commanding the Government of U.P. to provide teachers keeping in view the sanctioned strength of students as done prior to August, 2000 (supra), after taking into account the Statutes of various universities, UGC guidelines, Government circulars laying down teacher-student ratio. The State Government shall also ensure that number of teachers should be such that every section of every subject possesses teachers to impart education in different years of the discipline to meet out the requirement.

(III). Respondent college shall engage part time teachers to meet out the requirement of 1556 students within a month to impart education for the session 2012-2013. However, henceforth the number of students in B. Com. and other courses shall be confined to the extent of sanctioned strength. The State

Government shall also ensure that in each and every college of U.P., students are admitted only in terms of sanctioned strength and not beyond that. The colleges admitting students beyond sanctioned strength from the session 2013-2014 be de-affiliated by the Universities and the Government and recognition be withdrawn.

(IV). The Government of U.P. shall issue a Government order or circular communicating to all the universities and affiliated colleges as well as related Government Departments in terms of observations made in the body of the present judgment (para 53 and others) for maintenance of standard of education keeping in view the teacher-student ratio expeditiously say, within two months."

7. Sri Indu Prakash Singh, learned counsel for the petitioners has placed reliance in the case of **A. Manoharan and others Vs. Union of India and others (2008) 3 SCC 641** whereby in the identical situation, the Hon'ble Supreme Court held that an order issued dealing with the matter having prospective effect, cannot be applied retrospectively. The relevant portion of the judgment reproduce herein below:

"Furthermore, the Regulations have been amended only with effect from 1.08.2004. It would have a prospective effect. It cannot be applied retrospectively. Any vacancy which has arisen prior to coming into force of the said amended Regulations must be filled up in terms of the law as was existing prior thereto."

8. In view of the settled proposition of law the Director of Higher Education seems to be not justified in rejecting the payment of the salary. The impugned order at the face of record, seems to be passed incorrectly interpreting the Government Order dated 21.08.2000. Moreover, since the controversy has been settled by this Court (supra) the impugned order seems to not sustainable. In view of the above, the impugned order suffers from substantial illegality and is not sustainable. The writ petition deserves to be allowed.

9. Accordingly, the writ petition is allowed. A writ in the nature of certiorari is issued quashing the impugned order dated 25.03.2011 passed by the Director of Higher Education, opposite party no. 2 with consequential benefits. A writ in the nature of mandamus is issued commanding the respondents to reconsider petitioners' claim with regard to payment of the regular salary in the light of observations made herein above and pass a speaking and reasoned order expeditiously say, within a period of three months from the date of production of certified copy of this order and communicate decision.

10. With the aforesaid direction, the writ petition allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.03.2013

BEFORE
THE HON'BLE SURENDRA VIKRAM SINGH RATHORE, J.

Writ Petition No.1059 (M/S) Of 2013

Harihar Prasad Pathak and another ...Petitioner
Versus
State Of U.P. and another ...OppositeParties

Constitution of India, Art.-226. Petition for quashing the trail at stage of recording statement under section 313 Cr.P.C- rejected-challenged on ground record not properly reconstructed- carbon copy of the statements of witness accepted on record- never objected by the counsel for accused/petitioner-such application merely to delay the trail-nothing whisper either in application or in writ petition- recording incorrect statement or any part of document is false-what prejudice shall caused in absence of the these document- petition dismissed-direction for expeditious trail given.

Held: Para-9

The facts of the above case are, to a great extent identical with the facts of the present case. In that case, this Court has considered the submissions and have proceeded to dispose of the appeal on the basis of the reconstructed record. In the facts of this case also carbon copies of the statements of witnesses recorded during trial were given to the accused and therefore the accused-persons could have filed the same before the court showing that the evidence of witnesses in the reconstructed record is not correct but the same has not been done. It is nowhere the case of the accused persons that any part of statement of witnesses is incorrect. Such objection ought to have been raised at the time of reconstruction of the record. But at that time with the consent of counsels of both the parties the record was reconstructed. Therefore,, raising such objection at a later stage, indicates the intention of the accused persons that they intend to delay the trial.

Case Law discussed:
[2004 (50) ACC 691]; (IXXX) 1992 ACC 223; 2007 (2) ACR 2244; 2005(2) ACR 1880 (MANU/UP/2496/2004); (2001) 9 SCC 149

(Delivered by Hon'ble Surendra Vikram Singh Rathore, J.)

1. Under challenge in this petition is the order dated 21.01.2013 passed by the learned Additional District Judge, Court No.3, Faizabad, in S.T. No.1082 of 1996 (State Vs. Harihar Pathak & Others) whereby the Application No.87-A of the petitioners was rejected.

2. Brief facts giving rise to present controversy, as transpires from the perusal of the impugned order and the copy of the application annexed with this petition, are that the petitioners were facing trial for the offence under Sections 302/34, 307/34, 504 and 506 I.P.C., Police Station Kumarganj, District Faizabad, arising out of Case Crime No.258 of 1996. The case was committed to the court of Sessions. During course of trial after recording the evidence of several witnesses, the record of the case was lost. Hence, the reconstruction of the file was ordered and learned Additional District Judge, Court No.9, under the directions of the District Judge, got the file reconstructed and the reconstruction of the file was approved by the learned District Judge and thereafter the file was sent to the court concerned for trial at the stage of recording of the statement under Section 313 Cr.P.C. In that court an application was moved on behalf of the accused-persons on the ground that the file was not reconstructed properly. The reconstructed documents and evidence of witnesses is against the provisions of Sections 275, 276 & 278 Cr.P.C. and Sections 65, 67 of Evidence Act. The trial court after considering the entire matter rejected the application, hence the instant petition.

3. Submission of the learned counsel for the petitioners is that there is no provisions for reconstruction of the record and no rules have been framed therefore. It is further submitted that

unauthenticated statements of witnesses were taken on record and were wrongly reconstructed. As such the file cannot be treated to be reconstructed. It was further mentioned in the application that all the witnesses of facts are still alive, therefore, the intention of the applicants was to get their evidence recorded a fresh.

4. Learned A.G.A. has opposed the prayer and has stated that there is no illegality in the impugned order and the file was reconstructed with the consent of the learned counsels for both the parties. The documents were admitted by the counsels to be correct and accordingly the reconstruction of the record was approved. Therefore, there is no illegality in the impugned order. It is further submitted that the violation of sections of Cr.P.C. and Evidence Act which the petitioners are alleging do not come into play in the present matter.

5. Admittedly, in the Cr.P.C. there is no provision for reconstruction of the record nor any rules have been framed therefor. But the reconstruction of the record is done on the administrative side. Hon'ble the Apex Court in the case of **State of U.P. Versus Abhai Raj Singh and Another** reported in [2004 (50) ACC 691] in para 11 has directed as under:-

"The High Court shall direct reconstruction of the record within a period of six months from the date of receipt of our judgment from all available or possible sources with the assistance of the prosecuting agency as well as the defending parties and their respective counsel. If it is possible to have the records reconstructed to enable the High Court itself to hear and dispose of the appeals in the manner, engaged under Section 386 of the Code, rehear the appeals and dispose of the same, on their own merits and in accordance with law. If it find that reconstruction is not practicable but by ordering retrial interest of justice could be later served-adopt that course and direct retrial-and from that stage shall take its normal course. If only reconstruction is not possible to facilitate the High Court to hear and dispose of the appeals and the further course of retrial and fresh adjudication by the Sessions Court is also rendered possible due to loss of vitally important basic records-in that case and situation only, the direction given in the impugned judgment shall operate to the matter shall stand closed."

6. The Hon'ble Apex Court has also issued directions to this Court that all efforts should be made for the reconstruction of the record. Therefore, there is no need for any separate rules for reconstruction of the record. Before proceeding further it is necessary to quote the section which the learned counsel for the petitioners has mentioned in his application:-

"***275, Record in warrant-cases:- (1)*** In all warrant-cases tried before a Magistrate, the evidence of each witness shall, as his examination proceeds, be taken down in writing either by the Magistrate himself or by his dictation in open Court or, where he is unable to do so owing to a physical or other incapacity, under his direction and superintendence, by an officer of the Court appointed by him in this behalf:

Provided that evidence of a witness under this sub-section may also be recorded by audio-video electronic means in the presence of the advocate of the person accused of the offence.

(2) Where the Magistrate causes the evidence to be taken down, he shall record a certificate that the evidence could not be taken down by himself for the reasons referred to in sub-section (1).

(3) Such evidence shall ordinarily be taken down in the form of a narrative, but the Magistrate may, in his discretion take down, or cause to be taken down, any part of such evidence in the form of question and answer.

(4) The evidence so taken down shall be signed by the Magistrate and shall form part of the record.

276, Record in trial before Court of Session :- (1) In all trials before a Court of Session, the evidence of each witness shall, as his examination proceeds, be taken down in writing either by the presiding judge himself or by his dictation in open Court or, under his direction and superintendence, by an officer of the Court appointed by him in this behalf.

(2) Such evidence shall ordinarily be taken down in the form of a narrative, but the presiding judge may, in his discretion take down or cause to be taken down, any part of such evidence in the form of question and answer.

(3) The evidence so taken down shall be signed by the presiding Judge and shall form part of the record.

278, Procedure in regard to such evidence when completed:-

(1) As the evidence of each witness taken under Section 275 or section 276 is completed, it shall be read over to him in the presence of the accused, if in attendance, or of his pleader, if he appears by pleader, and shall, if necessary, be corrected.

(2) If the witness denies the correctness of any part of the evidence when the same is read over to him, the Magistrate or presiding judge may, instead of correcting the evidence, make a memorandum thereon of the objection made to it by the witness and shall add such remarks as he thinks necessary.

(3) If the record of the evidence is in a language different from that in which it has been given and the witness does not understand that language, the record shall be interpreted to him in the language in which it was given, or in a language which he understands.

63. Secondary Evidence:

Secondary evidence. Secondary evidence means and includes--

(1) certified copies given under the provisions hereinafter contained; 1

(2) copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;

(3) copies made from or compared with the original;

(4) counterparts of documents as against the parties who did not execute them;

(5) oral accounts of the contents of a document given by some person who has himself seen it. Illustrations

(a) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.

(b) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original.

1. See s. 76, infra.

(c) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence; but the copy not so compared is not secondary evidence of the original, although copy from which it was transcribed was compared with the original. (d) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine- copy of the original, is secondary evidence of the original.

Section 65 The Indian Evidence Act, 1872

65. Cases in which secondary evidence relating to documents may be given. Secondary evidence may be given of the existence, condition or contents of a document in the following cases:--

(a) when the original is shown or appears to be in the possession or power-- of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it; (b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest; (c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time; (d) when the original is of such a nature as not to be easily movable; (e) when the original is a public document within the meaning of section 74; (f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in 1[India] to be given in evidence; 2[1. Subs. by Act 3 of 1951, s. 3 and Sch., for" the States". 2. Cf. the Bankers' Books Evidence Act, 1891 (18 of 1891), s.4. (g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court and the fact to be proved is the general result of the whole collection. In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible. In case (b), the written admission is admissible. In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible. In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

67-Proof of signature and handwriting of person alleged to have signed or written document produced-

If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the

handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.

7. Sections 275, 276 & 278 applies when the evidence is recorded. Sections 275, 276 & 278 has no role to play in the present controversy because it is not the case of the petitioners that due procedure was not adopted while the evidence was recorded initially. But the challenge is to the effect that the record has not been properly reconstructed. Sections 63, 65 & 67 of the Evidence Act have also no role to play because it is not a case of recording secondary evidence but the question relates to the reconstruction of the record.

8. It transpires from the record and the application move by the accused persons that the record was reconstructed with the help of the counsels for both the parties and at the time of the reconstruction both the parties had testified the record to be true on the basis of which learned Additional Sessions Judge, who was entrusted with the work of reconstruction, has reconstructed the record and submitted it to the learned Sessions Judge for its approval. After approval of the learned Sessions Judge the file stood reconstructed. It has nowhere been mentioned in the entire application that which part of the statement of the witnesses, so reconstructed, is false or incorrect. Impliedly, a request has been made for retrial of the case. The occurrence of this case relates to the year 1996 meaning thereby more than 17 years have elapsed after the aforesaid incident. In the case of **Aziz Khan Versus State of U.P.**, reported in (IXXX) 1992 ACC 223, it has been held by this court that in the event the reconstruction of record is not possible retrial should not be ordered after a gap of about 11 years. Therefore, there is no question of directing retrial or re-recording the evidence of the witnesses again, in the background that the record has already been reconstructed. These arguments are being raised simply to further delay the trial. This Court in the case of **Satyendra Kumar Singh & Others Versus State of U.P.** reported in 2007 (2) ACR 2244 has held that if the reconstruction of the record is not possible accused cannot be convicted. It impliedly means that all efforts should be made for reconstruction of the record and only when it is impossible to reconstruct the record only then acquittal can be ordered. In the case of **Abdul Waheed and Others Versus State of U.P.** reported in 2005 (2) ACR 1880 (MANU/UP/2496/2004). The appeal was heard after reconstruction of the record and the accused persons were convicted by this Court. In that case an objection was raised to the effect that reconstruction is inadmissible in evidence for the reason that there is no explanation as to from what source the reconstruction has been made. It was further submitted that there is no certainty or even positive information about the authenticity or genuineness of the reconstructed record. Reconstructed record is also not complete and the site plan and some other documents are still missing. This Court following the verdict of the Hon'ble Apex Court in the case of **Abhai Raj Singh (Supra)**, while dealing with this aforementioned objections has held as under:-

"17. It is not possible to reach any such conclusion on consideration of the report of the then District and Sessions

Judge, namely Sri K.D. Rai, dated 10.09.1999, whereby he transmitted the reconstructed record and from the subsequent report of the succeeding District and Sessions Judge. Rather it is manifest that the record has been reconstructed by collecting material from the sources where it could be available. As we said above, Mushtaq Khan son of the complainant Razzak Khan submitted the copies of the statements of witnesses and certain other papers with his application dated 19.05.1999 for the reconstruction of the record. We also note that the learned counsel for the Appellants has not been able to point out any mistake or inaccuracy in the reconstructed record. Nor has any inaccuracy been pointed out in the facts recorded by the trial court in its judgment dated 31.03.1981, which is impugned in this appeal. Indeed, the accused could have produced their own copies of the statements of witnesses supplied to them by the trial court and other documents during committal proceedings. By doing so, they could show inaccuracy (ies), if any, in the statements of the witnesses and other documents sent by the District and Sessions Judge in the form of reconstructed record. They did not do anything of the kind and simply want to take advantage of unsubstantiated contention that the reconstructed record is inadmissible."

9. The facts of the above case are, to a great extent identical with the facts of the present case. In that case, this Court has considered the submissions and have proceeded to dispose of the appeal on the basis of the reconstructed record. In the facts of this case also carbon copies of the statements of witnesses recorded during trial were given to the accused and therefore the accused-persons could have filed the same before the court showing that the evidence of witnesses in the reconstructed record is not correct but the same has not been done. It is nowhere the case of the accused persons that any part of statement of witnesses is incorrect. Such objection ought to have been raised at the time of reconstruction of the record. But at that time with the consent of counsels of both the parties the record was reconstructed. Therefore,, raising such objection at a later stage, indicates the intention of the accused persons that they intend to delay the trial.

Hon'ble the Apex Court in the case of **Kunwar Bahadur Singh Versus Shiv Baran Singh and Others** reported in (2001) 9 SCC 149 has held as under:-

"24. A distinction must be made between a case where the trial court reports that the reconstruction of file is impossible or the reconstructed file is scanty and incomplete lacking in material documents of which no extracts are to be found in the judgment of the trial court and a case where the trial court after due verification reconstructs the file. In the former case, declining to go into the merits may be justifiable but in the latter case, it is impermissible. There can be no doubt that jurisprudentially, an accused is presumed to be innocent till he is found to be guilty by a competent court. In giving its verdict the court will give benefit of doubt arising on consideration of evidence brought on record by the prosecution or an account of absence of material evidence which ought to have been adduced but is not brought on record, to the accused person and acquit him of the offence charged against. But a doubt arising on the basis of surmises and

conjectures should never be allowed to influence the verdict of the court as in such cases giving benefit of doubt to the accused will be counterproductive and destructive of the system of delivery of justice in criminal cases having repercussions on the existence of every civilised and peaceful society. The courts will have to be cautious and prudent to secure the ends of justice."

11. In the facts of this case in the application it was also mentioned that in the reconstructed file, challan lash, photo lash, letter to CMO, letter to RI are not available.

12. These are the documents which form part of the inquest report and are sent with the inquest report. In a criminal trial these documents does not assume much importance and are formal in nature. It is the substantial evidence of the witnesses on which the decision has to be taken. The petitioners have also not pointed out any ground or any reason showing their prejudice which they apprehends in the absence of these documents, therefore, all these grounds appears to have been raised simply to further delay the disposal of a very old sessions trial.

13. In view of the discussion made above, I do not find any illegality in the impugned order necessitating the interference of this Court, hence, the petition being devoid of merit, deserves to be dismissed and is hereby dismissed.

14. Trial court is directed to conclude the trial expeditiously as the same is very old.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.03.2013

BEFORE
THE HON'BLE DEVI PRASAD SINGH, J.
THE HON'BLE ZAKI ULLAH KHAN, J.

Service Bench No. 1855 of 2000

Union of India ...Petitioner
Versus
R.A. Pandey ...Respondents

Counsel for the Petitioner:
Sri Qamar Hasan Rizvi
Sri I.H. Farooqui

Counsel for the Respondents:
Sri R.U. Pandey, Sri Ashok Kumar Pandey
Sri Ram Lagan Mishra

Constitution of India, Art.-226- Service-withdrawl of voluntary retirement-petitioner applied for voluntary retirement on 14.05.1993-made effective on 31.08.1993-on request 26.08.1993 moved withdrawl for retirement-held-upto 31.08.1993 relation of master and servant continuing -can apply for withdrawl-but no salary payable during period of non discharge of duty-but for other purpose such period be counted in service.

Held: Para-6

In the present case, admittedly, the claimant-respondent had moved an application for voluntary retirement w.e.f. 31.8.1993, hence, it was incumbent upon the petitioner to consider the claimant's application dated 27.8.1993 keeping in view the fact that by that date master and servant relationship persists. Application for withdrawal should have been allowed by the petitioner. The judgement and order passed by the learned tribunal seems to be based on well appreciation of law on the issue involved.

Case Law discussed:
1987 (Supp) SCC 228; (1996) 8 SCC 283;

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

1. Heard learned Standing counsel appeared on behalf of the petitioner and Shri Ram Lagan Mishra learned counsel for the respondents.

2. Instant writ petition has been preferred under Article 226 of the constitution of India against the impugned order dated 28.8.2000 (Annexure -1 to the writ petition) passed in O.A. No. 879 of 1993 by Central Administrative Tribunal, Lucknow whereby application moved by the claimant respondent has been allowed with regard to voluntary retirement.

3. The brief facts of the present controversy relates to the circumstances when petitioner has moved an application on 14.5.1993 seeking voluntary retirement w.e.f. 31.8.1993. However, claimant respondent withdrawn the application with regard to voluntary retirement on 27.8.1993. According to the petitioner's counsel, it was accepted on 26.8.1993. Claimant-respondents had approached the Tribunal with the prayer that since, application was moved for withdrawal of voluntary retirement before 31.8.1993 and even after acceptance master and servant relationship continues up to 31.8.1993, there was no option before the petitioner except to accept the withdrawal application moved by the claimant-respondent on 27.8.1993. It was pleaded before the Tribunal that since, the claimant was in service up to 31.8.1993, the withdrawal application moved by the respondent before 31.8.1993 should have been accepted and application for voluntary retirement should be treated as withdrawn. The tribunal had relied upon Apex court judgements reported in 1987 (Supp) SCC 228, Balram Gupta Vs. Union of India and another followed by one another judgement reported in (1996) 8 SCC 283, Balbir Singh Negi Vs. Union of India and others.

4. In the case of Balram Gupta (supra) their Lordship of Hon'ble Supreme Court held that an application may be withdrawn before the intended date of voluntary retirement.

5. In the case of Balbir Singh Negi (supra) Hon'ble Supreme Court reiterated that till master and servant relationship is effective an application may be withdrawn. The relevant portion from the judgement of Balbir Singh Negi (supra) is reproduced as under:-

"The learned counsel for the petitioner sought to rely upon the judgement of this court in Balram Gupta Vs. Union of India in which this Court had held that a government servant after making the application but before it becomes effective and the relation ship of master and servant ceases to operate, is entitled to withdraw the resignation."

6. In the present case, admittedly, the claimant-respondent had moved an application for voluntary retirement w.e.f. 31.8.1993, hence, it was incumbent upon the petitioner to consider the claimant's application dated 27.8.1993 keeping in view the fact that by that date master and servant relationship persists. Application for withdrawal should have been allowed by the petitioner. The judgement and order passed by the learned tribunal seems to be based on well appreciation of law on the issue involved.

7. However, so far as, question of salary is concerned, since, the claimant-respondent had not discharged duty, he seems to be not entitled for payment of arrears of salary for the period when respondent had not discharged duties.

8. Shri Ram Lagan Mishra learned counsel for the respondent submits that claimant was restored in service in pursuance the judgement of tribunal and continued in service up to till the age of superannuation i.e. on 30.11.2007.

9. The impugned order dated 28.8.2000 is liable to be modified and is modified to the extent that the claimant-respondent is not entitled for arrears of salary for the period when he was not in job but for all other purposes, the claimant respondent shall deem to be in service and post retiral dues shall be assessed in accordance to rules. Tribunal's order stands modified accordingly.

10..Writ petition disposed of accordingly.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.03.2013

BEFORE
THE HON'BLE ANIL KUMAR,J.

Service Single No. 1941 of 2000

Smt. Asha Devi ...**Petitioner**
Versus
State of U.P. ...**Respondent**

Counsel for the Petitioner:
Sri B.R. Singh

Counsel for the Respondents:
C.S.C.

U.P. Financial Rules (financial Hand Book Vol. II Part 2 to 4- Full salary during suspension period-after reinstatement-petitioner a police constable placed under suspension on 21.12.2000-reinstated on 17.11.2001-till death no disciplinary proceeding initiated-entitled for full salary during suspension period-order impugned giving only subsistence allowance-quashed.

(Delivered by Hon'ble Anil Kumar, J)

1. Heard Sri B.R. Singh, learned counsel for petitioner, learned State counsel and perused the record.

2. Facts of the present case are that initially one Sri Brij Nath Ram working on the post of Head Constable while he was posted at Police Station Kamlapur, District Sitapur, an FIR has been lodged in respect to the incidence under Section 323/224 IPC and Section 29 of the Police Act on the ground that one Sri Tahsildar Singh, accused in a Gangster Act has run away from the police custody.

3. Subsequently, in the said incidence, the petitioner was placed under suspension by order dated 21.12.2000, revoked by order dated 12.11.2001 passed by Superintendent of Police, Sitapur. In the said matter, he filed a Writ Petition No. 1347 (SS) of 2006 (Brij Nath Ram Vs. State of U.P. and others), disposed of by means of the order dated 17.04.2006, relevant portion quoted as under:-

"Heard Sri Sajiv Pandey, holding brief of Sri S.P. Tripathi, learned counsel for the petitioner and the learned Standing Counsel.

The grievance of the petitioner is that vide order dated 21.12.2000 he was

placed under suspension under Rule 17(1)(a) of U.P. Subordinate Police Services (Punishment and Appeal) Rules, 1991 and for administrative purposes was attached at the police line. Subsequently on 17.11.2001 he was reinstate and vide order 7.5.2002 he was transferred from Sitapur to Ambedkar Nagar. In pursuant thereto he joined at Ambedkar Nagar. In the order of reinstatement it is mentioned that the order of revocation of suspension shall not prejudice the enquiry likely to be initiated against the petitioner. It is stated that no charge sheet has been issued to the petitioner and no disciplinary enquiry has been conducted till date. It is further submitted that ins spite of several representations made before respondent NO. 3, copies whereof have been filed as Annexure Nos. 6 and 7 to the writ petition neither full salary of the period of suspension has been paid, nor any other benefits i.e. Promotional pay scale have been allowed to him.

The learned Standing counsel submits that responden5t NO. 3 shall look into the grievance of the petitioner and representation of the petitioner, if any, pending before him, shall be considered and decided in accordance with law expeditiously.

Looking to the facts and circumstances, the writ petition is finally disposed of with a direction to respondent No. 3 to consider and decide the petitioner's representations dated 25.11.2005 (Annexure-6 to the writ petition) and dated 25.1.2006 (Annexure-7 to the writ petition) by a speaking order within a period of six weeks form the date of production of a certified copy of this order alongwith copies of the aforesaid representations. The petitioner is at liberty to file a further detail representation alongwith certified copy of this order. In case the petitioner is found entitled to get any amount, the respondents shall take steps for payment of such amount within two months thereafter."

4. In pursuance to the same, the impugned order dated 28.05.2008 has been passed by Superintendent of Police, operative portion quoted as under:-

"प्रकरण में मुख्य आरक्षी बृजनाथ को जांचोपरांत दोषी पाया गया तथा घटना से सम्बंधित पंजीकृत उक्त अभियोग अभी विचाराधीन है । ऐसी परिस्थिति में मुख्य आरक्षी बृजनाथ राम की इनकी निलंबन अवधि दिनाँक २१.१२.२००० से ११.११.२००१ तक की अवधि में दिए गए जीवन निर्वाह भत्ते के अतिरिक्त कोई अवशेष वेतन, भत्ते आदि नहीं होगी । निलंबन अवधि की गणना पेंशन, पदोन्निति एवं अवकाश आदि में की जाएगी ।"

5. Aggrieved by the said order, Sri Brij Nath Ram has filed the present writ petition before this Court. During the pendency of the present case, he died and substituted by hi legal representative/Smt. Asha Devi as petitioner No. 1/1.

6. Learned counsel for petitioner while assailing the impugned order submits that in which FIR was lodged which is the basis of placing the petitioner under suspension neither in the said FIR nor in the chargesheet submitted, thereafter petitioner's name find place.

7. Learned counsel for petitioner further submits that till the petitioner was

alive, no disciplinary proceedings has been initiated against him in the incidence in question in which he has been placed under suspension, so keeping in view the said fact, the action on the part of opposite parties thereby not giving the salary excluding subsistence allowance to the petitioner for the period 21.12.2000 to 12.11.2001 and the impugned order dated 28.05.2008 is an exercise which is arbitrary in nature, liable to be set aside.

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

9. As per admitted facts of the case are that the petitioner was placed under suspension by an order dated 21.12.2000, revoked by an order dated 12.11.2001. Further, in the instant case in which he was placed under suspension an FIR was also lodged, on 19.12.2000 (Annexure No. 2 in which a charge sheet (Annexure No. 5) has been filed in which name of the petitioner does not find place.

10. Further, till the death of the petitioner, no disciplinary proceeding has been initiated in the matter in which he has been placed under suspension.

11. In view of the said facts as well as the provisions as provided under Sub-Rule 2 of Rule 54-B of the U.P. Fundamental Rules (Financial Hand Book Volume II (parts 2 to 4), which is quoted as under:-

"Notwithstanding anything contained in Rule 53, where a Government servant under suspension dies before the disciplinary or court proceeding instituted against him are concluded, the period between the date of suspension and the date of death shall be treated as duty for all purposes and his family shall be paid the full pay and allowances for that period to which he would have been entitled had he not been suspended, subject to adjustment in respect of subsistence allowance already paid."

12. The impugned order 28.05.2008 (Annexure No. 1) passed by O.P. No. 3 that the petitioner (deceased/Sri Brij Nath Ram) is not entitled for salary excluding substantial allowance for the period 21.12.2000 to 12.11.2001 is contrary, liable to be set aside.

13. For the foregoing reasons, the impugned order dated 28.05.2008 (Annexure No. 1) passed by O.P. No. 3/Superintendent of Police, Sitapur is set aside to the extent that deceased/Sri Brij Nath Ram is not entitled for salary excluding substantial allowance for the period 21.12.2000 to 12.11.2001, the said amount shall be paid to Smt. Asha Devi (petitioner No. 1/1)

14. With the above observations, the writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.03.2013

BEFORE
THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.

Misc. Single No.2099 of 2013

Smt. Karmaita ...Petitioner
Versus
The Tehsildar and another...Respondents

Counsel for the Petitioner:
Sri Ashwini Ojha

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226- Mutation proceeding pending before Tehsildar since 2006-direction to decide within 3 month-issued.

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

1. Notice on behalf of opposite party no.1 has been accepted by the office of learned Chief Standing Counsel.

2. Considering the proposed order, requirement of issuance of notice to opposite party no.2 is hereby dispensed with.

3. Heard Sri Ashwani Ojha, learned counsel for the petitioner, who confines his prayer only for issuing a direction to the Tehsildar, District Amethi to decide the Mutation Case No.198 of 2006; Smt. Karmaita vs. Shiv Bahadur, under section 34 of U.P. Land Revenue Act in respect of Gata No.311 having an area of 0.468 hectare, situate in village-Semra, Pargana and Tehsil-Amethi expeditiously.

4. The prayer made by learned counsel for the petitioner being innocuous in nature is, hereby granted.

5. Accordingly, the Tehsildar, Amethi is directed to decide the aforesaid Mutation Case expeditiously, say within a period of three months from the date a certified copy of this order is produced before him.

6. With the aforesaid direction, the writ petition is disposed of finally.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.03.2013

BEFORE
THE HON'BLE DEVI PRASAD SINGH, J.
THE HON'BLE ZAKI ULLAH KHAN, J.

Writ Petition No. 2199 (S/S) Of 1997

Raj Kishore ...Petitioner
Versus
State of U.P. and others ...Respondents

Civil Services Regulations-Regulation 351-A- Disciplinary proceeding-when treated as pending?-petitioner retired from post of Junior engineer on 31.01.1986-show cause notice issued on 06.07.1986-without seeking permission from His Excellency, the Governor-proceeding deemed pending only after service of chargesheet and not by show cause notice-for illegal harassment of petitioner Rs. 25000/ awarded as cost-recovery order quashed.

Held: Para-8
The Hon'ble Apex Court has clearly laid down service law relating to the departmental enquiries and services. It is very clear from the ratio of the Hon'ble Apex Court in above mentioned citations that the enquiry should have commenced during service by issue charge-sheet and not mere by show cause notice. The departmental enquiry proceedings are not initiated merely by issuance of show cause notice, it is initiated only when charge-sheet has been issued (Union of India Vs. K.V. Jankiraman). The Apex Court itself ruled in 'Coal India Ltd. Vs. Saroj Kumar Mishra' that the date of application of mind on the allegations leveled against an officer by the competent authority as a result whereof the charge-sheet is issued would be the date on which the disciplinary proceedings is said to have been initiated and not prior thereto, therefore, it is crystal clear that in the instant petition the facts are attracted to the ratio given by the Hon'ble Apex Court in case Jankiraman (Supra), therefore, there remains no doubt that the respondents have violated the legal

norms and unnecessarily harassed the petitioner. Therefore, since last more than twenty five years he is being harassed and tortured by the act of respondents, therefore special cost is being imposed on the respondents as of Rs. 25,000/- (Twenty Five Thousand) to meet the ends of justice.

Case Law discussed:
2011 (29) LCD 1348; (2007) 6 SCC 694

(Delivered by Hob'ble Zaki Ullah Khan, J)

1. This writ petition under Article 226 of the Constitution of India has been filed by the petitioner inter alia praying that the Court may issue a direction for quashing the impugned order dated 28.10.1996 (Annexure No. 18) passed by State Public Services Tribunal and simultaneously he has also prayed that the order dated 19.03.1988 passed by the opposite party no. 3, Superintending Engineer, Tubewell Circle, Lucknow (Annexure No. 11) for the recovery of Rs. 2,67,667.84 paise from the petitioner be quashed. The petitioner has also prayed that a writ, order or direction in the nature of mandamus commanding the respondent nos. 1 to 5 to pay full pensionary benefits as admissible under Rules be issued..

2. The brief facts in the petition are that the petitioner was posted on the post of Junior Engineer in the year 1960 and superannuated from service on 31.01.1986. The dispute is regarding the post retiral dues; a show cause notice was given to the petitioner on 06.07.1997 and he was explain as to why the amount be not recovered from him because shortage of material. It is contended that the provisions of Rule 351-A of Civil Services Regulation have not been followed. The petitioner repeatedly submitted that he could not peruse the documents by which the recovery is being directed as he retired from service on the prior date. The order of the recovery dated 19.03.1988, therefore is per se illegal. The basis of the petitioner's contention is that there is specific provision under Rule 351-A of Civil Services Regulation that no proceedings can be initiated after the superannuation without seeking prior permission of His Excellency The Governor and that to regarding the incident which happened four years earlier the retirement. In the instant matter, the recovery relates to period which is beyond the four years. Therefore, in any circumstances the recovery is altogether baseless void and illegal. The payment of pension / gratuity of Government servant cannot be withheld merely on account of any enquiry pending against him. The Government has issued execution direction in the matter of grant of pension and gratuity to the retired Government servant contained in G.O. No. G-3-1555/X-909-79 dated 30.09.1982 which provide no departmental / judicial proceedings or any enquiry or Administrative Tribunal has been instituted against the Government servant, he shall be paid full pension gratuity admissible under Rules. Till his retirement no enquiry was instituted against him. Despite making several representations dated 02.09.1986 and 05.04.1988 his pension was not released. The action of the opposite parties are arbitrary without rules. The opposite party no. 3 issued show cause notice only on 06.07.1987 requiring him to furnish his explanation towards shortage of stock and T & P detected against him. The petitioner submitted that through reply that these items has never been received by him. The petitioner was not shown relevant papers and the opposite party no. 3 did not go

through his proper replies and passed an arbitrary order for recovery of Rs. 2,67,667.84/- and withheld his post retiral dues. The petitioner preferred a claim petition before the U.P. State Public Services Tribunal but the Tribunal was of the opinion that the petitioner retired on 31.01.1986 and show cause notice was issued to him on 06.07.1986. It is submitted by the opposite parties that the shortage of stock and T & P came into the light in the year 1981 and immediately thereafter the show cause was given to explain the shortages. The Tribunal was not satisfied with the explanation given by the petitioner that the enquiry was instituted after the retirement and related the matter with effect from 1981. The Tribunal opined that the matter was pending since 1981 and there was continuous probe going on since then. The Tribunal was of the opinion that if the services of the employees are not satisfactory his pension can be reduced but since ten years have passed the Tribunal granted relief in part and directed that the pension should be paid to the petitioner but dismissed the petition. Being aggrieved by the aforesaid order the instant petition has been filed.

3. The opposite parties submitted the counter affidavit and reiterated that the petitioner was asked to explain on 23.07.1981 regarding lost of items and he could not furnish any defence and could not explain as to why there was shortage of articles. The allegation of the petitioner that no enquiry is pending is baseless. He was probed regarding lost of items since 1981 much before his retirement. Since the proceeding were pending, benefits except reduced pension were withheld due pending recovery of the value of the Government stock and T & P detected against the petitioner. The petitioner contention to the contrary are false, the petitioner could not justify as to any item regarding which show cause notice was given to him. Hence, there was no need to permission under section 351-A of Civil Services Regulation since the enquiry initiated as back as 1981.

4. The petitioner rebutted the allegations made in the counter affidavit and alleged that the shortage are fabricated 50% of the shortage has been reconciled. The matter of reconciliation rest with the Executive Engineer concerned. The contention is false and misconceived that the deponent is responsible for any shortage of the Government material as alleged no proceedings were initiated against him while deponent was in service. Only His Excellency Governor can direct that after retirement under the provisions of Rule 351-A of Civil Services Regulation. The recovery can be instituted as far as the petitioner is concerned. He was neither placed under suspension nor any enquiry was pending against him and he was never held guilty of any misconduct.

5. We have heard learned counsel for the petitioner as well as learned counsel for the respondents and learned Standing Counsel for the State.

6. The petitioner was appointed on 13.01.1951 as a Mechanic and was promoted to the post of Junior Engineer in the month of November, 1966 and was retired from service on 31.01.1986. The show cause notice was issued on 06.07.1987 by the Superintending Engineer after retirement. The petitioner replied the notice that no enquiry was pending against him. No permission was taken by the department in view of provision under Rule 351-A of Civil

Services Regulation. No charge sheet has ever been issued to him. No disciplinary enquiry proceeding against him till date under section 4(6) of Payment of Gratuity Act, 1972, gratuity can be stopped only when the disciplinary proceedings are completed and the petitioner's service are terminated. Even the Tribunal has directed to pay the pension but directed that his gratuity be withheld till the recovery proceedings are pending. Learned counsel for the petitioner vehemently argued that the petitioner is an old man of 86 years of age and retired twenty years back and he has not been paid his retiral dues despite no legal matter is pending against him. Merely on fictitious ground his retirement dues cannot be withheld. The Division Bench of this Court has held **2011 (29) LCD 1348, U.P. State Warehousing Corporation, Lucknow Vs. Bris Bhan Singh and another** that the disciplinary proceedings not permissible unless provided under the rules in another case Division Bench of this Court in Writ Petition No. 328 (SB) of 2007 (Paras Nath Sharma Vs. State Public Services Tribunal, Lucknow and others held that no punishment / recovery after retirement can be made without prior sanction of Hon'ble Governor and also the Division Bench of this Court held that in Writ Petition No. 3754 (SB) of 1993 (Vivek Kumar Mittal Vs. State of U.P. and others), no punishment / recovery after retirement can be made without prior sanction of Hon'ble Governor. The Apex Court has also held in **(2007) 6 SCC 694** that the enquiry commenced after issuance of charge sheet no punishment can be awarded on the basis of show cause notice and the Civil Services Regulation 351-A is reproduced as below:-

"351-A. The Provincial Government reserve to themselves the right to order the recovery from the pension of an officer who entered service on or after 7th August, 1940 of any amount on account of losses found in judicial or departmental proceeding to have been caused to Government by the negligence or fraud of such officer during his service. Provided that:

(1). Such departmental proceedings, if not instituted while the officer was on duty.

(I) shall not be instituted save with the sanction of the specified period and the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused to Government, it the pensioner is found in departmental or judicial proceedings to have been guilty of grave misconduct, or to have caused, pecuniary loss to government by misconduct or negligence, during his service, including service rendered on re-employment after retirement;

Provided that:

(a) such departmental proceedings, if not instituted while the officer was on duty either before retirement or during re-employment-

(i) shall not be instituted save with the sanction of the Governor,

(ii) shall be in respect of an event which took place not more than four years before the institution of such proceedings, and

(iii) shall be conducted by such authority and in such place or places as the Governor may direct and in accordance with the procedure applicable to proceedings on which an order of dismissal from service may made

(b) judicial proceedings, if not instituted while the officer was on duty either before the retirement or during re-employment, shall have been instituted in accordance with sub-clause (ii) (a) and

(c) the Public Service Commission, U.P., shall be consulted before final orders are passed.

7. We, have gone through the relevant case law and Civil Service Regulations, this is admitted fact that no punishment as ever been provided to the petitioner. The petitioner was not facing any enquiry just a notice was issued to him after the date of retirement and no permission has ever been sought from His Excellency The Governor, for initiating the enquiry and it is interesting to note that the matter relates to more than four years prior to retirement which is the period mentioned for initiating enquiry i.e. enquiry can be initiated only four years prior to the retirement of the petitioner. The petitioner was retired in the year 1986 and the matter relates to the year 1981. It is beyond the prescribed period of four years and there are three repeated pronounced judgment of the Division Bench of this Court that after retirement no enquiry can be initiated without prior sanction of His Excellency The Governor. The Hon'ble Apex Court has also held in the similar matter. The Apex Court is of the view that:-

"A. Service Law-Departmental Enquiry-Continuation after retirement-Held, is permissible only in those cases where departmental enquiry has been commenced during service, by issue of a charge-sheet and not by issue of mere show cause notice -UCO Bank Officer Employees Service Regulations, 1979 Regn. 20(3)(iii)-Banks-Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970.

C. Service Law-Retirement / Superannuation-Retiral benefits-Payment, when departmental enquiry illegally initiated against an employee after his retirement-Enquiry held invalid and appellant Bank directed to release all retiral benefits expeditiously-Fresh proceedings against retired employee barred keeping in view that he stood retired long back in 1996-Civil Procedure Code, 1908 Or. 41 R. 33-Constitution of India, Art. 142.

---21. The aforementioned Regulation, however, could be invoked only then the disciplinary proceedings had clearly been initiated prior to the respondent's ceasing to be in service. The terminologies used therein are of seminal importance. Only when a disciplinary proceeding has been initiated against an officer of the back despite his attaining the age of superannuation, can the disciplinary proceeding be allowed on the basis of the legal fiction created thereunder i.e. continue "as if he was in service". Thus, only when a valid departmental proceeding is initiated by reason of the legal fiction raised in terms of the said provisions, the delinquent officer would be deemed to be in service although he has reached his age of superannuation. The departmental

proceeding, it is trite law, is not initiated merely by issuance of a show cause notice. It is initiated only when a charge sheet is issued (Union of India Vs. K.V. Jankiraman). This aspect of the matter has also been considered by this Court recently in Coal India Ltd. Vs. Saroj Kumar Mishra, wherein it was held that date of application of mind on the allegations leveled against an officer by the competent authority as a result whereof a charge sheet is issued would be the date on which the disciplinary proceedings are said to have been initiated and not prior thereto. Pendency of a preliminary enquiry, therefore, by itself cannot be a ground for invoking Clause 20 of the Regulations."

8. The Hon'ble Apex Court has clearly laid down service law relating to the departmental enquiries and services. It is very clear from the ratio of the Hon'ble Apex Court in above mentioned citations that the enquiry should have commenced during service by issue charge-sheet and not mere by show cause notice. The departmental enquiry proceedings are not initiated merely by issuance of show cause notice, it is initiated only when charge-sheet has been issued (Union of India Vs. K.V. Jankiraman). The Apex Court itself ruled in 'Coal India Ltd. Vs. Saroj Kumar Mishra' that the date of application of mind on the allegations leveled against an officer by the competent authority as a result whereof the charge-sheet is issued would be the date on which the disciplinary proceedings is said to have been initiated and not prior thereto, therefore, it is crystal clear that in the instant petition the facts are attracted to the ratio given by the Hon'ble Apex Court in case Jankiraman (Supra), therefore, there remains no doubt that the respondents have violated the legal norms and unnecessarily harassed the petitioner. Therefore, since last more than twenty five years he is being harassed and tortured by the act of respondents, therefore special cost is being imposed on the respondents as of Rs. 25,000/- (Twenty Five Thousand) to meet the ends of justice.

9. We accordingly allow the petition and quash the impugned 28.10.1996 (Annexure No. 18) passed by State Public Services Tribunal and also quash the order dated 19.03.1988 passed by the opposite party no. 3, Superintending Engineer, Tubewell Circle, Lucknow (Annexure No. 11) for the recovery of Rs. 2,67,667.84 paise and mandamus has issued against the respondent nos. 1 to 5 to pay full pensionary benefits as prayed.

10. Accordingly, the writ petition is allowed with cost. Rs. 25,000/- Half of the cost be paid to the petitioner and rest will be credited in the account of Mediation and Conciliation Centre of this Court. The cost be paid within a period of three months from the date of order and in default of payment of cost, the District Magistrate shall realize as land revenue in accordance with order of the Court.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 15.03.2013

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

Writ Petition No. 2291 OF 2003 (M/B)

Meesam Ammar Rizvi and another ...Petitioner
Versus
District Assistant Registrar, Co-operative Societies and others ...Respondents

<u>Constitution of India, Art.-226-</u> Recovery of Loan Rs. 5,31,143/- loan advanced to purchase Luxury car- petitioner deposited Rs. 5,80,200/- between April 99 to March 2001-hence demand notice bad-provisions of cooperative Societies Act Section 91 not attracted-court found deposit receipt of Rs. 5,80,200/- as forged document-exemplary cost of Rs. 2,50,000/-imposed with direction to initiate proceeding under section 340 Cr.P.C.

<u>Held: Para-15</u>

From what we have mentioned above, it is clear that the petitioner has filed this writ petition with oblique motives and has not presented the correct facts just to gain undue advantage. Such type of act should always be discouraged and is highly deprecated. This is the case, where we thought to impose heavy cost so as to deter in indulging such activities again. Therefore, we do not find any justification to interfere with the recovery notice under challenge or entertain the petitioner's prayer for setting aside the impugned recovery citation.

<u>Case Law discussed:</u>
(1997) 2 SCC 682; AIR 1983 SC 1015; [2008 (12)SCC 481; (2009)3 SCC 141;

(Delivered by Hon'ble Rajiv Sharma, J)

1. Heard Sri Sudeep Seth, learned Counsel for the petitioners, Sri Vivek Raj Singh, learned Counsel for the respondent Nos. 2 and 3 and Sri H.P. Srivastava, learned Additional Chief Standing Counsel.

2. Through the instant writ petition under Article 226 of the Constitution of India, the petitioner challenges the notice dated 31.3.2003 issued under Section 91 of the U.P. Co-operative Societies Act, 1965 [hereinafter referred to as the "Act"] by District Assistant Registrar, Co-operative Societies, U.P., Lucknow (respondent No.1), contained in Annexure No.1 to the writ petition, requiring the petitioner to deposit Rs.5,31,143/- within a period of one month, otherwise, the orders for sale of properties of the petitioners would be issued to recover the said amount. It was also provided that the petitioners may submit their reply, if any, by 18.4.2003 on any working day.

3. Shorn off unnecessary details, the facts of the case are that petitioner No.1-Meesam Ammar Rizvi applied for commercial loan of Rs.4,63,000/- from City Co-operative Bank Ltd., Ashok Marg, Lucknow for purchasing a Luxury Vehicle i.e. Car, which was sanctioned and disbursed to the petitioner No.1 on 5.4.1999. In the said loan, petitioner No.2-Anwar Rizvi was a guarantor.

4. According to petitioners, during the period from April, 1999 to March, 2001, petitioner No.1 deposited an amount of Rs.5,80,200/- through Cash in the Bank. Therefore, the entire outstanding loan amount was repaid by the petitioner No.1 by March, 2001. According to him, petitioner No.1 had deposited more amount than the outstanding loan dues but even then, the Secretary/Recovery Officer, City Co-operative Bank Ltd., Ashok Marg, Lucknow (respondent No.2) issued a notice dated 8.6.2002 to the petitioners to deposit outstanding loan due of

Rs.4,06,454/- (Annexure No.4 to the writ petition), to which petitioners, vide letters dated 25.7.2002 and 7.8.2002, demanded up-dated statement of accounts from the respondent No.2.

5. According to petitioners, instead of furnishing updated statement of accounts, respondent No.2 issued another notice dated 3.9.2002 to the petitioners, requiring from them to deposit Rs.5,31,143/- towards outstanding dues within a week from the date of receipt of the notice, otherwise proceedings under Section 91 of the Act would be initiated against them and the dues would be realized by sale of the property of the petitioners. Thereafter, petitioners have again asked to furnish them updated statement of account to settle the matter vide letter dated 11.9.2002 but no heed was paid. However, the petitioner No.1 had sent a detailed reply dated 21.9.2002 to the notice dated 3.9.2002, regarding invocation of Section 91 of the Act. Instead of considering the reply, the impugned recovery notice dated 31.3.2003 under Section 91 of the Act has been issued to the petitioners, which is highly arbitrary and unlawful.

6. Hence the instant writ petition.

7. Sri Sudeep Seth, learned Counsel for the petitioners submits that commercial loan granted by a Co-operative Society for purchase of Luxury Car is not subject to charge under Section 39 of the Act and as such, the property, which is not subject to charge under Section 39 of the Act, cannot be enforced under Section 91 of the Act. He submits that the petitioner has already deposited the entire outstanding loan dues to the respondent-Bank and as such, notice issued under Section 91 of the Act is illegal and arbitrary. In support of his submission, he has relied upon the judgment of the Apex Court in **Recovery Officer, Lakhimpur and others Versus Ravindra Kaur (Smt.) and others** reported in (1997) 2 SCC 682.

8. Per contra, Sri Vivek Raj Singh, learned Counsel for the respondent Nos. 2 and 3 submits that averments made in the counter affidavit that receipt dated 17.3.2001 showing the payment of Rs.3,50,000/- and receipt dated 7.3.2001 for Rs. 20,000/- are forged and actually no money has been deposited, was strongly refuted by the petitioners in the rejoinder affidavit and as such, with the consent of the parties, a Division Bench of this Court, vide order dated 2.2.2006, directed the Divisional General Manager, Urban Bank Department, Reserve Bank of India, to make an enquiry in the matter and submit his report to this Court. In compliance of the order dated 2.2.2006, the Deputy General Manager, Reserve Bank of India, Urban Banks Department, Lucknow, inquired into the matter and submitted its report dated 20.3.2006.

9. While drawing attention to the inquiry report dated 20.3.2006, Sri Vivek Raj Singh submits that the Inquiry Officer, in his report dated 20.3.2006, has asserted that the alleged payment of Rs.20,000 and Rs.3,50,000/- dated 7.3.2001 and 17.3.2001 in the car loan account of Meesam Ammar Rizvi i.e. petitioner No.1 were not received by the Ashok Marg Branch of City Co-operative Bank Ltd., Lucknow. It has also been pointed out in the report dated 20.3.2006 that the cash receipt stamps put on the counterfoils dated 7.3.2001 and 17.3.2001 produced by the petitioner No.1, are also

apparently different from that put on the cash vouchers of Ashok Marg Branch of City Co-operative Bank, Lucknow on 7.3.2001 and 17.3.2001. Therefore, the documents, which have been annexed alongwith the writ petition by the petitioners in support of their case, are forged and fabricated documents and as such, he preferred an application for initiating proceedings under Section 340 Cr.P.C. against the petitioners.

10. We have heard learned Counsel for the parties and perused the records.

11. In order to adjudicate the matter to its logical end, we think it appropriate to reproduce the Enquiry Report dated 20.3.2006, which is as under :

"The undersigned came to know of the orders dated 02.02.2006 passed by the Hon'ble High Court of Judicature at Lucknow Bench, Lucknow in above writ petition No. 2291 (M/B) of 2003 vide City Co-operative Bank Ltd., Lucknow letter No. HO./ADM/433/05-06 dated 22.02.2006. Accordingly, as directed the Hon'ble High Court, I advised both the petitioners viz. Shri Messam Ammar Rizvi and Shri Anwar Rizvi on 24.02.2006 to come to my office on 06.03.2006 at 11.00 a.m. along with all their original documents. Shri Meesam Ammar Rizvi called on me on 06.03.2006. However, Shri Anwar Rizvi did not come. Shri Meesam Ammar Rizvi showed me the original documents pertaining to his car loan a/c No.VEH-656 in question. I took photocopy of some of the counterfoils showing payments in cash in the above loan account. During the course of investigation Shri Rizvi told me that repayment instalments were generally collected by the bank from his house. He also told me that the sum of Rs.3,50,000/= was paid in cash on 17.03.2001 through Shri Gorakh Nath Srivastav, the then CEO/Secretary of the bank, at his request to tide over the liquidity constraint being faced by the bank at the time. He also told me that receipt for the same was given to him after much persuasion. Shri Rizvi has also submitted copy of a sale deed dated 22.02.2001 showing receipt of Rs.3,30,000/= in cash. After hearing the petitioners, I advised the City Co-operative Bank Ltd., Lucknow vide letter dated 06.03.2006 to provide certain information/documents. They gave me the information/documents vide their letter dated 17.03.2006. On the same day (17.03.2006) I scrutinized some of their relevant original documents and also talked to the bank officials. I have also gone through the writ petition, affidavits, counter affidavits etc. filed by the parties to the dispute.

My observations are as under :

Shri Meesam Ammar Rizvi had taken a car loan of Rs.4,63,000/= on 05.04.1999 from the Ashok Marg branch of City Co-operative Bank Ltd., Lucknow. There is no dispute in this regard. There is also no dispute regarding the fact that Shri Rizvi has been making payment in his above loan account from time to time. The dispute is only regarding the cash payment of Rs.20,000/= and Rs.3,50,000/= alleged to have been made by Shri Meesam Ammar Rizvi in his above loan account on 07.03.2001 and 17.03.2001 respectively. In this connection, the attendance register of the Ashok Marg branch of the bank for the month of March, 2001 and its cash vouchers dated 07.03.2001 and 17.03.2001 show that one Shri Neeraj

Anand had worked as cashier at the branch on both these dates whereas the counterfoils produced by Shri Rizvi bear the signature of two different persons. Signatures on the counterfoils dated 07.03.2001 and 17.03.2001 produced by Shri Rizvi are also apparently different from that of Shri Neeraj Anand who had worked as cashier of the branch on these dates. Moreover, the cash receipt stamps put on the counterfoils dated 07.03.2001 and 17.03.2001 produced by Shri Rizvi are also apparently different from that put on the cash vouchers of Ashok Marg branch of the bank on 07.03.2001 and 17.03.2001. Moreover, the cash scroll of Ashok Marg branch of the Bank also does not show any such cash receipt of Rs.20,000/= and Rs.3,50,000/= in the loan account of Shri Meesam Ammar Rizvi on 07.03.2001 and 17.03.2001 respectively. As per the bank records during the month of March 2001, Shri Rizvi had deposited Rs.2000/= on 07.03.2001 and Rs.15000/= on 20.03.2001 in his loan account.

In view of the foregoing, it is clear that both alleged payments of Rs.20000/= and Rs.3,50,000/= dated 07.03.2001 and 17.03.2001 in the car loan account of shri Meesam Ammar Rizvi were not received by the Ashok Marg branch of City Co-operative Bank Ltd., Lucknow. As regards the contention of Shri Rizvi that payment of Rs.3,50,000/= on 17.03.2001 was made through Shri Gorakh Nath Srivastav, the then CEO/Secretary of the bank, it is not possible to offer any comment because Shri Srivastav is no more alive to answer the charge. Moreover, Shri Rizvi also could not produce any documentary proof in this regard except the copy of a sale deed dated 22.02.2001 showing receipt of Rs.3,20,000/= being the sale deed dated 22.02.2001 showing receipt of Rs.3,20,000/= being the sale proceeds of his Mango/Guava orchards. The bank's officials are also not aware of existence of any system in the bank for collection of payments from the customer's house in those days."

12. From perusal of the above report dated 20.3.2006, it is clear that document, which has been annexed by the petitioners at Page No.24 of the writ petition relating to deposit receipt of Rs.3,50,000/-, is a fabricated document insofar as the said amount of Rs.3,50,000/- was never deposited by the petitioners in the City Co-operative Bank. Even otherwise, Section 269 T of the Income-tax Act prohibits repayment of loan in cash, if the amount is twenty thousands or more. Thus, we are of the opinion that the petitioners have preferred the instant writ petition with incorrect facts by annexing forged documents, just to gain undue advantage, in which, the petitioners got success when a Division Bench of this Court, on believing the assertion of the petitioners to be true, prima facie, stayed the recovery with respect to the loan taken by the petitioners for the purchase of car vide ad interim order dated 1.5.2003. In these backgrounds, we feel that dishonesty should not be permitted to bear the fruit and benefit to the persons who played fraud or made misrepresentation and it is the duty of the Courts to see that fraud is not perpetuated.

13. In **Welcome Hotel and Ors. v. State of Andhra Pradesh and Ors. etc**. AIR 1983 SC 1015, the Apex Court has held that a party which has misled the Court in passing an order in its favour is not entitled to be heard on the merits of the case.

14. In **K.D. Sharma v. Steel Authority of India Ltd. and Ors**., [2008 (12) SCC 481], the Apex Court has held that the jurisdiction of the Supreme Court under Article 32 and of the High Court under Article 226 of the Constitution is extraordinary, equitable and discretionary and it is imperative that person approaching the Writ Court must come with clean hands and put forward all the facts before the Court without concealing or suppressing anything and seek an appropriate relief. If there is no candid disclosure of relevant and material facts or the petitioner is guilty of misleading the Court, his petition may be dismissed at the threshold without considering the merits of the claim. The same rule was reiterated in **G. Jayshree and Ors. v. Bhagwandas S. Patel and Ors.**: (2009) 3 SCC 141.

15. From what we have mentioned above, it is clear that the petitioner has filed this writ petition with oblique motives and has not presented the correct facts just to gain undue advantage. Such type of act should always be discouraged and is highly deprecated. This is the case, where we thought to impose heavy cost so as to deter in indulging such activities again. Therefore, we do not find any justification to interfere with the recovery notice under challenge or entertain the petitioner's prayer for setting aside the impugned recovery citation.

16. The writ petition is **dismissed** with cost, which shall be quantified as Rs.2,50,000/-. The petitioners are directed to deposit the said cost before the Registry of this Court within a month from today, failing which, Registrar shall request the District Magistrate/Collector to recover the said cost as arrears of land revenue. On receipt of the said cost, the Registrar of this Court shall remit the said amount/cost in the account of Mediation and Conciliation Centre of this Court.

17. As regard the application for initiating proceeding under Section 340 Cr.P.C. against the petitioners is concerned, it will be open for the respondents, if they so desire, to approach the Magistrate concerned.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.03.2013

BEFORE
THE HON'BLE ABDUL MATEEN, J.
THE ASHWANI KUMAR SINGH, J.

Misc. Bench No. 2358 of 2013

Anurag Kumar and others ...Petitioner
Versus
The State of U.P. and others...Respondents

Counsel for the Petitioner:
Sri R.P. Verma

Counsel for the Respondents:
G.A.

Constitution of India-Art. 226- Quashing of FIR-offence under Section 379 IPC and 4/10 Tree Protection Act-Commission of Cognizable offence disclosed from FIR-can not be quashed-petitioner shall not be arrested till submission of report u/s 173(2) Cr. P.C.

(Delivered by Hon'ble Abdul Mateen J)

1. Heard learned counsel for the petitioners and learned Additional Government Advocate.

2. Under challenge in the instant writ petition is F.I.R. relating to Case

Crime No. 38 of 2013 under Section 379 I.P.C. & 4/10 Tree Protection Act, P.S. Mall, District Lucknow.

3. We have gone through the F.I.R., which discloses commission of cognizable offence, as such, the same cannot be quashed.

4. However, in the peculiar facts and circumstances of the case, we dispose of the writ petition finally with the direction that the petitioners shall not be arrested in the aforesaid case crime number till submission of report under Section 173(2) Cr.P.C., provided they co-operate with the investigation, which shall go on.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.03.2013

BEFORE
THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.

Service Single 2360 of 2000

Ram Sajiwan ...Petitioner
Versus
U.P. Co Operative Institutional Services and others ...Respondents

Counsel for the Petitioner:
Sri J.P. Singh, Sri M.G. Tripathi
Sri R.K. Verma

Counsel for the Respondents:
H.G.S. Parihar
C.S.C.

U.P. Cooperative Employee Services Regulation 1975-Regulation 84- Minor punishment-stoppage of annual increment for remaining period of Services-without supplying the copy of enquiry report without indicating date, place and time for enquiry-for minor penalty full fledge enquiry not needed-but when reply to show cause notice not taken in consideration-rather decided to hold formal enquiry-without following proper procedure-order impugned not sustainable.-quashed.

Held: Para-19

In the peculiar facts and circumstances of the instant case, keeping in view the fact that the very basis of passing of the impugned order of punishment is the enquiry report submitted by the Enquiry Officer, a copy of which was never provided to the petitioner, the Court comes to the irresistible conclusion that the procedure followed by the opposite parties before passing the impugned order of punishment is absolutely unlawful and against the settled norms and procedure and also against the Regulation 85 of the Regulations 1975.

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

1. Hon'ble Devendra Kumar Upadhyaya, J.

2. Heard Sri M.G. Tripathi, learned counsel for the petitioner and Sri Diwakar Singh, holding brief of Sri H.G.S. Parihar, learned counsel appearing for opposite parties no. 2 and 3 i.e. Committee of Management, District Cooperative Bank Ltd., Raebareli and Secretary/General Manager, District Cooperative Bank, Raebareli respectively.

3. The petitioner by means of instant writ petition has assailed validity of punishment order dated 7/8.11.1997, passed by the Secretary/General Manager, District Cooperative Bank Ltd., Raebareli, whereby punishment of stoppage of yearly increment for the remainder period

of his service has been inflicted. The petitioner has also challenged the order dated 29.01.2000, contained in Annexure No.1 to the writ petition, whereby an appeal filed by the petitioner challenging the punishment order of stoppage of annual increment has been dismissed.

4. The facts of the case, as culled from the pleadings brought on record by the respective parties, are that a complaint dated 18.10.1995 was made by the General Manager of Dugdha Utpadan Sahkari Samiti, Tripula, District Raebareli in respect of an incident wherein it was reported that payment of a cheque bearing no.36751, dated 22.12.1994 for a sum of Rs. 8700/- was made to some other person by committing forgery by the employees of District Cooperative Bank, Branch-Deeh, District Raebareli. According to the said complaint, a cheque was issued by Dugdha Utpadan Sahkari Samiti, Kachnawan, District Raebareli in favour of Sri Ram Das Maurya whereas payment was made to Sri Ram Bahadur Maurya. The said complaint was made to the Secretary/General Manager, District Cooperative Bank Ltd., Raebareli and it appears that when no action was taken, a reminder was also sent on 29.12.1995 by the General Manager of Dugdha Utapadak Sahkari Samiti Ltd., Tripula, Raebareli. Thereafter another complaint was made on 02.11.1995 by Sri Ram Gopal and Ram Das Maurya, the President and the Secretary respectively of Dugdh Utpadak Sahkari Samiti, Kachnawan, District Raebareli.

5. On the aforesaid complaint, contemplating certain action against the alleged involvement of the employees/officers of the Bank, a show cause notice was issued to the petitioner on 04.01.1996 requiring therein that petitioner should submit his reply within three days. The said show cause notice required the petitioner to submit his reply on the allegations pertaining to the same transaction which was the subject matter of the complaints aforementioned.

6. A perusal of charge-sheet reveals that it has been stated in the said charge-sheet that from Account No.32, the amount has been misappropriated on 08.07.1995 by fraudulently using cheque bearing no.3651, dated 22.12.1994 and further that the cheque in question was issued by the society concerned for making payment to one Sri Ram Das Maurya, however, the same was not encashed on the date of its presentation on account of deficiency of balance and was kept in the branch office of the Bank and it has subsequently been used for misappropriating the amount by way of overwriting etc. The show cause notice also stated that the entry of the aforesaid cheque in the account was made by the petitioner and petitioner ought to have objected to it as on the cutting and overwriting over the cheque, the signature of the authorized signatory was not available. The show cause notice further states that since the petitioner did not object, it makes his integrity doubtful.

7. Petitioner submitted reply to the aforesaid show cause notice on 13.01.1996 denying the allegations and clearly stating therein that in the payment of cheque in question no bank employee was involved and further that cheque has all along been with Sri Ram Das Maurya and it is Ram Das Maurya who got the cheque encashed by sending someone else to the Bank.

8. However, no decision was taken by the disciplinary authority on the aforesaid reply submitted by the petitioner to this show cause notice dated 04.01.1996 and subsequently vide an order dated 25.09.1997, Senior Manager of the Bank, Sri S.N. Lal was appointed as Enquiry Officer. The Enquiry Officer thereafter does not appear to have held any enquiry whatsoever of any kind; rather he submitted his report to the punishing authority on 06.10.1997. It is further noticeable that even copy of the said enquiry report was not provided to the petitioner requiring him to submit his objection/reply to the findings recored by the Enquiry Officer.

9. The question which arises for consideration in the instant case is as to whether keeping in view the facts and circumstances of the instant case, the procedure prescribed under the relevant rules/regulations for holding full fledged departmental enquiry ought to have been adopted by the opposite parties before passing the impugned order or not. Further, as to whether, in case the opposite parties were obliged to follow the full fledged procedure meant for the departmental proceedings, was it followed or not in the instant case.

10. Admittedly, the disciplinary matters of the petitioner are governed by U.P. Co-operative Employees Service Regulations, 1975 (hereinafter referred to as 'Regulations, 1975').

Regulation 84 of the aforesaid Regulations prescribes the following penalties:-

"a. censure,

b. withholding of increment,

c. fine on an employee of Category IV (peon, chaukidar etc.)

d. recovery from pay or security deposit to compensate in whole or in part for any pecuniary loss caused to the co-operative society by the employee's conduct,

e. reduction in rank or grade held substantively by the employee,

f. removal from service, or

g. dismissal from service."

11. According to the scheme of the aforesaid Regulations relating to penalties, disciplinary proceedings and appeal, penalty of censor can be imposed even without giving show cause notice whereas penalty of withholding of increment, fine or recovery from pay can be passed only after issuing show cause notice and calling for a reply from the delinquent employee and in respect of punishment for removal from service, reduction in rank or grade and dismissal from service under the provisions of Regulations 1975, disciplinary proceedings as envisaged and provided for under Regulation 85 is to be followed, which provides serving of charge-sheet to the employee concerned containing specific charges, requiring the delinquent to submit explanation in respect of the charges and giving him an opportunity to produce evidence and cross-examine the witnesses in his defence and also giving opportunity of being heard in person. The scheme of Regulation 85 clearly envisages holding of full fledged departmental enquiry wherein principles

of natural justice and other accepted norms of disciplinary proceedings ought to be followed. However, Regulation 85 will come into play only in case either of the major penalties i.e. reduction in rank, removal from service or dismissal from service are contemplated to be awarded to the delinquent. In the instant case neither of the major penalties has been inflicted upon the petitioner.

12. Instant case has a very striking feature inasmuch as though a show cause notice was issued initially calling for reply from the petitioner but subsequently an Enquiry Officer was appointed to hold the enquiry into the allegations relating to the alleged forged withdrawal of money from Branch-Deeh of the Bank. True, petitioner has been inflicted only with the minor penalty in the end and issuance of show cause notice calling for his reply would have sufficed to meet the requirement of holding enquiry in case of minor penalty, however, question which needs consideration, as observed above, is that since after receiving reply to the show cause notice, disciplinary authority did not pass order of penalty inflicting minor penalty, rather decided to appoint an Enquiry Officer to hold an enquiry into the allegations, therefore, as to whether the procedure as prescribed under Regulation 85 i.e. procedure for full fledged enquiry was legally required to be followed by the opposite parties or not.

13. It would have been appropriate and without any legal flaw, had the punishing authority taken a decision on the basis of reply submitted by the petitioner to the show cause notice and passed an order of minor penalty but since no such decision on receiving the reply of the petitioner was taken by the disciplinary authority; rather the disciplinary authority took a decision otherwise, that is, to hold an enquiry by way of appointing an Enquiry Officer, as such, it was incumbent upon the opposite parties to have held the disciplinary proceedings strictly in accordance with the procedure prescribed under Regulation 85 for award of major penalty, irrespective of the fact that finally the punishment may or may not have been a minor penalty.

14. The aforesaid proposition assumes significance keeping in view the fact that the very basis of passing the impugned order of punishment dated 7/8.11.1997 is the enquiry report submitted by the Enquiry Officer which ultimately was conducted without associating the petitioner with the same resulting in breach of principles of natural justice.

15. It is strange to note that though the punishing authority in the instant case has passed the punishment order on the enquiry report submitted by the enquiry officer-Sri S.N. Lal, but during the course of enquiry conducted by him, petitioner was not associated with the said enquiry in any manner. The enquiry officer never issued any charge-sheet to the petitioner nor did he call for any explanation or reply from the petitioner. Petitioner also did not receive any intimation regarding date, time and place etc. for holding the enquiry. The aforesaid facts cannot be disputed as the enquiry report itself nowhere makes a mention that in the enquiry petitioner was ever associated in any manner.

16. As observed above, the punishment of stoppage of increment is

minor penalty as described under Regulation 84 of Regulations, 1975 and such a minor penalty could be inflicted on the delinquent employee by the disciplinary authority only after calling for an explanation or issuing a show cause notice to him. In the instant case, the basis of the impugned order of minor penalty of stoppage of increment is not the reply submitted by the petitioner. In fact the reply submitted by the petitioner to the show cause notice has not even been taken into consideration at all. What all is discussed by the disciplinary authority while passing the order dated 7/8.11.1997 is the report of the Enquiry Officer wherein petitioner was never associated and further that the petitioner was never even confronted with the enquiry report which is the basis of the impugned punishment order.

17. Needless to say that although the Enquiry Officer can obtain all information from all channels and sources but under law it is obligatory on his part not to act on any such information unless the person against whom such information or material is being used, is supplied with such information or material. Non-supply of document which forms basis of decision by the disciplinary authority explicitly amounts to denial of appropriate reasonable opportunity to the delinquent employee. A document, in case forms part of the enquiry and is considered by the disciplinary authority while passing the order of punishment then any omission to supply such document to the delinquent employee amounts to flagrant violation of principles of natural justice.

18. Admittedly, in the instant case the vary basis of passing the impugned punishment order dated 7/8.11.1997 is the report submitted by the Enquiry Officer-Sri S.N. Lal which admittedly, was never provided to the petitioner and petitioner was not even associated with the said enquiry, as such, procedure adopted by the opposite parties in the instant case do not conform to the principles of natural justice and other settled norms of the departmental proceedings.

19. In the peculiar facts and circumstances of the instant case, keeping in view the fact that the very basis of passing of the impugned order of punishment is the enquiry report submitted by the Enquiry Officer, a copy of which was never provided to the petitioner, the Court comes to the irresistible conclusion that the procedure followed by the opposite parties before passing the impugned order of punishment is absolutely unlawful and against the settled norms and procedure and also against the Regulation 85 of the Regulations 1975.

20. For the discussions made and reasons given above, the writ petition deserves to be allowed.

21. **Accordingly, the writ petition is allowed** and the impugned order of punishment dated 7/8.11.1997 is hereby quashed. The order dated 29.01.2000, rejecting the appeal of the petitioner is also quashed.

22. It is directed further that pay of the petitioner by adding all the past annual increments shall be re-fixed within a period of one month from the date a certified copy of this judgment and order is produced before the authority concerned and payment thereof including

the arrears shall be made within next three months thereafter.

23. Costs made easy.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW20.02.2013

BEFORE
THE HON'BLE SUDHIR AGARWAL,J.

Misc. Single 2647 of 1993

Shailendra Tewari and others...Petitioners
Versus
1st A.D.J. Faizabad and others ...Respondents

Counsel for the Petitioners:
R.S. Pandey

Counsel for the Respondents:
C.S.C.

U.P. Zamindari abolition and Land Reforms Act 1950-Section 3(4) read with U.P. Consolidation of Holdings Act 1953-3(5)- 'Land'-definition does not include 'Banjar land' suit relating to Banjar land-whether civil or revenue court has jurisdiction? Held-only civil Court has jurisdiction.

Held: Para-21
For the purpose of U.P. Zamindari Abolition and Land Reforms Act, 1951 (hereinafter referred to as the "Act, 1951") also so far as the meaning of term 'holding' or 'land' is concerned, in respect to land recorded as "Banjar", the law as discussed above would apply equally and, therefore, suit in question is not barred by Section 331 of Act, 1951 and the Civil Court had jurisdiction to take cognizance of suit in question and decide the same. The Appellate Court has rightly taken the view about maintainability of suit in Civil Court, in the judgment impugned in this writ petition, and, I find no legal or otherwise fault therein, warranting interference.

Case Law discussed:
1965 ALJ 609; 1967 AWR 337; 1969 AWR 317; 1971 RD 520; 1975 AWC 469; 1986 AWC 919; 1989 RD 293;

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

1. This writ petition is directed against the judgment dated 26.05.1993 passed by First Additional District Judge, Faizabad allowing appeal filed by respondent no. 2 and setting aside Trial Court's order dated 10.11.1987. The Appellate Court held that suit is cognizable by Civil Court and has directed parties to appear before court below so that the matter may proceed further.

2. It is contended that though the land in dispute is "Banjar land" recorded in revenue records and if there is a dispute of title, jurisdiction lies with Revenue Court and not with Civil Court. Reliance is placed on Apex Court's decision in **Kamla Prasad and others Vs. Kishna Kant Pathak and others, 2007(4) SCC 213.**

3. However, I do not find any force in the submission.

4. A perusal of plaint shows that suit in question was filed with relief that defendant be restrained from cutting trees standing over land in dispute, which is admittedly a "Banjar land", so recorded in revenue record.

5. The terms "land" has been defined in Section 3(4) of U.P. Zamindari Abolition and Land Reforms Act, 1950 (U.P. Act No. 1 of 1951) (hereinafter

referred to as the "Act, 1951"). It reads as under:

"3(14) "Land" except in Sections 109, 143 and 144 and Chapter VII means land held or occupied for purposes connected with agriculture, horticulture or animal husbandry which includes pisciculture and poultry farming."

6. Section 117(1)(iii) of Act, 1951 says that trees (other than trees in the holding on the boundary of a holding or in a grove or abadi) vests in Gaon Sabha. This Court in **Mohd. Naqi Khan Vs. State of U.P., 1965 ALJ 609** held that trees standing in the graveyard vest in Gaon Sabha.

7. The term "land" has also been defined in Section 3(5) of U.P. Consolidation of Holdings Act, 1953 (hereinafter referred to as the "Act, 1953"). It reads as under:

"3(5) 'Land' means land held or occupied for purposes connected with agriculture, horticulture and animal husbandry (including pisciculture and poultry farming) and includes--

(i) the site, being part of a holding, of a house or other similar structure; and
(ii) trees, wells and other improvements existing on the plots forming the holding."

8. The term "consolidation" is also defined in Section 3(2) and reads as under:

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

Explanation- For the purpose of this clause, holding shall not include the following:
(i) Land which was grove in agricultural year immediately preceding the year in which the notification under Section 4 was issued;
(ii) land subject to fluvial action and intensive soil erosion;
(iii) land mentioned in Section 132 of U.P. Zamindari Abolition and Lad Reforms Act, 1950;
(iv) such compact areas as are normally subject to prolonged water-logging;
(v) usar, kallar and rihala plots forming a compact area including cultivated land within such area;
(vi) land in use for growing pan, rose, bela, jasmine and kewra; and
(vii) such other areas as the Director of Consolidation may declare to be unsuitable for the purpose of Consolidation."

9. The comparison of two definitions, as above, indicate that principle part of definition of land in Act, 1953 has been borrowed from Act, 1951 but it has been expanded so much so that for the purposes of Act, 1953 even the site for house or well or trees standing over a plot has been included. The trees etc., however, must exist on a plot which forms part of a holding.

10. The term "holding" under clause (4-C) of Act, 1953 means a parcel or parcels of land held under one tenure by a tenure holder singly or jointly with other tenure holder. Therefore,, land can be holding under Act, 1953 only if it is held

by tenure holder that is a Bhumidhari, Sirdari or Asami. If Banjar land can be considered to be land within meaning of clause (3) of Section 3 of Act, 1953, extracted earlier then only it can be held by a Bhumidhar, Sirdar or Asami and shall be covered in the definition of holding. "Banjar land" has not been defined either in two Acts but Section 3(12) of Act, 1953 adopts meaning of word and expression not defined in Act, 1953 but used or defined in Act, 1951. Though in Act, 1951 also there is no definition of "Banjar land" but para 124-A of Land Records Manual framed in pursuance of Land Revenue Act making provision for entry in annual register of field book provides as under:

"(v) otherwise barren.

Note: Sub-clause (v) will include land which cannot be brought under cultivation without incurring a high cost."

11. This indicates that "Banjar land" is that land which is unfit for cultivation and cannot be brought under cultivation without incurring heavy expenditure. It is, therefore, not "land" as defined in the Act. A "Banjar land" is not a "land" under the Act, it also cannot be a holding. That being so, Revenue Courts or consolidation authorities would have no jurisdiction to adjudicate upon the rights and titles of Banjar land. In the context of provisions of Act, 1953 this matter has been examined earlier by this Court.

12. The functions of consolidation authorities are confined to deciding questions relating to tenure holder's rights, i.e., rights of Bhumidhars, Sirdars or Amins in respect of agricultural holding and not beyond that. This is what was hold by Division Bench of this Court in **Syed Ashfaq Hasan Vs. Waqf Alal Nafs and Alal Aulad and Alal Ayal, 1967 AWR 337**.

13. Similarly this Court in **Badri Dube Vs. Commissioner, Varanasi Division, 1969 AWR 317** held that words, 'persons interested' do not include persons who have other rights than the rights of a Bhumidhar, Sirdar and an Asami in respect to Act, 1953. It is in this context the Court held that "Banjar plot" does not form part of a holding and, therefore, trees situate on such a plot of land which is vested in Gaon Sabha it would not be within the jurisdiction of consolidation authorities being not a part of holding and, therefore, in such matters Civil Court has jurisdiction.

14. In **Rama v. State of U.P., 1971 RD 520** this Court said:

". . . . . . a Banjar land does not form part of a holding and, therefore, the consolidation authorities had no jurisdiction to adjudicate upon the rights of the parties in respect of the trees in question. It is open to the parties to get their rights adjudicated upon by a competent Civil Court."

15. A doubt arose that decision of this Court in **Rama v. State of U.P. (supra)** is in conflict with another subsequent decision in **Shambhu Vs. Deputy Director of Consolidation Azamgarh, 1975 AWC 469** and the matter came to be considered by a Division Bench in **Baijnath Rai and another Vs. Deputy Director of Consolidation, Ghazipur and others, 1986 AWC 919**. The view taken by Division Bench in para 2 of judgment

fortify the view I have discussed above. The Court held:

"Banjar land is that land which is unfit for cultivation and cannot be brought under cultivation, without incurring heavy expenditure. It is, therefore, not land as defined in the Act. . . . . . . If trees are planted on a Banjar land or it is let out for planting trees and the trees standing over it or after planting were such in number as to exclude cultivation when fully grown then it becomes grove land."

`16. The Court held that a Banjar land is not within the jurisdiction of consolidation authorities so as to take upon themselves in matter of adjudication under Act, 1953. That would also apply, in my view, for Revenue Courts under Act, 1951. The Court, however, further proceeded to observe that there may have been cases where Banjar land let out for converting it into land may be within few years by incurring expenses and planting trees in such a number so as to convert it in a grove land after the trees fully grown. It says, if trees are planted on a Banjar land or it is let out for planting trees and trees standing over it or after planting of such a number as to exclude cultivation when fully grown then it becomes grove land and once Banjar land becomes grove land, the consolidation authorities can decide objections in this regard. That is how the Court resolved both judgments and found no conflict therein. The Court said:

"Any land, therefore, having trees in such number as to preclude cultivation becomes grove-land. And once a land banjar or otherwise, becomes grove land the Consolidation authorities shall have jurisdiction to decide. In cases where right or title is claimed on trees standing over land what has to be decided is if the trees standing over it were such in number that it became grove land. If the finding is in the affirmative the Consolidation authorities shall have jurisdiction to decide right or claim of parties. If the finding is in negative the objection has to be dismissed and parties directed to seek their remedy in Civil Courts."

17. Again a learned Single Judge in **Bhawani Pher Tiwari Vs. Narbada Devi, 1989 RD 293** followed the earlier decision in **Rama Vs. State of U.P. (supra)** and observed:

" . . . . . scattered trees standing over Banjar land cannot be termed as grove and the Consolidation Courts lack inherent jurisdiction in adjudicating upon rights of parties in respect of them."

18. In the present case it is not disputed by parties that land in question is recorded as Banjar and has not become a grove land. The trees standing thereon, therefore, would not form part of land of holding so as to attract jurisdiction of Revenue Court.

19. So far the decision relied by counsel for petitioners in **Kamla Prasad and others Vs. Kishna Kant Pathak (supra)** is concerned, I find that there the admitted facts therein were, that the defendants had share in property in dispute, as is evident from paras 6, 7, 12 and 13 of the judgment. The Court found that plaintiff's own case was that he and defendants no. 10 to 12 were co-Bhumidhars of disputed land and as such the defendants had also right in disputed

property. The execution of sale deed by defendants and plaintiff was also not in dispute but what he claimed that at the time of execution, he was under intoxication, and, the documents got executed by contesting defendants without there being any free will on the part of plaintiff. It is in these facts and circumstances the Court held that question as to how much share belong to plaintiff and defendants respectively is a question which can be determined only by Revenue Court and further that after sale deed, name of plaintiff was deleted from revenue records, and the name of contesting defendants have been entered in his place is also a matter to be decided by Revenue Courts. The question of possession of agricultural land was also to be decided by Revenue Court since the Civil Court could have no jurisdiction to give any finding of possession over agricultural land. The Apex Court in paras 12, 13 and 16 said:

"12. Having heard the learned advocates for the parties, in our opinion, the submission of the learned counsel for the appellants deserves to be accepted. So far as abadi land is concerned, the trial Court held that Civil Court had jurisdiction and the said decision has become final. But as far as agricultural land is concerned, in our opinion, the Trial Court as well as Appellate Court were right in coming to the conclusion that only Revenue Court could have entertained the suit on two grounds. Firstly, the case of the plaintiff himself in the plaint was that he was not the sole owner of the property and defendant 10 to 12 who were proforma defendants, had also right, title and interest therein. He had also stated in the plaint that though in the Revenue Record, only his name had appeared but defendant 10 to 12 have also right in the property. In our opinion, both the Courts below were right in holding that such a question can be decided by a Revenue Court in a suit instituted under Section 229-B of the Act.

13. On second question also, in our view, Courts below were right in coming to the conclusion that legality or otherwise of insertion of names of purchasers in Record of Rights and deletion of name of the plaintiff from such record can only be decided by Revenue Court since the names of the purchasers had already been entered into. Only Revenue Court can record a finding whether such an action was in accordance with law or not and it cannot be decided by a Civil Court.

16. The instant case is covered by the above observations. The lower Appellate Court has expressly stated that the name of the plaintiff had been deleted from Record of Rights and the names of purchasers had been entered. The said fact had been brought on record by the contesting defendants and it was stated that the plaintiff himself appeared as a witness before the Mutation Court, admitted execution of the sale deed, receipt of sale consideration and the factum of putting vendees into possession of the property purchased by them. It was also stated that the records revealed that the names of contesting defendants had been mutated into record-of-rights and the name of plaintiff was deleted."

20. A bare perusal of aforesaid decision thus makes it clearly distinguishable and inapplicable to the facts of present case.

21. For the purpose of U.P. Zamindari Abolition and Land Reforms Act, 1951 (hereinafter referred to as the "Act, 1951") also so far as the meaning of term 'holding' or 'land' is concerned, in respect to land recorded as "Banjar", the law as discussed above would apply equally and, therefore, suit in question is not barred by Section 331 of Act, 1951 and the Civil Court had jurisdiction to take cognizance of suit in question and decide the same. The Appellate Court has rightly taken the view about maintainability of suit in Civil Court, in the judgment impugned in this writ petition, and, I find no legal or otherwise fault therein, warranting interference.

22. In view of above, I find no merit in the writ petition. Dismissed. Interim order, if any, stands vacated.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 06.03.2013

BEFORE
THE HON'BLE VISHNU CHANDRA GUPTA, J.

Criminal Misc. Case No. 2657(482) of 2010

Ram Kishun Yadav ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri Shivesh Nath Dubey

Counsel for the Respondents:
Govt. Advocate

Code of Criminal Procedure-Section 482-Quashing of criminal proceeding -on ground in proceeding for revision of map under section 54 Land & Revenue Act-the Assistant Record Officer-is not Court-hence cognizence taken on police investigation not bad-provision of Section 195 not attracted during course of inspection thumb impression of dead person made by counsel-in absence of entire material-matter remitted back for reconsideration-whether case fall, under section 195-Magistrate has power to take cognizance apart from the procedure under section 340 and 343 Cr.P.C.

Held: Para-28 & 29

(28) It is clear that if the case falls within the ambit of either Section 195(1)(a) or 195(1)(b), cognizance taken by Magistrate would be bad because the same would be against the procedure established by law as contained in Section 195 readwith Section 340 and 343 Cr.P.C.

(29) In view of the above facts and circumstances of the case, this court is of the firm view that matter should be sent back to the Trial Court to give specific finding with reasons on the basis of material available on police diary whether this case is covered under section 195 Cr.P.C. or not ? In case, trial court comes to the conclusion that case does not falls within the ambit of section 195 Cr.P.C., only in that event, that court shall proceed with the trial.

Case Law discussed:
2005(4)SCC,370; AIR 1998 SC 768; 11 SCC 251; AIR 1979 SC page 437; 1983 Cr.L.J; AIR 1973 (SC)1100; AIR 1974 (SC)

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

(1) This Criminal Misc. Case under section 482 Criminal Procedure Code (for short 'Cr.P.C.') has been filed to quash the proceeding of case No. 4934 of 2009, arising out of case crime no. 4234/08, under section 471/467/468/419/420 of Indian Penal Code (for short 'I.P.C.'), P.S. - Kotwali

Nagar, Distt. - Faizabad, pending in the court of Chief Judicial Magistrate, Faizabad.

(2) In this petition the cognizance taken by the court in pursuance of the police report has been challenged in the light of Section 195 Cr.P.C. on the ground that in this case forgery committed in respect of a document produced in the judicial proceedings. Therefore, cognizance taken by the court on the basis of police report would be void. Learned counsel for the petitioner in support of his contention relied upon the judgment of the Apex Court passed in **2005 (4) SCC, 370, Iqbal Singh Marwah and Another Vs. Meenakshi Marwah and Another.**

(3) On the contrary learned AGA submitted that case does not fall within the ambit of Section 195 Cr.P.C. because the forgery committed in respect of such document which is not produced by either party to the proceedings. On fact Iqbal Singh Marwah's case (supra) will not apply.

(4) In the light of the submissions raised by the counsels for the parties, the facts of this case required to be scanned.

(5) The First Information Report (for short 'F.I.R.') has been lodged by one Chandrika Prasad reader of Court of Assistant Record Officer, Faizabad, in police station - Kotwali city that a case is pending before the court having case no. 50/59/85/91/139/130/146/166/236/410 of village Manjha Barhatta, Pargana, Haweli Oudh Tahsil and District - Faizabad. This case was Mahanth Ram Garib Das Vs. Kamal Das was in respect of section 54 of U.P. Land Revenue Act. In the order sheet of this case dated 28.11.19877 (Paper No.4-Aa) and order sheet dated 7.8.1987(Paper No.3-Aa), the forged thumb impression of Kamal Das were affixed by the advocate during the course of inspection of file. The Assistant Record Officer by its order dated 1.10.2008 directed to lodged the F.I.R. of this incident. It was also mentioned in the first information report that person who had already died was shown to be alive before the court. The benefit of this act should go to one Ram Kishun Yadav (Petitioner) S/O Jai Sri Yadav, presently R/O 566, Audhpuri Colony, Amani Ganj, Kotwali City, Faizabad. The F.I.R. Accordingly lodged against him on 10.10.2008. The investigation was conducted and chargesheet was filed against Ram Kishor Yadav u/s 419/420/467/468/471 I.P.C. From the perusal of the record of investigation it reveals that forged thumb impressions of deceased Kamal Das were put on the order-sheets with intent to get an advantage to show that Kamal Das was alive on the date fixed in this case on 07.08.1987 and 28.11.1987. Hence, offence against the petitioner is made out.

(6) Whether case falls within the ambit of section 195 Cr.P.C. or not, it would be necessary to look into the provisions of section 195 of the Cr.P.C., which are re-produced herein below :-

"**195. Prosecution for contempt of lawful authority of public servants,for offences against public justice and for offences relating to documents given in evidence.-**--(1) No court shall take cognizance-

(a)(i) If any offence punishable under sections 172 to 188 (both inclusive) of the Indian Penal Code (45 of 1860), or

(ii) Of any abetment of, attempt to commit, such offence, or

(iii) Of any criminal conspiracy to commit, such offence,

except on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate;

(b)(i) Of any offence punishable under any of the following sections of the Indian Penal Code (45 of 1860), namely, sections 193 to 196 (both inclusive), 199, 200, 205 to 211 (both inclusive) and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any court, or

(ii) Of any offence described in section 463, or punishable under section 471, section 475 or section 476, of the said Code, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any court, or

(iii) Of any criminal conspiracy to commit, or attempt to commit, or the abetment of, any offence specified in sub-clause (i) or sub-clause (ii), except on the complaint in writing of that court, or of some other court to which that court is subordinate.

except on the complaint in writing of that Court or by such officer of the Court as that Court may authorise in writing in this behalf, or of some other Court to which that Court is subordinate.

(2) Where a complaint has been made by a public servant under clause (a) of subsection (1) any authority to which he is administratively subordinate may order the withdrawal of the complaint and send a copy of such order to the court; and upon its receipt by the court, no further proceedings shall be taken on the complaint:

Provided that no such withdrawal shall be ordered if the trial in the court of first instance has been concluded.

(3) In clause (b) of sub-section (1), the term "court" means a Civil, Revenue or Criminal Court, and includes a tribunal constituted by or under a Central, provincial or State Act if declared by that Act to be a court for the purposes of this section.

(4) For the purposes of clause (b) of sub-section (1), a court shall be deemed to be subordinate to the court to which appeals ordinarily lie from appeal able decrees or sentences of such former court, or in the case of a civil court from whose decrees no appeal ordinarily lies, to the principal court having ordinary original civil jurisdiction within whose local jurisdiction such civil court is situate:

Provided that-

(a) Where appeals lie to more than one court, the Appellate Court of inferior jurisdiction shall be the court to which such court shall be deemed subordinate;

(b) Where appeals lie to a Civil and to Revenue Court, such court shall be deemed to be subordinate to the Civil or Revenue Court according to the nature of the case or proceeding in connection with which the offence is alleged to have been committed."

(7) From perusal of section 195(1)(b) (ii) reveals that the court could take cognizance of any offence described in Section 463, or punishable 471, 475 or 476 I.P.C. when such offence is alleged to have been committed in respect of document produced or given in evidence in a proceeding in any Court, except on the complaint in writing of that Court or by such officer of some other Court of the as that court may authorise in writing in this behalf, or the Court to which that court is subordinate.

(8) Learned counsel for the petitioner submits that the case is covered under section 195(1)(b)(ii) Cr.P.C. because it relates to a document in the record of the case. Hence, in view of the Iqbal Singh Marwah's case cognizance could only be taken on complaint filed by the court or by any other authorized person and not on the basis of police report.

(9) On the contrary learned A.G.A. submits that this case does not fall within the ambit of Section 195(1)(b)(ii) Cr.P.C. because the alleged act of accused was in relation to a document which has not been produced by any of the party nor the alleged act said to have been committed by any of the party to the proceedings.

(10) Having considered the rival submissions of counsels for the parties and going through the record it is necessary to look into the factual matrix of this case.

(11) Admittedly the documents purported to have been tempered with are nothing but the order-sheets of proceedings before a Revenue Authority. The alleged tempering is not in respect of document produced or given in evidence by any party to the proceeding in the aforesaid proceedings.

(12) To attract the provisions of section 195 Cr.P.C. following are the requirements:-

I. If any offence is committed for contempt of lawful authority of public servants as covered under section 172 to 188 I.P.C.(both inclusive), section 195(1)(a) will attract.

II. If prosecution relates to an offence against public justice as included in section 193 to 196 (both inclusive) 199, 200, 205 to 211 (both inclusive) and 228 I.P.C , section 195(1)(b)(i) will attract.

III. If prosecution for the offence relating to a document produced by any party to the proceeding given in evidence in a court as covered in Section 463, 471, 475, 476 I.P.C , section 195(1)(b)(ii) will attract.

(13) In all the aforesaid three contingencies, no court could take cognizance except on the complaint in writing of the public servant concerned or any authority to which he is administratively subordinate or by Court or by such officer of some other Court as that court may authorise in writing in this behalf, or the Court to which that court is subordinate.

(14) So far as the procedure of complaint is concerned, Section 340 of Cr.P.C. is also relevant, which is reproduced herein below:-

"340 . Procedure in case mentioned in section 195.--(1) When upon an application made to it in this behalf or otherwise any court is of opinion that it is expedient in the interest of justice that an inquiry should be made

into any offence referred to in clause (b) of sub-section (1) of section 195, which appears to have been committed in or in relation to a proceeding in that court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that court, such court may, after such preliminary inquiry, if any, as it thinks necessary,-

(a) Record a finding to that effect;
(b) Make a complaint thereof in writing;
(c) Send it to a Magistrate of the first class having jurisdiction;
(d) Take sufficient security for the appearance for the accused before such Magistrate, or if the alleged offence is non-bailable and the court thinks it necessary so to do send the accused in custody to such Magistrate; and

(e) Bind over any person to appear and give evidence before such Magistrate.

(2) The power conferred on a court by sub-section (1) in respect of an offence may, in any case where that court has neither made a complaint under sub-section (1) in respect of that offence nor rejected an application for the making of such complaint, be exercised by the court to which such former court is subordinate within the meaning of sub-section (4) of section 195.

(3) A complaint made under this section shall be signed, -
(a) where the court making the complaint is a High Court, by such officer of the court as the court may appoint;
(b) in any other case, by the presiding officer of the court or by such officer of the Court as the Court may authorise in writing in this behalf.]

(4) In this section, "court" has the same meaning as in section 195."

(15) Section 343 of Cr. P.C. relating to manner of taking cognizance by the Magistrate in such type of case. Section 343 is also reproduced herein below :-

"343. Procedure of Magistrate taking Cognizance.-

(1) A Magistrate to whom a complaint is made under section 340 or section 341 shall, notwithstanding anything contained in Chapter XV proceed, as far as may be, to deal with the case as if it were instituted on a police report.

(2) Where it is brought to the notice of such Magistrate, or of any other Magistrate to whom the case may have been transferred, that an appeal is pending against the decision arrived at in the judicial proceeding out of which the matter has arisen, he may, if he thinks fit, at any stage, adjourn the hearing of the case until such appeal is decided."

(16) Section 345 of the Criminal Procedure Code deals with the cases falling Clause (b) of sub-clause (1) of Section 195 Cr.P.C. Section 345 is also relevant in the light of Section 195 . Section 345 Cr.P.C. provides procedure in certain cases of contempt, the provision ogf section 345 Cr.P.C.is also reproduced herein below :-

"345. Procedure in certain cases of contempt.--

(1) When any such offence as is described in section 175, section 178, section 179, section 1 80 or section 228 of

the Indian Penal Code (45 of 1860) is committed in the view or presence of any Civil, Criminal or Revenue Court, the court may cause the offender to be detained in custody and may at any time before the rising of the court on the same day, take cognizance of the offence and, after giving the offender a reasonable opportunity of showing cause why he should not be punished under this section, sentence the offender to fine not exceeding two hundred rupees, and, in default of payment of fine, to simple imprisonment for a term which may extend to one month, unless such fine be sooner paid.

(2) In every such case the court shall record the facts constituting the offence, with the statement (if any) made by the offender as well as the finding and sentence.

(3) If the offence is under section 228 of the Indian Penal Code (45 of 1860), the record shall show the nature and stage of the judicial proceeding in which the Court interrupted or insulted was sitting, and the nature of the interruption or insult.

(17) The investigation is the statutory power of the police under Cr.P.C.. These powers are not in any way controlled or circumscribed by section 195 Cr.P.C. as held in **State of Punjab Vs. Raj Singh, AIR 1998 SC 768**.

(18) It is also to be noticed that at the stage of investigation Section 195 Cr.P.C. has no application. Once investigation is completed then embargo in section 195 Cr.P.C. comes into play and court would not be competent to take cognizance . If offence falls within the ambit of Section 195 Cr.P.C. as held in **M. Narayan Das V/s State of Karnataka, 2003)11 SCC 251.**

(19) In **Iqbal Singh Marwaha's case** (Supra) a constitution Bench of Hon'ble Supreme Court dealt with the case falling under section 195(1)(b)(ii) and held that if forgery in respect of the document produced in the court has been committed before filing of the documents, the same would be out of the purview of section 195 Cr.P.C.

(20) The present case is not in respect of a document produced in any proceedings in a court by any party to the proceeding, so **Iqbal Singh Marwaha's case(Supra)** will not extend any help to the petitioner.

(21) For attracting the provisions Section 195 it is indispensable that offence committed must in some manner have affected the proceedings or had been designed to affect them or come to the light in course of them, but an offence committed after the close is wholly outside the scope of provision of Section 195, as held in **S. L. Goswami vs High Court Of Madhya Pradesh AIR 1979 SC page 437.**

(22) The next requirement to attract section 195 is that the proceedings must be before a court. The proceedings purported to be under section 54 of the U.P.Land Revenue Act are related with revising the map and record of Revenue Land. In **Lal Bihari Prasad Vs. State of Bihar, 1980 Cr.L.J page 64 (Patna-Division Bench)** it has been held that Deputy Collector incharge of Land Reforms or Additional Collector or Additional Commissioner hearing

mutation dispute is not a court within the meaning of Section 195Cr.P.C. However, in **Maharaji Vs. Rama Shankar, 1983 Cr.L.J, 24 (Allahabad High Court)**, it was held that Tehsildar conducting mutation proceedings u/s 34 of U.P. Land Revenue Act, 1901 is a Revenue Court within the meaning of Section 195 Cr.P.C.

(23) The proceedings under section 54of U.P.L.R.Act relating to revision of map and record of revenue land are conducted by Record Officer in view of section 54(1) of U.P.L.R.Act. Section 4(8) defines the Revenue Court. Section 4(8) of U.P.Land Revenue Act,1901 is extracted below:-

" 4. **Definitions**.-- In this Act unless there be something repungent in the subject or context--

(8) " Revenue Court" means all or any of the following authorties(that is to say), the Board and all members thereof, Commissioners, Additional Commissioners,Collectors ,Additional Collectors, Assistant Collectors, Settelment officers, Record officers,and Assistant Record Officers and Tehsildars;"

Hence Rocord officer conducting proceeding under section 54 of U.P.L.R.Act certainly be categorized as court proceedings and the Revenue Officer dealing with those proceedings shall certainly fall within the ambit of "Court" as defined in Section 195 (3) of Cr.P.C.

(24) In order to attract an operation of the section 195, the offence should be alleged to have been committed by the party to the proceedings in his character as a party, i.e., after having become a party to the proceedings, as held in **Raghunath Vs. State of U.P. AIR 1973 (SC) 1100 and in Mohan Lal Vs. State of Rajasthan AIR 1974 (SC) page 299.**

(25) The question, whether in the present case Section 195 Cr.P.C.will create a bar in taking cognizance by the Magistrate ? is to be considered in the light of the fact of the case. The entire record is not before this court. What offence has been committed in the facts and circumstances of this case or whether the offence for which the cognizance has been taken by the Magistrate are made out or not is also to be seen in the light of fact of this case.

(26) From perusal of the record available here, it appears from the allegations made in the F.I.R. that some lawyer tempered with the order sheets of the case. However, the chargesheet has been filed against the present petitioner Ram Kishun Yadav. In case, the case falls Under Section 195 (1)(b)(ii) or (iii) Cr.P.C. then it would be incumbent upon the court to see whether the person committed offence by tempering the order-sheet was party to those proceedings, in respect of which such forgery has been committed.

(27) In case the the matter falls within the ambit of Section 195(1)(a)(i) or 195(1)(b)(i) in that event too court has to decide whether any offence punishable under section 172 to 188 (both inclusive), section 193 to 196 (both inclusive), 199, 200, 205 to 211 (both inclusive) and section 228 I.P.C. are made out from the material available in the police diary.

(28) It is clear that if the case falls within the ambit of either Section

195(1)(a) or 195(1)(b), cognizance taken by Magistrate would be bad because the same would be against the procedure established by law as contained in Section 195 readwith Section 340 and 343 Cr.P.C.

(29) In view of the above facts and circumstances of the case, this court is of the firm view that matter should be sent back to the Trial Court to give specific finding with reasons on the basis of material available on police diary whether this case is covered under section 195 Cr.P.C. or not ? In case, trial court comes to the conclusion that case does not falls within the ambit of section 195 Cr.P.C., only in that event, that court shall proceed with the trial.

(30) In view of the above it is provided that till the Trial Court takes decision on the aforesaid issue, no coercive steps shall be taken against the petitioner.

(31) With this observation, petition is finally disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.03.2013

BEFORE
THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.

Service Single No. 5933 of 2005

State of U.P. ...Petitioner
Versus
State Backward Commission U.P. and others ...Respondents

Counsel for the Petitioner:
C.S.C.

Counsel for the Respondents:
Sri B.K. Chaudhary
Ari A.K. Chaudhary
Sri Alok Kumar
Sri B.L. Maurya
Sri N.L. Pandey

U.P. State Commission for Backward Classes Act.1996-Section-10- **Power of Commission-to adjudicate individual grievances-when legislature silent-commission has no authority to adjudicate the individual grievances-in absence of power like Court or Tribunal-order quashed.**

Held: Para-18

A perusal of impugned order dated 13.08.2004, passed by the Commission reveals that the Commission not only required the authorities of the Education Department to submit their reply but also proceeded to decide the complaint as a lis between the complainants and authorities of the Education Department and after discussing the matter at length has given a finding to the effect that the complainants are liable to be promoted in lecturer's grade and further that they are entitled to the salary of the said grade. The manner in which the Commission appears to have proceeded and recorded its finding leaves no room of doubt that it not only entertained but even decided the individual dispute raised by the complainants in respect of their individual grievances pertaining to their service conditions.

Case Law discussed:
[2011 (1) ADJ 112 (DB)]

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

1. As to whether U.P. State Commission for Backward Classes (hereinafter referred to as ' Commission') constituted under U.P. State Commission for Backward Classes Act, 1996 is couched with power and authority under Section 9 read with Section 10 of the said

Act to determine a lis relating to service matter of an individual is the question which is engaging attention of this Court in the instant writ petition.

2. Heard Sri Himanshu Shekhar, learned counsel appearing for the petitioners- State of U.P. through Principal Secretary Education Civil Secretariat, Lucknow and others and learned counsel for Commission as well as learned counsel for complainants and perused the documents and material available on record.

3. Facts of the case which led to filing of the instant writ petition whereby a challenge has been thrown by the State of U.P. to an order dated 13.08.2004, passed by the Commission in Case No. 226 of 2000, Ram Sewak and others -versus- Regional Joint Director of Education, Lucknow, are that a complaint by Sri Ram Sewak, Sri Divakar Singh and Sri Brij Gopal was made to the Commission praying therein that an appropriate direction be issued to make available lecturer's pay-scale to them and to relieve them of alleged exploitation. In the said complaint, it was stated by the complainants that they had teaching in intermediate classes of Sohan Lal Higher Secondary School, Rajendra Nagar, Lucknow since July, 1998 (hereinafter referred to as 'Institution') but no efforts were made by the Management of the said Institution regarding their promotion and payment of pay-scale of lecture grade. It was also stated in the said complaint that the Institution was recognized to run high school and intermediate classes along with the financial grant under which the high school and intermediate classes are being run. However, for certain reasons, with the consent and concurrence of the District Inspector of Schools, Lucknow, intermediate classes were suspended for some years.

4. On the aforesaid complaint, it appears that the Commission required District Inspector of Schools and other authorities of the Education Department to furnish their reply, in compliance thereof the District Inspector of Schools submitted his reply by means of a letter dated 17.02.2003, which has been annexed as Annexure No.6 to the writ petition. In the said reply, it was stated by the District Inspector of Schools that the Institution in question is recognized for high school classes and is in grant-in-aid scheme for the classes upto high school level. Further, so far as the intermediate classes (11th and 12th) are concerned, the recognition to the Institution though has been granted, however, intermediate classes are not covered by grant-in-aid scheme. It was further replied by the District Inspector of Schools that no posts in the Institution have been sanctioned in lecturer's grade. It was also informed that the intermediate classes were earlier ordered to be abolished by means of an order dated 12.07.1961 and thereafter, the Institution was recognized for intermediate classes without any grant from the State Government, vide order dated 13.9.1997. The District Inspector of Schools further submitted in his reply to the Commission that the complainants, namely, Sri Ram Sewak, Sri Divakar Singh and Sri Brij Gopal are regular/permanent LT Grade teachers in the Institution and they are getting their salary in the said grade from the State exchequer. He also stated that as per report submitted by the principal of the Institution, the complainants were required to teach the intermediate classes

for sometime when the Institution received recognition for intermediate classes without any grant, however, subsequently, the teaching work from the complaints was stopped being taken. The District Inspector of Schools further stated that in case recognition is granted in an Institution without any State grant then in that event payment to the teachers teaching in subjects which are recognized without State grant is made by the college management. Lastly, he categorically stated in his reply that in absence of any sanctioned post of lecturer's grade available in the institution, the complainants are not legally entitled to be paid the pay-scale of lecturer's grade.

5. The matter was considered by the Commission which appears to have treated the complaint to be decided as a lis between complainants and authorities of education department of the District, Lucknow. The Commission, thus, passed impugned order dated 13.08.2004 holding therein that the complainants Ram Sewak and Brij Gopal are entitled to be promoted on the lecturer's grade and they are also entitled to be paid salary of the said grade.

6. Assailing the order dated 13.08.2004, Sri Himanshu Shekher, learned counsel appearing for the State has submitted that though Commission is a creation of statute made by the State Legislature, however, under the statutory scheme of the said legislative enactment under which Commission has been created, the Commission has not been trusted any lawful authority to adjudicate any individual dispute between the parties, specially a dispute of nature which was enquired into and adjudicated by the Commission in the instant case.

7. On the other hand, learned counsels appearing for the complainants-opposite parties and the Commission have tried their best, though in vain, to defend the order dated 13.08.2004, passed by the Commission arguing, inter-alia, that the Commission has been vested with ample powers under Section 9 (b and c) of U.P. State Commission for Backward Classes Act, 1996. Drawing attention of the Court to the aforesaid provisions of the Act, it has been submitted by the learned counsels appearing for the Commission as well as complainants that under sub-clause (b) of Section 9 of the Act, the Commission has been vested with ample authority to investigate and monitor all the matters relating to safeguards provided for the backward classes and further that the Commission can enquire into a specific complaint as well and make appropriate orders and recommendations. It has also been stated that the order dated 13.08.2004 is not a direction; rather it is an opinion of the Commission.

8. I have given my anxious consideration to the competing arguments raised by the learned counsels for the respective parties.

9. State Commission for Backward Classes has been constituted by the State Government under Section 3 of the Act. The functions and powers of the Commission can be found in Chapter 3 of the Act. Section 9 contains prescriptions which provide for functions of the Commission. Section 9 of the Act runs as under:-

"9. Functions of the Commission - (1) The Commission shall perform all or any of the following functions, namely -

(a) the Commission shall examine requests for inclusion of any class of citizens as a Backward Class in the Schedule and hear complains of wrong inclusion or non-inclusion of any Backward Class in the Schedule and tender such advice to the State Government as it deems appropriate;

(b) to investigate and monitor all matters relating to the safeguards provided for the Backward Classes under any law for the time being in force or under any order of the State Government and to evaluate the working of such safeguards;

(c)to enquire into specific complaints with respect to the deprivation of rights and safeguards of the backward Classes;

(d) to participate and advise on the planning process of socio-economic development of the backward Classes and to evaluate the progress of their development;

(e) to present to the State Government annually and at such other times as the Commission may deem fit, reports upon the working of those safeguards;

(f) to make in such reports recommendations, as to the measures that should be taken by the State government or the effective implementation of those safeguards and other measures for the protection, welfare and socio-economic development of the backward Classes; and

(g) to discharge such other function in relation to the protection, welfare, development and advancement of the backward Classes as may be referred to it by the State Government.

(2) The State Government shall cause the reports of the Commission to be laid before each House of the State Legislature along with it memorandum explaining the action taken or proposed to be taken on the recommendations and the reason for the non-acceptance, if any, of any such recommendations."

10. Section 10 of the Act vests certain powers to the Commission and states that while performing its functions under Section 9 of the Act, the Commission shall have all the powers of a civil court in respect of matter pertaining to summoning and enforcing the attendance and examining the person on oath, requiring the discovery and production of any document, receiving evidence on affidavits, calling for any public record or its copy, issuing commissions for examination of witnesses and documents and any other matter which may be prescribed. Section 10 of the Act is also quoted herein as under:-

"10.Powers of the Commission:- *The Commission shall, while performing its functions under sub-section (1) of Section 9, have all the powers of a civil court trying a suit and in particular, in respect of the following matters, namely:-*

a) summoning and enforcing the attendance of any person and examining him on oath;

b) requiring the discovery and production of any document;

c) receiving evidence on affidavits;

d) requisitioning any public record or copy thereof from any court or office;

e) issuing commissions for the examination of witnesses and documents; and

f) any other matter which may be prescribed."

11. As observed above, the issue which needs an answer in the instant case is as to whether in exercise of its functions and powers under Sections 9 and 10 of the Act, the Commission can entertain and decide an individual dispute pertaining to the alleged grievances of an individual relating to matter concerning his service conditions.

12. So far as Section 10 of the Act is concerned, it gives power to the Commission in certain matters enumerated therein to exercise certain powers of a civil court. A close scrutiny of Section 9 of the Act discloses that the basic function of the Commission is to entertain the requests for inclusion of any class of citizens as a backward class in the Schedule and to hear complaints of wrong inclusion or non-inclusion of any backward class in the Schedule of the Act. The Commission has further been mandated to tender its advise to the State Government as may be deemed appropriate by it. The Commission has also been given authority to investigate and monitor all matters relating to the safeguards provided for the Backward Classes under law and also to make an evaluation of the working of such safeguards. It can also enquire into specific complaints with respect to deprivation of rights and safeguards of the Backward Classes. Various other functions have also been prescribed under Section 9 including presentation of reports to the State Government annually on working of such safeguards provided for to the Backward Classes. It is also couched with an authority to make recommendations as regards the measures which should be taken by the State Government for effectively implementing the safeguards and measures for protection, welfare and socio-economic development of the Backward Classes.

13. The functions, thus, entrusted by the State Legislature to the Commission are related to a class action, meaning thereby, the Commission is mandated to discharge its functions in a manner that appropriately ensures safeguarding the protections and rights provided by law to the Backward Classes. The Commission is not vested with an authority or power or jurisdiction to decide an individual dispute, specially the dispute of the nature which has been decided in the instant case which is primarily related to the alleged grievance of the complainant that they are not being promoted to the lecturer grade and further that they are not being paid their salary in the said grade.

14. The intermediate institutions in the State of U.P. are governed by the provisions of U.P. Intermediate Education Act, 1921. The matters relating to service conditions of the teachers and non-teaching staffs working in these institutions are governed by the provisions of U.P. Intermediate Education Act, 1921, the U.P. Secondary Education (Services Selection Boards) Act 1982 and the U.P. High Schools and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act, 1971. The complainants, or for that matter any other teaching or non-teaching staff,

having any grievance concerning the matters related to their service conditions in the institution could approach the authorities of the education department or could take recourse to knocking the doors of the courts seeking appropriate legal remedy which may be available to such a person under law. However, as observed above, the scheme of the Act under which the Commission has been constituted clearly shows that the Commission has not been constituted to entertain or decide an individual dispute concerning service conditions of the employees including teachers working in an intermediate institutions.

15. The aforesaid view finds support from a Division Bench judgment of this Court reported in **[2011(1) ADJ 112 (DB)], Prof. Banarsi Tripathi versus State of U.P. and others.** In this judgment, this Court has in unequivocal terms held that investigation and enquiry referred to in various sub-clauses of Section 9 of the Act are not provided to be made in respect of any grievance relating to enforcement of the rights of any individual. It has further been held that Section 9 (a, b, d, e, f and g) also talks of rights and safeguards of Backward Classes and not of an individual. The relevant paragraphs 36, 38, 39, 40, 41 and 42 of the said judgment in the case of **Prof. Banarsi Tripathi (supra)** are reproduced below:-

36. Section 9 (1) (a) of the State Act is couched in the same language as Section 9 (1) of the Central Act, except that the word 'wrong inclusion' in place of 'over-inclusion'. The word more or less carry the same meaning. The State Act provides for further powers to the Commission under Section 9 (1) (b), (c), (d), (e) and (f). The Commission may also discharge such other function under Clause (g) in relation to protection, welfare, development and advancement of the Backward Classes as may be referred to it by the State Government. Sub-clause (b) provide for investigation and monitoring of all matters relating to safeguards provided for backward class under any law for the time being enforced or under the orders of the State Government. Sub-clause (c) provides for enquiry into specified complaints with respect to deprivation of rights and safeguards of the backward classes. Both these sub-clauses provide for class action in respect of safeguards provided for backwardness under any law and in respect of deprivation of their rights. The investigation and enquiry referred to in the sub-clauses are not provided to be made in respect of any complaint relating to enforcement of the rights of any individual. The word 'backward classes' has to be read in the context of the complaints of deprivation of rights and safeguards of group of persons. The Commission can inquire into violation of their rights, and submit its report to the State Government, which shall cause the report to be laid before each house of the State Legislature along with a memorandum explaining action taken or proposed to be taken and the reasons for the non-acceptance, if any of any such recommendation. The powers enumerated in Section 9 (1) are not to be exercised in respect of complaints of any individuals regarding enforcement of their rights. The deprivation of the rights and safeguards of backward classes do not include an individual complaint of enforcement of any right, and would certainly not include a recommendation or direction to the Court to give payment of salary,

appointment, to lodge first information report against any person or to punish a person. It would definitely not include a direction not to appoint a person as Head of the Department or a members of any statutory committee.

38.The object and purpose of establishing the Backward Classes Commission at the Centre and in the State is to examine the requests for inclusion of any class of citizens as a backward class in the lists, and hear complaints of over-inclusion or under-inclusion of any backward class in such lists, and tender such advice to the Government as it deems appropriate. The State Act has extended the functions of State Commission to investigate and monitor all the matters relating to the safeguards provided for the Backward Classes under any law or under any order of the State Government, and to evaluate the working of such safeguards. Section 9 of the State Act further provides to enquire into specific complaints with respect to the deprivation of rights and safeguards of the Backward Classes, to participate and advise on the planning process of socio-economic development of the Backward Classes and to evaluate the progress of their development. The State Commission is also empowered to present to the State Government annually upon the working of those safeguards. The functions enumerated under sub clauses (f) and (g) of Section 9 of the State Act include the powers to make such reports and recommendations, as to the measures that should be taken by the State Government or the effective implementation of those safeguards and other measures for the protection, welfare and socio-economic development of the Backward Classes, and to discharge such other function in relation to the protection, welfare, development and advancement of the Backward Classes as may be referred to it by the State Government.

39.The individuals belonging to Backward Classes like all other citizens of the country have the rights, under various statutes and also under Article 226 and a fundamental right under Article 32 of the Constitution of India to raise their grievances and to seek relief from Courts.

40. When the statute includes an explicit function, we must follow and understand that function in the same light and purpose. These functions are restricted to the enumerated functions with the conditions that the Commission shall perform all or any of the functions. The doctrine of 'noscitur a sociis', used to interpret statutes provides that, an ambiguous term may be given more precise content by the neighboring words with which it is associated, can be used here to interpret the scope and content of functions of the Commission under Section 9 (1) (c). All the functions under sub Sections (1) (a),(b), and (d) to (g), are class actions. Section 9 (1) (c) , also talks of rights and safeguard of backward classes, and not of an individual belonging to backward class. The Commission, in our considered opinion therefore, does not have power to investigate, monitor or advise the State Government in respect of any functions other than the functions enumerated in Section 9. Basically the functions of the Central Commission and State Commission is to look into the wrong inclusion or non-inclusion of any Backward Class in the Schedule, and such class action relating to the Backward Classes, which are necessary for

protecting their rights given under any law, for their protection, welfare and socio-economic development. The individual complaints regarding non fulfillment of any right guaranteed under Constitution by any law are required to be investigated and redressed in accordance with the process prescribed for adjudication by the courts of law and not by the Commission.

41. The Commission for the purpose of dealing with the complaints, is not a Court or Tribunal, to adjudicate such complaints. The powers of the Commission under Section 10 of the Act or in respect of investigation and enquiry into a class action, is for the purpose of recommendation, and not for deciding any issue brought before it. The Commission has not been established to substitute the courts of law nor can be clothed with powers of imposing penalties and punishment, separated and given to courts under Article 50 of the Constitution of India.

42. The service conditions of the government servants, employees of any Corporations, Government Societies, Public Sector Undertakings, Local Bodies, or Universities are governed by statutory rules, regulations, statutes, ordinances and government orders. The State Commission is not empowered and authorised to direct any action to be taken against any employee, on the pretext of oppression, victimization, or protection of the rights of persons of Backward Classes. Any such recommendation will be wholly illegal and will be overreaching the jurisdiction conferred on the Commission. The State Government in such case will act beyond its executive powers and duties to recommend action against individuals.

16. In the aforesaid judgment, it has, thus, clearly been held that the Commission is not a Court or Tribunal to adjudicate individual complaints. Incidentally, it is also noticeable that the aforesaid judgment in the case of **Prof. Banarsi Tripathi (supra)** also relates to service related grievances of an individual.

17. So far as instant case is concerned, a complaint by complainants was made to the Commission, which is on record as Annexure No.5 to the writ petition, perusal of which makes it explicit that grievances of the complainants related to their alleged non-promotion in lecture's grade and non-payment of salary to them in the said grade. Clearly, the grievance/complaint raised by the complainants was individual in nature and the same concerned the matter relating to their service conditions.

18. A perusal of impugned order dated 13.08.2004, passed by the Commission reveals that the Commission not only required the authorities of the Education Department to submit their reply but also proceeded to decide the complaint as a lis between the complainants and authorities of the Education Department and after discussing the matter at length has given a finding to the effect that the complainants are liable to be promoted in lecturer's grade and further that they are entitled to the salary of the said grade. The manner in which the Commission appears to have proceeded and recorded its finding leaves no room of doubt that it not only entertained but even decided the

individual dispute raised by the complainants in respect of their individual grievances pertaining to their service conditions.

19. In view of discussions made above and having regard to the judgment of Division Bench of this Court in the case of **Prof. Banarsi Tripathi (supra),** I have no hesitation to hold that the order dated 13.08.2004, passed by the Commission is well beyond its jurisdiction and authority vested in it under the provisions of Act.

20. This, the writ petition deserves to be allowed.

21. Accordingly, the writ petition is allowed. A writ in the nature of certiorari is issued and the impugned order dated 13.08.2004, passed by the State Commission for Backward Classes, U.P. in Case No. 226 of 2000, Sri Ram Sewak and others -versus- Regional Joint Director of Education, Lucknow is hereby quashed.

22. There will be no order as to cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.03.2013

BEFORE
THE HON'BLE ANIL KUMAR, J.

Service Single No.8005 of 2010

Ramesh Chandra Maurya ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri B.R. Singh

Counsel for the Respondents:
C.S.C.

Constitution of India-Artcle-226-Service Law-period of short time working w.e.f. 13.07.1983 to 26.05.1989-on post of Gram Panchayat Adhikari-whether can be counted for other consequential service benefits?-held-'No'-word re-appointment-denotes 'first regular appointment on 26.05.1989-so short term working followed by termination-can not taken into consideration.

Held: Para-18

Lastly, the petitioner was given appointment on the post of Gram Panchayat Adhikari by an order dated 09.05.1989 (Annexure No. 6) in pursuance to the Government Order dated 20.10.1986, even if the words mentioned in the appointment order are "पुनः नियुक्ति समायोजित" but the said date (09.05.1989) shall be the date of his appointment in the department on the post of Gram Panchayat Adhikari and that date shall be the starting point of his career. So, the relief as claimed by the petitioner for giving benefit of the service rendered by him w.e.f. 13.07.1983 to 26.05.1989 on the post of Gram Panchayat Adhikari cannot be granted, as such, the petitioner cannot derive any benefit from the law as laid down by Hon'ble the Supreme Court in the case of Sushil Kumar (Supra) because the same is not applicable in the facts and circumstances of the present case.

Case Law discussed:
(1986) 3 SCC 325; (2000) 10 SCC 659; 2001(5)SCC358; JT 1993(1) SCC 360

(Delivered by Hon'ble Anil Kumar, J)

1. Heard Sri B.R. Singh, learned counsel for petitioner, Sri A.N. Trivedi, learned State counsel and perused the record.

2. Facts of the present case are that petitioner was initially appointed on the post of Gram Panchayat Adhikari on 13.07.1983 in the Panchayat Raj Department, State of U.P. and posted under District Panchayat Raj officer, Raebarerli. While he was working and discharging his duties his services has been terminated by order dated 1/3.05.1984 (Annexure No. 2) on the ground that 35 Gram Panchayat Adhikari who were working on deputation have been repatriated back to their substantive post in the Panchatraj Department.

3. Thereafter, on 08.01.1985 (Annexure No. 4) petitioner was given appointment on the post of Gram Panchayat Adhikar by means of order dated 08.01.1985 (Annexure No. 4) and posted at Maharajganj. In the said capacity, he worked and discharged his duties upto 16.12.1987. Again some persons who are working in a different department had been repatriated back on the post of Gram Panchayat Adhikari, so the services of the petitioner was terminated.

4. Subsequently, in view of the Government Order dated 20.10.1986, the petitioner appointed on the post of Gram Panchayat Adhikari by means of the order dated 09.05.1989 (Annexure No. 6) passed by Director, Panchayat Raj, U.P, Lucknow.

5. In view of the abovesaid factual background, the petitioner had filed the present writ petition before this Court praying that the services rendered by him w.e.f. 13.07.1983 to 26.05.1989 on the post of Gram Panchayat Adhikari may be counted for his service benefit.

6. Sri B.R. Singh, learned counsel for petitioner in order to press the said relief submits that from the perusal of the order dated 09.05.1989 (Annexure No. 6) passed by Director, Panchayat Raj, by which the petitioner has been appointed on the post of Gram Panchayat Adhikar, the word mentioned are "पुनः नियुक्ति समायोजित"So taking into consideration the said material fact, the petitioner is entitled for all the service benefits for the services rendered by him in the department from 13.07.1983 to 26.05.1989. In support of his contention, learned counsel for petitioner has relied on the judgment passed by Hon'ble the Supreme Court in the case of **Sushil Kuamr Yadunath Jha Vs. Union of India and another, (1986) 3 SCC 325.**

7. Sri A.N. Trivedi, learned Additional Chief Standing Counsel while rebutting the contention of the petitioner submits that as in the appointment order dated 09.05.1989, the word which has been mentioned "पुनः नियुक्ति समायोजित", so it is a fresh appointment of the petitioner on the post in question which has been accepted by him. Thus, taking into consideration the said facts, the relief as claimed by the petitioner for counting the service rendered by him w.e.f 13.07.1983 to 26.05.1989 on the post of Gram Panchat Adhikari cannot be granted to him for the purpose of service benefit.

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

9. The core question which is to be decided in the present case is whether in view of the words mentioned in the appointment order dated 09.05.1989 passed by Director, Panchayat Raj, i.e.

"पुनः नियुक्ति समायोजित", means the same is a fresh appointment of the petitioner on the post of Gram Panchayat Adhikar or not?

10. The word "पुनः नियुक्ति" mentioned in the order dated 09.05.1989 means "reappointment" whereas "समायोजित" means "absorption".

11. Further, word "पुनः नियुक्ति"/re-employment is defined in the "**Words and Phrases Permanent Edition Volume 36-B at page 96**" as "re-employment" means the same service in which he was formerly employed"

12. The word "absorption" is defined in **Encyclopaedic Law Lexicon** by Justice C. K. Thakker at page 26 as under:-

"The term "absorbed" in service Jurisprudence with reference to a post in the very nature of things implies that an employee who has not been holding a particular post in his own right by virtue of either recruitment or promotion to that post but is holding a different post in a different department is brought to that post either on deputation or by transfer and is subsequently absorbed in that post where after he becomes a holder of that post in his own right and loses his lien on his parent post (See. Devdutta and others Vs. State of M.P. And others, (1991) Supp. (2) SCC 553.

13. Hon'ble the Apex Court in the case of J & K State Road Transport Corporation Vs. Om Prakash and others, 1998 (7) SCC 662, has held that "re-employment means when regular employment has "ceased".

14. In the case of **Union of India and others Vs. Rekha Majhi (2000) 10 SCC 659**, Hon'ble the Supreme Court has considered the word expression "re-employment" and it has been held that being the object of the rule, we have to give a wider meaning to the expression "re-employed" which finds place in Rule 75(21)(ii) of the Rules. The expression "re-employed", if construed in the light of the object behind the Rule and facts of this case, would also include first regular appointment in the service (See. **M.S. Chawla and others Vs. State of Punjab and another , 2001 (5) SCC 358).**

15. Appointment is effected by the employer through a contract of employment. As in every contract, so in a contract of public employment an offer of appointment to the candidate sought to be employed and his acceptance of the offer forms the basis of appointment. Appointment is made to a vacancy and in a post. It is, therefore, made by a positive and deliberate act of engagement creating a relationship between employer and employee. Appoinment is the starting point of a career in public employment. It confers a status and ensure all the rights that are attached to public service, including confirmation, seniority, promotion, and so on tenure. (See. Besant Lal Vs. State of Punjab AIR 1969 P&H 178).

16. Hon'ble the Supreme Court in the case of Prafulla Kr. Swain Vs. Prakash Ch. Misra, JT 1993 (1) SCC 360 held that appointment means an actual act of posting a person to a particular office and anything short of it cannot be construed as appointment.

17. As such, although the petitioner has been initially appointed on the post of Gram Panchayat Adhikari on 13.07.1983, however, by order dated 02.05.1984 his services were terminated/dispensed, again appointed on the said capacity uptill 16.12.1987, thereafter, his services were terminated.

18. Lastly, the petitioner was given appointment on the post of Gram Panchayat Adhikari by an order dated 09.05.1989 (Annexure No. 6) in pursuance to the Government Order dated 20.10.1986, even if the words mentioned in the appointment order are "पुनः नियुक्ति समायोजित" but the said date (09.05.1989) shall be the date of his appointment in the department on the post of Gram Panchayat Adhikari and that date shall be the starting point of his career. So, the relief as claimed by the petitioner for giving benefit of the service rendered by him w.e.f. 13.07.1983 to 26.05.1989 on the post of Gram Panchayat Adhikari cannot be granted, as such, the petitioner cannot derive any benefit from the law as laid down by Hon'ble the Supreme Court in the case of **Sushil Kumar (Supra)** because the same is not applicable in the facts and circumstances of the present case.

19. For the foregoing reasons, the writ petition lacks merit and is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.03.2013

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.
THE HON'BLE ABHINAVA UPADHYA, J.

Civil Misc. Writ Petition No. 10384 Of 2013

Smt. Urmila Jaiswal ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri S.S.P. Gupta
Sri Anil Pandey

Counsel for the Respondents:
C.S.C
Sri Akhilesh K. Dwivedi
Sri Ramesh Rai

Constitution of India, Art.-226- Power of Review-Appeal against cancellation fair price shop-dismissed -subsequently-on review application-commissioner allowed the appeal and remanded back for fresh decision-whether power of review can be exercised in absence of statutory provision?-Held-'No' under clause 28 of U.P. Scheduled commodities distribution order 2004-no such provision of review impugned order including entire subsequent proceeding-without jurisdiction.

Held: Para-26

Thus, from the proposition of law as noted above, it is clear that when the Statute does not confer any power of review expressly or by necessary implication the power of review cannot be inherent. The distinction which is sought to be raised by the counsel for the respondent no.4 that a mistake was said to be corrected by Commissioner under the inherent power is not acceptable. The Commissioner expressly exercised the power of review and allowed the review application vide order dated 28.12.2012, which is beyond his jurisdiction.

Case Law discussed:
1997 R.D. Page 562; 2003 ACJ 1906; 2007(9) ADJ 581 (DB); AIR 1996 SC 2592; 2005(4) AWC 3563; ADJ 2010 (3) 685; 2008(2) UPLBEC 1256; AIR 1999 SC 3609; 1987 (4)

SCC 525; 2005(13)SCC 777; (2010) 9 SCC 437; ADJ 2010 (3) 685; 2008(1) ADJ 718

(Delivered by Hon'ble Ashok Bhushan, J)

1. Heard learned counsel for the petitioner, Shri Ramesh Rai, learned counsel for the respondent no.4 and learned Standing Counsel for the respondent nos. 1 to 3.

2. By this writ petition, the petitioner has prayed for quashing the order dated 28.12.2012 passed in the review application filed by the respondent no.4 as well as the consequential order dated 12.02.2013 restoring the supply of respondent no.4.

3. We have heard learned counsel for the parties.

4. The issue which has been raised for consideration in the petition is legal in nature, therefore, with the consent of the parties, the writ petition is being finally disposed of at the stage of admission.

5. The brief facts of the case as on record are that the respondent no.4 was allotted fair price shop of Gram Phulwariya. He has been running his shop since 1993. By order dated 26.02.2011, the fair price shop of the respondent no.4 was cancelled. Against the said order, the respondent no.4 filed an appeal being appeal no.90/88/173/G-2011, which appeal was also dismissed by the Commissioner on 13.04.2012. After the appeal was dismissed by the Commissioner on the basis of resolution of Gaon Sabha dated 20.09.2012, fresh allotment was made in favour of petitioner Smt. Urmila Jaiswal by order dated 12.10.2012. The respondent no.4 after dismissal of his appeal has filed a review application on 01.06.2012, which review application was allowed by order dated 28.12.2012 and the matter was remitted to District Supply Office for passing a fresh order. After the order of the Appellate Authority dated 28.12.2012, the District Supply Officer has passed an order on 12.02.2013 by which fair price shop agreement of respondent no.4 was restored. Consequently, the petitioner's fair price shop agreement was cancelled.

6. The petitioner has come up in the writ petition challenging the order of the Commissioner dated 28.12.2012 allowing the review application as well as the consequential order dated 12.02.2013.

7. Learned counsel for the petitioner challenging the aforesaid orders contended that the Commissioner having once dismissed the appeal by order dated 13th April 2012, had no authority or jurisdiction to review the order and pass subsequent order on 28.12.2012, which is without jurisdiction and all the consequential proceedings are vitiated accordingly. He has submitted that the appeal of the Commissioner is provided under Clause 28 of U.P. Scheduled Commodities Distribution Order, 2004, and there is no provision for review nor any such power has been conferred on the Appellate Authority. He submits that statute having not conferred any power of review on the commissioner, the review application could not have been entertained, therefore, the orders passed are without jurisdiction.

8. Learned counsel for the petitioner has placed reliance on Full Bench judgment of this Court reported in **1997 R.D. Page 562 (Smt. Shivraji and**

Others Vs. Dy. Director of Consolidation, Allahabad and others), 2003 ACJ 1906 (Sudha Sharma Vs. State of U.P.) and Division Bench judgment of this Court reported in 2007(9) ADJ 581 (DB) (Syed Madadgar Husain Rizvi and another Vs. State of U.P. and Others).

9. Sri Ramesh Rai, learned counsel for the respondent no.4 refuting the submission of the petitioner contended that the petitioner has no locus to challenge the orders passed by the Commissioner in review being subsequent allottee. It is submitted that the review application was entertained and pending on the date when allotment was made in favour of the petitioner. Hence, the petitioner has no right or locus to challenge the orders. It is further submitted that the Appellate Authority has inherent power to correct the earlier order on 13.04.2012. He submits that every judicial or quasi-judicial authority has inherent power to correct the mistake. It is further submitted that setting aside the order dated 28.12.2012 has resulted in restoration of earlier order dated13.04.2012, which was an illegal order. Hence, this Court shall not exercise its discretion in setting aside the order of the Appellate Authority even though the same may be without jurisdiction. The result of which is to restore the illegal order.

10. Shri Ramesh Rai has placed reliance on the judgment of the Apex Court reported in **AIR 1996 SC 2592 (Indian Bank Vs. M/s Satyam Fibres (india) Pvt. Ltd**. In support of his argument that petitioner has no locus he has placed reliance on a Division Benches judgments reported in **2005(4) AWC 3563 Kesari Devi Vs. State of U.P., ADJ 2010 (3) 685 Desh Raj Vs. State of U.P, 2008 (2) UPLBEC 1256 (Amin Khan Vs. State of U.P. & Others)**. In support of his submissions that quashing the order dated 28.12.2012, an illegal order shall revive. He has placed reliance on the Apex Court judgment reported in **AIR 1999 SC 3609 (Maharaja chintamani Saran Nath Shahdeo, Vs. State of Bihar and Others.**

11. We have considered the submissions of the learned counsel for the parties and have perused the record.

12. Against an order cancelling the fair price shop agreement, the appeal is contemplated in Clause 28 of the 2004 Order (hereinafter referred to as 'Order 2004'). Clause 28 of the Order 2004 is quoted below:

"28. Appeal- (1) All appeal shall lie before the concerned Divisional Commissioner who shall hear and dispose of the same may by order delegate his/her powers to the Assistant Commissioner Food for hearing and disposing of the appeal.

(2) Any person aggrieved by an order of the Food Officer or the designated authority refusing the issue or renewal of a ration card or cancellation of the ration card may appeal to the Appellate Authority within thirty days from the date of receipt of the order.

(3) Any agent aggrieved by an order of the competent authority suspending or cancelling agreement of the fair price shop may appeal to the Appellate Authority within thirty days from the date of receipt of the order.

(4) No such appeal shall be disposed of unless the aggrieved person or agent has been given a reasonable opportunity of being heard.

(5) Pending the disposal of an appeal the Appellate Authority may direct that the order under Appeal shall not take effect until the appeal is disposed of."

13. Against an order suspending or cancelling the fair price shop agreement, the appeal is contemplated within 30 days. The provision further contemplates that no appeal shall be disposed of unless the aggrieved person or agent has been given a reasonable opportunity of being heard. Power of granting interim order has also been given under Clause 28 of the Statute.

14. In the present case appeal was filed by the respondent no.4 against an order dated 26.02.2011 by which fair price shop agreement of the respondent no.4 was cancelled by District Supply Officer. The appeal was dismissed on 13.04.2011 after hearing the respondent no.4 by detailed order, copy of which has been annexed as annexure-2 to the writ petition. The Appellate Authority has placed reliance on the Government Order dated 17th August 2002 and has held that the appellant being not resident of village phulwariya, his fair price shop agreement was rightly cancelled by the District Supply Officer.

15. Now the question which is to be answered as to whether the Appellate Authority can review its order since the respondent no.4 has filed the review application dated 01.06.2012 taking various grounds of review and one of the ground was that the Government Order issued on 17th August 2002 was not attracted on the respondent no.4. The Commissioner heard the review on merits and had passed an order allowing the review application and setting aside the earlier order of cancellation. The Order 2004 does not contain any provision empowering the Appellate Authority to review its order. There is no dispute that the Appellate Authority has exercised the quasi-judicial power. The Full Bench relied by the learned counsel for the petitioner in **Smt. Shivraji (Supra)** has laid down following proposition of law. Para 35 of the said judgment is quoted below:

"35. Any tribunal exercising judicial or quasi-judicial power, which is not vested with powr of review under the statute expressly or by necessary implication, has an inherent power of review of its previous order in any circumstances. In our view the decisions only lay down the proposition that a tribunal exercising judicial or quasi judicial power has the inherent power to correct a clerical mistake or arithmetical error in its order and has the power to review an order which has been obtained by practising fraud on theCourt, provided that injustice has been perpetrated on a party by such order. Therefore, these decisions should not be construed as laying down any proposition of law contrary to the well settled principle of law that any order delivered and signed by a judicial or quasi judicial authority attains finality subject to appeal or revision as provided under the Act and if the authority passing the order is not specifically vested with power of review under the statute, it cannot reopen the proceeding and review/revise its previous order.

16. The Full Bench held that any Tribunal exercising judicial or quasi-judicial power, which is not vested with power of review under the Statute expressly or by necessary implication, has no power of review except an inherent power to correct the clerical mistake or to correct the order, which has been obtained by practising the fraud on the Court.

17. A Division Bench judgment in **Sudha Sharma (supra) as well as Syed Madadgar Husain Rizvi (supra)** lays down the same principles. The Division Bench has held that a quasi judicial authority is not permitted to review its order unless it is so expressly conferred by the Statute itself.

18. The Apex Court in **1987(4) SCC 525 Dr (Smt.) Kuntesh Gupta Vs. Management of Hindu Kanya Mahavidyayla, Sitapur (U.P.) & Others** had occasion to consider the issue as to whether the Vice-Chancellor of a University under the provisions of U.P. State Universities Act, 1973 has power of review. The Vice-Chancellor had passed an order on 24.01.1987 disapproving the order of dismissal of the appellant. Subsequently, the Vice-Chancellor had review the said order on 07.03.1987. While considering the aforesaid case, following was laid down by the Supreme Court in paragraph 11:

"It is now well established that a quasi-judicial authority cannot review its own order, unless the power of review is expressly conferred on it by the statute under which it derives its jurisdiction. The Vice-Chancellor in considering the question of approval of an order or dismissal of the Principal, acts as a quasi-judicial authority. It is not disputed that the provisions of the U.P. State Universities Act, 1973 or of the Statutes of the University do not confer any power on the Vice-Chancellor. In the circumstances, it must be held that the Vice-Chancellor acted wholly without jurisdiction in reviewing her order dated January 24, 1987 by her order dated March 7, 1987. The said order of the Vice-Chancellor dated March 7, 1987 was a nullity."

19. The Apex Court in **2005 (13) SCC 777, Kapra Mazdoor Ekta Union Vs. Birla Cotton Spinning and Weaving Mills Ltd.** and another had again considered the power of review. The Tribunal had reviewed its earlier award dated 12.06.1987. The matter was taken to the High Court, which held that in absence of an express provision in the Industrial Disputes Act, Tribunal could not review its earlier award. The matter was taken to the Apex Court, where one of the submission raised was that even in the absence of an express power of review, the Tribunal had the power to review its order if some illegality was pointed out. Rejecting the submissions following was laid down in paragraph 17 and 18:

" 17. The question still remains whether the Tribunal had jurisdiction to recall its earlier "Award dated June 12, 1987. The High Court was of the view that in the absence of an express provision in the Act conferring upon the Tribunal the power of review the Tribunal could not review its earlier Award. The High Court has relied upon the judgments of this Court in Dr. (Smt.) Kuntesh Gupta v. Management of Hindu Kanya Maha Vidyalaya,

Sitapur (U.P.) and Ors. and Patel Narshi Thakershi and Ors. v. Pradyumansinghji Arjunsingji : AIR1970SC1273 wherein this Court has clearly held that the power of review is not an inherent power and must be conferred by law either expressly or by necessary implication. The appellant sought to get over this legal hurdle by relying upon the judgment of this Court in Grindlays Bank Ltd. v. Central Government Industrial Tribunal and Ors. (supra). In that case the Tribunal made an ex-parte Award. Respondents applied for setting aside the ex-parte Award on the ground that they were prevented by sufficient cause from appearing when the reference was called on for hearing. The Tribunal set aside the ex-parte Award on being satisfied that there was sufficient cause within the meaning of Order 9 Rule 13 of the Code of Civil Procedure and accordingly set aside the ex-parte Award. That order was upheld by the High Court and thereafter in appeal by this Court.

18. It was, therefore, submitted before us relying upon Grindlays Bank Ltd. v. Central Government Industrial Tribunal and Ors. (supra) that even in the absence of an express power of review, the Tribunal had the power to review its order if some illegality was pointed out. The submission must be rejected as misconceived. The submission does not take notice of the difference between a procedural review and a review on merits. This Court in Grindlays Bank Ltd. v. Central Government Industrial Tribunal and Ors. (supra) clearly highlighted this distinction when it observed :-

"Furthermore, different considerations arise on review. The expression 'review' is used in the two distinct senses, namely (1) a procedural review which is either inherent or implied in a court or Tribunal to set aside a palpably erroneous order passed under a mis-apprehension by it, and (2) a review on merits when the error sought to be corrected is one of law and is apparent on the face of the record. It is in the latter sense that the court in Patel Narshi Thakershi case held that no review lies on merits unless a statute specifically provides for it. Obviously when a review is sought due to a procedural defect, the inadvertent error committed by the Tribunal must be corrected ex debit a justitiae to prevent the abuse of its process, and such power inheres in every court or Tribunal".

20. Again in **(2010) 9 SCC 437, Kalabharti Advertising Vs. Hemant Vimalnath Narichania and Others**, the power of review in the absence of statutory provisions was considered by the Apex Court. Following proposition was laid in paragraph nos. 12, 13 and 14:

"12. It is settled legal proposition that unless the statute/rules so permit, the review application is not maintainable in case of judicial/quasi-judicial orders. In absence of any provision in the Act granting an express power of review, it is manifest that a review could not be made and the order in review, if passed is ultra-vires, illegal and without jurisdiction. (vide: Patel Chunibhai Dajibha v. Narayanrao Khanderao Jambekar and Anr. : AIR 1965 SC 1457 and Harbhajan Singh v. Karam Singh and Ors. : AIR 1966 SC 641).

13. In Patel Narshi Thakershi and Ors. v. Shri Pradyuman Singhji Arjunsinghji : AIR 1970 SC 1273; Maj. Chandra Bhan Singh v. Latafat Ullah Khan and Ors. : AIR 1978 SC 1814; Dr. Smt. Kuntesh Gupta v. Management of Hindu Kanya Mahavidhyalaya, Sitapur (U.P.) and Ors. : AIR 1987 SC 2186; State of Orissa and Ors. v. Commissioner of Land Records and Settlement, Cuttack and Ors. : (1998) 7 SCC 162 and Sunita Jain v. Pawan Kumar Jain and Ors : (2008) 2 SCC 705, this Court held that the power to review is not an inherent power. It must be conferred by law either expressly/specifically or by necessary implication and in absence of any provision in the Act/Rules, review of an earlier order is impermissible as review is a creation of statute. Jurisdiction of review can be derived only from the statute and thus, any order of review in absence of any statutory provision for the same is nullity being without jurisdiction.

14. Therefore, in view of the above, the law on the point can be summarised to the effect that in absence of any statutory provision providing for review, entertaining an application for review or under the garb of clarification/modification/correction is not permissible."

21. From the proposition of law as laid down in the above cases, it is well established that unless the Statute/Rule permit, the review application is not maintainable in case of judicial/quasi judicial orders. In Order 2004, no power of review has been expressly provided nor such power can be read by implication. The Commissioner after dismissing the appeal filed under Clause 28 of Order 2004 has entertained the review application on merits and had allowed the review on merits.

22. The submission on which Shri Rai has much emphasised is that every quasi-judicial or judicial authority has inherent power to correct the mistake. He has placed reliance on para 23 of the Indian Bank Vs. M/s Satyam (Supra). The Apex Court laid down following proposition of law in paragraph 23, which is quoted below:

"Since fraud affect the solemnity, regularly and orderliness of the proceedings 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 practised upon that Court. Similarly, where the Court is misled by a party or the Court itself commits a mistake which prejudices a party, the Court has the inherent power to recall its order. ......The Court has also the inherent power to set aside a sale brought about by fraud practised upon the Court (Ishwar Mahton v. Sitaram Kumar AIR 1954 Patna 450) or to set aside the order recording compromises obtained by fraud. (Bindeshwari Pd. Chaudhary v. Debendra Pal Singh, AIR 1958 Patna 618; Smt. Tara Bai v. V.S. Krishnaswaymy Rao, AIR 1985 Karnataka 270).

23. The proposition of law laid down by the Apex Court in the aforesaid case is that every judicial or quasi-judicial authority has power to set aside the order obtained by fraud practised upon that Court or where the Court is misled by the party and the Court itself commits a mistake which prejudices a party. Emphasis has been laid by the learned

counsel for the respondent on the phrase " the court itself commits a mistake".

24. Learned counsel for the respondent no.4 submits that the appeal filed under Clause 28 was decided by the Commissioner on 13.04.2012 and was decided after hearing the respondent no.4 who was the appellant. In deciding the appeal it cannot be said that Appellate Authority has committed any mistake. A decision of the authority rendered after appreciation of evidence and hearing submission of the parties, even if, on appreciation of evidence and material, two views are possible, the said decision cannot be said to have suffered from mistake. The government order on which reliance has been placed was considered and even if the decision may be held to be erroneous on interpretation of the Government Order or precision of the fact that exercise shall not be turn to be a mistake committed by the Court. The word 'mistake' has been defined in Law Lexicon, which is as follows:

"Mistake. An unconscious ignorance or forgetfulness of a fact, past or present, material to the contract, or a belief in the present existence of a thing material to the contract, which does not exist; some intentional act, omission, or error arising from ignorance, surprise, imposition, or misplaced confidence; in a legal sense, the doing of an act under an erroneous conviction, which act, but for such conviction would not have been done.

Misapprehension as to the existence of a thing, arising either from ignorance or from a false belief on the point.

25. The submission of the learned counsel for the respondent no.4 that the court committed a mistake in passing an order on the appeal, thus cannot be accepted.

26. Thus, from the proposition of law as noted above, it is clear that when the Statute does not confer any power of review expressly or by necessary implication the power of review cannot be inherent. The distinction which is sought to be raised by the counsel for the respondent no.4 that a mistake was said to be corrected by Commissioner under the inherent power is not acceptable. The Commissioner expressly exercised the power of review and allowed the review application vide order dated 28.12.2012, which is beyond his jurisdiction.

27. Now much emphasis was laid by the learned counsel for the respondent no.4 that the petitioner has no locus to challenge the order. He submits that the petitioner was the subsequent allottee and he has no authority to challenge the order restoring the fair price shop agreement. The facts as has been brought on record clearly indicate that the fair price shop agreement of the respondent no.4 was cancelled on 26.04.2011. The appeal filed against the said order was dismissed by the Commissioner on 13.04.2012. After dismissal of the appeal, the shop was clearly vacant and thereafter resolution was passed in favour of the petitioner for allotment of the shop and allotment was made on 12.10.2012. The submission of the respondent no.4 is that the petitioner was a subsequent allottee and since the review was entertained on 01.06.2012 the petitioner had no rights cannot be accepted. Admittedly, not even interim order was passed on the review application. We having found that there is no power of review. The proceedings of

review were clearly without jurisdiction. Thus, petitioner has right on the basis of the resolution of the Gaon Sabha dated 12.10.2012 and he has every locus to challenge the order dated 28.12.2012 and consequential orders thereafter.

28. Learned counsel for the respondent no.4 has placed reliance on a Division Bench judgment in **Kesari Devi Vs. State of U.P (Supra).** In the said judgment the court considered the word "person aggrieved". The Upadhyaksha of Zila Panchayat was held to be not necessary party and having no locus. The said case is clearly distinguishable. Since in the present case the petitioner allotment of fair price shop agreement was made after dismissal of the appeal. The said case does not help the respondent no.4 in the present circumstances.

29. Learned counsel for the respondent no.4 has placed reliance on the judgment of **Desh Raj Vs. State of U.P. reported in ADJ 2010 (3) 685**. In the said case the subsequent allottee who was allotted the shop after cancellation of the agreement was held to have no locus to challenge the subsequent order. There cannot be any dispute to the proposition as laid down in the above case, but in the present case the appeal against the cancellation order was dismissed and the shop of the respondent no.4 was restored on the basis of review order which was without jurisdiction. The said case is clearly distinguishable and not applicable.

30. Another judgment is **Sri Pal Yadav Vs. State of U.P. & Others reported in 2008 (1) ADJ 718**, where on account of cancellation of fair price shop of respondent, the petitioner of that writ petition was allowed to run the shop as stop-gap arrangement during the pendency of the appeal. The license was restored. Hence, the petitioner has no locus of being heard. There cannot be any dispute to above proposition. But facts of the present case are different since the allotment was made in favour of the petitioner when appeal was dismissed and the shop has been restored on the basis of the review order which is held without jurisdiction.

31. Last submission of the respondent no.4 is that this Court shall not quash the order dated 28.12.2012 of the Commissioner since the consequences of the order would be revive an earlier order dated 13.04.2012, which is an illegal order.

32. **In Maharaja chintamani Saran Nath Shahdeo, Vs. State of Bihar and Others (Supra)** the compensation was determined to the appellant and thereafter on a redetermination additional compensation was paid. The member of Board of Revenue took a suo motu action and reopen the compensation. Consequently a notice was issued for refund of the compensation. Challenging the action it was contended by the petitioner on that petition that Board of Revenue has no jurisdiction to pass any order and only an appeal should have been filed in the said context. The Apex Court laid down following in paragraph 15 and 37.

"15. Therefore, in view of the above ratio laid down by this Court, we hold that even if the Member of Board of Revenue had no power to issue direction for giving notice for refund of the excess amount paid, no exception can be taken to the said order if it is not found that legally the

appellant was paid excess compensation under the Act.

37. For what has been stated above we hold that the order of the learned Member of Board of Revenue directing the action to be taken for refund of the excess compensation was valid and proper though he had no jurisdiction to pass the order. In the event it is set aside it would amount to reviving an invalid order of payment of excess compensation to the appellant."

33. The Apex Court in the said case held that the order of the Board of Revenue, even if, without jurisdiction cannot be set aside since the consequences would be that there will a revival of invalid order of payment of excess compensation to the appellant. The determination of compensation was made under Bihar Land Reforms Act, 1950. It was held by the Apex Court that excess payment was paid to the appellant and payment of compensation was clearly against the statute. Hence, the Apex Court held that the order although without jurisdiction would not have been reviewed. Present is the case where it cannot be said that the order of the Commissioner earlier deciding the appeal on 13.04.2012 was illegal or without jurisdiction. Counsel for the respondent no.4 contended that Commissioner has wrongly interpreted the Government Order dated 17th August 2002 and applied the same. After referring the Government Order the Commissioner has taken one view of the matter,which cannot be said to be without jurisdiction or illegal. We make it clear that in this writ petition since the order passed by the Commissioner on 13.04.2012 has not been challenged nor we are required to express any opinion on the merits of the said order, hence, we refrain ourselves in expressing any opinion on correctness or otherwise of the said order on merits.

34. We confine ourselves to the issue that subsequent order of the Commissioner reviewing the order being without jurisdiction, all consequential proceedings falls on the ground. We leave it open to the respondent no.4 to question the order dated 13.04.2012 in appropriate proceedings.

35. With the above observations, the writ petition is allowed.

36. The order dated 28.12.2012 passed on the review application by the respondent no.2 as well as the consequential order dated 12.02.2013 passed by the respondent no.3 are set aside.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.03.2013

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Civil Misc. Writ Petition No. 11075 Of 2013

Anant Ram and another ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Santosh Kumar Mishra

Counsel for the Respondents:
C.S.C.

Constitution of India, Art-226- Imposition of penalty-deficiency of stamp duty-land in question not declared-as non agricultural purpose under section 143 of U.P. Z.A. of Land Reform Act-but also can not denied

the fact -the land being used for not agricultural purpose for couple of years-no intention to avoid stamp duty-in such circumstances penalty-not justified.

Held: Para-12

The authorities below have imposed penalty of Rs. 50,000/- in view of the fact that the proper stamp duty was not paid by the petitioners. There is no finding that there was any intention on part of the petitioners to evade payment of proper stamp duty. The petitioners appear to have acted bonafidely in assessing the market value of the land as per its agricultural nature as there was no declaration under Section 143 of the U.P. Z.A. and LR Act.

Case Law discussed:
AIR 1993 SC 2585

(Delivered by Hon'ble Pankaj Mithal, J)

1. Heard Sri Santosh Kumar Mishra, learned counsel for the petitioners.

2. Petitioners have purchased part of land of gata no. 614 vide instrument of sale no. 1203 of 2008 dated 16.4.2008.

3. Petitioners valued the aforesaid land as an agricultural land and paid stamp duty accordingly. The authorities by the impugned order dated 23.3.2012 and the appellate order thereto dated 21.1.2013 have held the aforesaid land to be of residential use and have thus applied the residential rate in determining its market value and the deficiency in stamp duty.

4. The submission of the learned counsel for the petitioners is that the land is actually agricultural in nature and its market value is not liable to be determined by treating it to be residential land.

5. The record reveals part of the same gata was sold by its owner earlier describing the land to be residential in nature and stamp duty at that time was paid according to the rates applicable to the residential land.

6. The land has not been declared to be non agriculture under Section 143 of the U.P.Z.A and LR Act but as there is no bar in law in using it for other purposes rather Section 142 of the Act permits use of agricultural land for non-agricultural purposes also in the absence of material evidence to show that the land was under actual cultivation, the finding with regard to nature of the land recorded by the authorities is difficult to be disturbed.

7. In Smt. **Sarifabibi Mohammad Ibrahim and others Vs. Commissioner of Income Tax, Gujrat AIR 1993 SC 2585** it was observed that whether the land is an agricultural land or not is essentially a question of fact and this question has to be answered having regard to the facts and circumstances of each case and where a land has not been cultivated for a period of years coupled with its location it is difficult to recognize it as an agricultural land.

8. In view of the above, the finding recorded by the authorities regarding nature of the land depending upon its location is not open for interference.

9. The minimum rates notified by the Collector for the different categories of land of the various localities are not shown to be on the higher side or excessive.

10. Accordingly, there is no illegality in applying the minimum rates notified for determining the market value of the residential land in the area.

11. In view of the aforesaid facts and circumstances, I am of the opinion that the order impugned does not require any interference in exercise of writ jurisdiction.

12. The authorities below have imposed penalty of Rs. 50,000/- in view of the fact that the proper stamp duty was not paid by the petitioners. There is no finding that there was any intention on part of the petitioners to evade payment of proper stamp duty. The petitioners appear to have acted bonafidely in assessing the market value of the land as per its agricultural nature as there was no declaration under Section 143 of the U.P. Z.A. and LR Act.

13. In these circumstances, the imposition of penalty is not justified and the same is deleted.

14. The writ petition is dismissed modifying the impugned order by deleting the penalty imposed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.03.2013
BEFORE
THE HON'BLE VIRENDRA VIKRAM SINGH, J.

Criminal Misc. Bail Application No. 11739 Of 2012

Rajendra Nishad ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Siddharth Shukla, Sri I.K. Chaturvedi
Sri Pramod Kumar Sahni

Counsel for the Respondent:
A.G.A.,Sri A.K. Rai
Sri P.K. Srivastava, Sri Manish Tiwari

Code of Criminal Procedure.- 439-Grant of Bail-seeking parity of co-accused-offence under section 147/148/149/302/307/506 IPC- other co-accused granted bail without disclosing conviction for murder and attempt to murder-in view of provisions of 437(ii) Cr.P.C.-not entitled for bail.

Held: Para-23

Having considered the facts and circumstances of the case as also the legal analogy the applicant who stood convicted on two counts for the offences like murder and attempt to murder can not be allowed to be released on bail

Case Law discussed:
1993(3) ACC,281; 2001(2) JIC

(Delivered by Hon'ble Virendra Vikram Singh, J)

1. Rajendra Nishad, the accused facing trial for offence bearing Crime No.958 of 2010 under Section 147/148/149/302/307/506 I.P.C., Police Station ,Barhalganj, District Gorakhpur, has applied for his release on bail.

2. The prosecution version is that on 28.11.2010, at 4 O'clock in the evening, while the complainant Ram Niwas along with his cousin Raja Ram, Kanhaiya and Sonu were coming back to their houses, that on their way, they were intercepted by seven accused, nominated in the F.I.R. including the applicant. On being exhorted, Nav Ratan fired upon Raja Ram. Ramesh, Narsingh and the present applicant indiscriminately fired with the fire arms, they had, and caused injuries to Kanhaiya and Sonu. Raja Ram was brought to Gorakhpur District Hospital,

where he succumbed to the injuries sustained by him.

3. About the motive to commit the offence, it has been mentioned in the F.I.R. that prior to this occurrence, on 24.9.2010, one Jitan Prashad, uncle of the complainant was shot at by the accused persons nominated in the present F.I.R. and they were pressurizing to have a compromise or to face the dire consequences thereof.

4. The applicant is also nominated as accused in the F.I.R. The present bail application has been pressed on the ground that all the co-accused have been enlarged on bail and the case against the applicant is at par with the case of Narsingh and Ramesh, who have been granted bail by this Court and by court below. Hence, on the ground of parity, as also on the ground that the role of causing fatal injury to Raja Ram has been assigned to Nav Ratan alone, the prayer for bail has been made.

5. Learned counsel for the complainant and learned AGA have vehemently opposed the application for bail on the ground that there exists criminal history against the applicant and further that the applicant was previously convicted in two different criminal trials against him. It is proper to mention it here that on behalf of the applicant, while filing the affidavit of Vijay Kumar Nishad, it has been conceded that in Case Crime No.238 of 1991, under Sections 302, 201 I.P.C., Police Station Bahralganj, the applicant and co-accused Ramakant were convicted by the judgement dated 30.6.1998 and were sentenced to undergo life imprisonment. It has further been accepted that in Sessions Trial No.403 of 1994 for offence under Section 307 read with Section 34 I.P.C., the applicant and co-accused Ramakant and Ramesh were convicted to undergo rigorous imprisonment for five years with stipulation of fine. It has been mentioned that against both the convictions, appeal was filed before this Court in which all the appellants were ordered to be released on bail. About the other criminal history filed by the learned AGA and learned counsel for the complainant, it has been sweared in the affidavit that most of the cases have ended in acquittal and in some of the cases, the applicant is on bail.

6. Since the ground of parity has been advanced, it is proper to mention it here as to how the co-accused were released on bail. The accused persons Navratan and Matru were found to be juvenile and they were released on bail accordingly. Smt. Dudhiya was enlarged on bail as she was a lady and further that the role assigned to her was exhortation only. Ramesh Nishad has been granted bail by this Court. The other accused Nar Singh and Ramakant have been granted bail by the Sessions Judge, Gorakhpur.

7. The principle of release of bail on parity has been considered in some of the judgments which are being quoted herewith.

8. In the case of **Nanha Vs. State of U.P., 1993 (3) ACC, 281**, the Division Bench of this Court has held that where the case of co-accused is identically similar and another co-accused has been granted bail by the courts the said co-accused is entitled to be released on bail on account of desirability of consistency and equity. It has been held that law of

parity is desirable rule. Now question arises whether on simple ground that the case against the the two accused persons being similar on merits alone, whether the principle of parity can be applied without ignoring other facts.

9. While granting bail to an accused, the Court has not only to consider the merits but has also to see whether there exists any chance of the applicant to flee from the course of justice and further that whether there are any chance for the applicant to influence or pressurize the witnesses. Thus, simply on the ground that evidence against the two accused persons is similar, the accused can not claim bail as right.

10. This Court in the case of **Amarnath Yadav Vs. State of U.P., 2010(1) JIC, 422, (Allahabad)** has held that by granting of bail by one Bench to any accused, another Bench is not under obligation to grant bail to similarly placed co-accused on the basis of principle of parity without considering the merit. In this case, the pronouncement of the Full Bench of this Court in the case of Sunder Lal Vs. State, 1983 CR.L.J., 736, was considered wherein the principle of parity was declined with the following observation:-

"The learned counsel only pointed out that by reasons of fact that other co-accused has been admitted to bail the applicant should also be granted bail. This argument alone would not be sufficient for admitting the applicant to bail who is involved in a triple murder case."

Granting of bail on the ground of parity has again been considered and refused in the case of Chander @ Chandra vs. State of U.P., 1998 U.P. Criminal Rules, 263, whereby the Division Bench has held that if bail has been granted in flagrant violation of well settled principles, and the order granting bail would not be in accordance with law, such order can never form the basis for a claim founded on parity. It was held that in such case, it will be open to the Judge to reject the bail application of the applicant before him as no Judge is obliged to pass orders against his conscience merely to maintain consistency.

11. The discussion made above abundantly goes to show that principle of parity apply when the case against the two accused persons is similar in all respects and further that the order granting bail to co-accused was passed on well known principles. It is again necessary that the test provided for release of bail to both the accused persons stand fulfilled and are similar in both the two cases.

12. While considering the proposition of law discussed above the present case is being considered.

13. Smt. Dudhyia has been granted bail by the Court of session on the ground that she is a lady and the role assigned to her is only that she exhorted and that she did not participate at all in causing injury to any person. Such is not the case against the present applicant. Hence, he cannot claim parity with the bail granted to the co-accused Smt.Dudhiya.

14. The case against Navratan, co-accused definitely stands on a graver

footing as he has been assigned the role of causing fatal injury to Rajaram. It is not denied that Navratan and Mantu co-accused has been granted bail on the ground that as they were declared juvenile. Bail to juvenile has granted under the provision of Section 12 of U.P. Juvenile Justice (Care and Protection of Children) Act, 2000 whereby grant of bail is a rule and the same can be denied only on the existence of the grounds enumerated therein. The section also provides non-application of the provisions of Criminal Procedure Code. Since the bail of the present applicant has to be considered under the provision of Cr.P.C. alone, the grant of bail to Navratan and Mantu shall be of no consequence in favour of the applicant.

15. Bail of Ramakant is again of no consequences to favour the applicant as the same is distinguishable on merits. As per version in the F.I.R., he has not taken any positive role in commission of offence. It is true that Rama Kant was a previous convict but the bail order shows that this fact has not been taken into consideration by the Court even though the fact is mentioned in the bail order. Since the provisions of Sec. 437(ii) Cr.P.C. were not taken into consideration in this order, the same can also not come to the rescue of the applicant.

16. It is not disputed that the accused persons Ramesh, Narsingh and the present applicant have been assigned the similar role in the F.I.R. that they indiscriminately fired causing injuries to Kanahiya and Sonu.

17. The merits of the case against the applicant appears to be distinguishable on the ground of previous convictions against him on two different counts. What shall be the effect of the previous conviction of the accused on the issue of grant of bail, has been considered under the provisions of Section 437 Code of Criminal Procedure,1973 (to be referred as Cr.P.C. herinafter). The relevant part of the provision of Section 437 Cr.P.C. is being quoted below:-

"437. When bail may be taken in case of non-bailable offence-

(1) When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail, but-

(i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;

(ii) such person shall not be so released if such offence is a cognizable offence and he had been previously, convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a (a cognizable offence punishable with imprisonment for three years or more but not less than seven years):

Provided that the Court may direct that a person referred to in clause (i) or clause (ii) be released on bail if such

person is under the age of sixteen years or is a woman or is sick or infirm:

Provided further that the Court may also direct that a person referred to in clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any other special reason."

18. In the case of **Ram Prakash Pandey Vs. State of U.P. and others, 2001 (2) JIC., page 681**, the Apex Court while considering the grant of bail to a person who has previously been convicted of offence punishable with life imprisonment as is the case against the applicant, has held as follows:-

"11. Thus a person who has been previously convicted of an offence punishable with life imprisonment shall not be released on bail unless there is no reasonable ground for believing that the person has committed the offence and/or there are special reasons to do so."

19. It is true that the case against the co-accused Ramesh Nishad and Narsingh stands on same footing as that the applicant. Ramesh Nishad was convicted for offence under Section 307 I.P.C. along with the applicant and Rama Kant was convicted for offence under Section Section 302/34 I.P.C. along with the applicant. The bail order of Ramesh Nishad shows that previous conviction against the applicant was never brought to the notice of the Court and the bail granted to co-accused Ramakant by the Session Judge, Gorakhpur though mentions about the previous conviction of Narsingh but no finding as provided under Section 437 (ii) Cr.P.C. has been considered, hence, these two bail orders cannot help the applicant.

20. It has next been argued that in both the two cases in which the applicant was convicted, appeal has been admitted for hearing by the High Court and the applicant has been released on bail. At this juncture, the question comes as to whether the status of the applicant after his release on bail remains as convict of the case or not. In order to appreciate this argument, provision of Section 389 Cr.P.C. needs be quoted.

"389. Suspension of sentence pending the appeal: release of appellant on bail -

(1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond:

(Provided that the Appellate Court shall, before releasing on bail or on his own bond a convicted person who is convicted of an offence punishable with death or imprisonment for life or imprisonment for a term of not less than ten years, shall give opportunity to the Public Prosecutor for showing cause in writing against such release :

Provided further that in cases where a convicted person is released on bail it shall be open to the Public Prosecutor to file an application for the cancellation of the bail.)

(2) The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of an appeal by convicted person to a Court subordinate thereto.

(3) Where the convicted person satisfies the Court by which he is convicted that he intends to present an appeal, the Court shall,-

(i) where such person, being on bail, is sentenced to imprisonment for a term not exceeding three years, or

(ii) where the offence of which such person has been convicted is a bailable one, and he is on bail, order that the convicted person be released on bail unless there are special reasons for refusing bail, for such period as will afford sufficient time to present the appeal and obtain the orders of the Appellate Court under sub-section (1), and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.

(4) When the appellant is ultimately sentenced to imprisonment for a term or to imprisonment for life, the time during which he is so released shall be excluded in computing the term for which he is so sentenced."

21. A bare perusal of the provision of Section 389 clearly goes to show that the Appellate Court while admitting any appeal for hearing suspends the execution of the sentence and orders for release of the appellant on bail but in such a position, the order of conviction remains intact until it is set aside by the final verdict of the Appellate Court. Thus, the status of the applicant despite the admission of appeals and his release on bail was that of convict and he cannot be exonerated of the consequences provided under Section 437 (ii) Cr.P.C.

22. The evidence in the present case is that the accused persons in prosecution of the common object of unlawful assembly caused the death of Raja Ram and caused fire arm injuries to two persons namely Kanahiya and Sonu. Thus, no finding can be recorded that there does not appear any reasonable ground for believing that the applicant is not guilty of the charges levelled against him.

23. Having considered the facts and circumstances of the case as also the legal analogy the applicant who stood convicted on two counts for the offences like murder and attempt to murder can not be allowed to be released on bail.

24. The application for bail is hereby rejected. However the trial Court is directed to proceed with the trial as expeditiously as possible, keeping in view the provisions of Sec. 309 CrPC, preferably within a period of six months to be computed from the date of production of certified copy of this order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.03.2013.

BEFORE
THE HON'BLE SABHAJEET YADAV,J.

Civil Misc. Writ Petition No.12954 Of 2003

Sadanand **...Petitioner**
Versus
District Judge, Allahabad **...Respondent**

Counsel for the Petitioner:
Sri Ashok Khare, Sri V.D. Chaohan

Sri S.C. Misra, Sri S.P.Pandey

Counsel for the Respondents:
Sri Amit Sthalekar, Sri Pradeep Kumar S.C.

<u>Constitution of India, Art.-226- 311(2)-</u> Dismissal of Service-on ground of conviction in criminal case-while against punishment under section 366, 376 I.P.C. -appeal pending and conviction stayed by High Court-admitted position-quoting wrong provision of law-can not invalidate the order-hence order impugned can not be faulted- in absence of any provision-about reinstatement after stay of conviction-can not be interfered by writ court -unless appeal finally decided and the petitioner fully exonerated.

Held: Para-16

In view of settled legal position and foregoing discussion I am of the considered opinion that once the petitioner is convicted on criminal charge u/s 366/376 I.P.C. involving offence of moral turpitude until the order of conviction is set aside in pending appeal or other proceeding, its effect and impact cannot be completely wiped off or ceased to operate merely because of execution of sentence or order appealed against was suspended or stayed and the petitioner was released on bail during the pendency of said appeal. However, in case petitioner's appeal would be allowed and he would be exonerated from the criminal charge or acquitted in appeal or other proceeding, it will always be open for the petitioner to approach the District Judge, Allahabad, who in turn will pass appropriate order. But in given facts and circumstances of the case, at this stage it is very difficult for this Court to interfere in the impugned order of termination of services of the petitioner.

<u>Case Law discussed:</u>
(1993)3 SCC 60- A.I.R. 1999 S.C. 983; A.I.R. 1958 SC 36; A.I.R. 1985 SC 1416; A.I.R . 1995 SC 1364

(Delivered by Hon'ble Sabhajeet Yadav, J.)

1. Heard Sri Satya Prakash Pandey, learned counsel for the petitioner and Sri Pradeep Kumar for respondent.

2. By this petition, the petitioner has challenged the order dated 10.2.2003 passed by the District Judge, Allahabad contained in Annexure-5 of the writ petition, whereby petitioner's services were terminated in purported exercise of power under the provisions of Uttar Pradesh Temporary Government Servants (Termination of Service) Rules, 1975 (hereinafter referred to as '1975 Rules') indicating that he will get 30 days' wage/salary in lieu of 30 days notice under the said Rules.

3. It is stated that the petitioner was appointed on the post of Driver by the District Judge, Allahabad on 26.10.1996 after due selection in pursuance of advertisement issued in the year 1996. Since the date of his appointment the petitioner was continuously working on the said post. On 21.10.2002 he was convicted in Session Trial No.202 of 1999 by Additional Session Judge, Allahabad u/s 366 and 376 I.P.C. wherein he was sentenced for 3 years and 7 years imprisonment and fine of Rs.3000/- and Rs.5000/- total Rs.8000/- was also awarded against him. Feeling aggrieved against which the petitioner has preferred Criminal Appeal No.4563 of 2002 before this Court, wherein on 25.10.2002 the operation of judgment and order dated 21.10.2002 appealed against passed by Trail court has been stayed and the

petitioner was also released on bail. Initially the petitioner was placed under suspension vide order dated 23.10.2002 intending to hold inquiry against him on account of his detention for a period of more than 48 hours. Thereafter a preliminary inquiry was held against the petitioner by Additional District Judge, Allahabad, who submitted his report 29.1.2003 to the District Judge, Allahabad, thereupon the District Judge, Allahabad after going through the said inquiry report has passed an order dated 4.2.2003 intending to terminate the services of the petitioner under 1975 Rules. The copy of preliminary inquiry report dated 29.1.2003 and order dated 4.2.2003 passed by the District Judge, Allahabad are on record as Annexure-2 and 1 respectively to the counter affidavit filed in the writ petition on behalf of the respondent.

4. It would be useful to quote the order dated 4.2.2003 passed by the District Judge, Allahabad contained in C.A.-1 as under:-

"Sri Sada Nand Yadav Driver working in Civil Court had been convicted by Addl. Sessions Judge, Court No.18 on 21.10.2002 on a charge under section 366 and 376 I.P.C. of P.S. Lalapur District Allahabad. The report in this respect had been submitted by Officer Incharge Pooled Cars. The employee having been convicted for a period of 3 years and 7 years for offence involving moral turpitude was suspended vide order dated 23.10.2002 by my predecessor in office after perusing the first information report, medical report supplementary medical report and judgment which he called vide his order dated 22.10.2002. Subsequently after the grant of bail he applied on 31.10.2002 for reinstatement as also for grant of earned leave for the period from 21.10.2002 to 29.10.2002 but the same was also refused by my predecessor in office with the observation that he cannot be permitted to serve until he is exonerated/acquitted inasmuch as the offence for which he was convicted is of moral turpitude. About three and half months time has passed from the date when he was convicted. It is not in the overall interest of Government work to allow him to continue to get subsistent allowance without any work. Preliminary enquiry was ordered in respect of his conduct by my predecessor in office. Enquiry Officer has reported that prior to his employment in the year 1996 Session Trial No.202/99 Crime No.77/83 was already registered against him. in which he had been convicted. He did not disclose the same. Beside this, another case crime no.39/96 under section 307 I.P.C. was also registered against him but he was acquitted of the same prior to his employment. Officer Incharge Pool Cars has given preliminary enquiry report. He has reported that employee Sri Sada Nand is guilty of concealment of facts aforesaid and also of his appearance in Sessions Cases before court without permission. He has also reported that Sri Sada Nand Yadav has been convicted and sentenced to 3 years rigorous imprisonment and a fine of Rs.3,000/- for the offence under section 366 I.P.C. and 7 years rigorous imprisonment with a fine of Rs.5,000/- for the offence under section 376 I.P.C. The cases indicate that the employee had criminal antecedents from the year 1983. The offence in which he has been convicted involve moral turpitude. He cannot be allowed continuance in Government service because of criminal antecedents. It is but natural that any

Government Officer taking work would be scared of him. It is not known as to when his case will come to an end and whether he will be acquitted on bail or will be finally convicted. He services are temporary. The facts and circumstances in my opinion warrant that instead of keeping him in continuous suspension it would be better to terminate his services in accordance with rules after giving 30 days notice and to take some body else in employment so that government work does not suffer and the government is also relieved of unnecessary financial obligation.

Let notice of termination of temporary service to Sri Sada Nand Yadav be given with 30 days salary in lieu of notice. "

5. In pursuant to the said order the District Judge Allahabad vide order dated 10.2.2003 terminated the services of the petitioner in exercise of his power under 1975 Rules. Learned counsel for the petitioner has submitted that since from the material available on record and attending circumstances it appears that earlier to the aforesaid order of termination passed by the District Judge the petitioner has already been convicted u/s 366 and 376 I.P.C. in aforesaid case crime, therefore, keeping in view the aforesaid conviction of the petitioner in mind his services were terminated by way of simpliciter termination though the aforesaid conviction of the petitioner was made basis and foundation of impugned order of termination passed against him. Thus, such simpliciter termination is punitive in nature and could not be passed without holding full fledged disciplinary inquiry against him. In support of his submission learned counsel for the petitioner has placed strong reliance upon a decision of Apex Court rendered in **Dipti Prakash Banerjee Vs. Satyendra Nath Bose National Centre for Basic Sciences, Calcutta and others (1999) 3 SCC 60 = A.I.R. 1999 S.C. 983**, wherein the Apex Court has examined all the earlier decisions rendered by it right from **Pashotam Lal Dhingra Vs. Union of India A.I.R. 1958 SC 36** on the question in issue and has held that once it is found that misconduct is foundation of order of simpliciter termination then such order of termination is treated to be punitive in nature as dismissal from service and should be passed only after holding full fledged disciplinary inquiry against delinquent employee.

6. There can be no quarrel with the aforesaid proposition but I am not inclined to go into the aforesaid details and take the view in one way or the other as to whether the aforesaid conviction of the petitioner was foundation of order of simpliciter termination of the petitioner or it was merely motive for such termination of services of the petitioner. In my opinion, even if it is assumed that the conviction of the petitioner u/s 366/376 I.P.C. was foundation of his termination and was not merely motive to pass such order even then in given facts and circumstances of the case the question arises for consideration that as to whether before terminating the services of the petitioner as a measure of punishment it was essential for holding disciplinary inquiry against him or not.

7. In this connection it would be useful to examine the provisions of Article 311 of the Constitution of India as under:-

"311. Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State.- (1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.

Provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed:

Provided further that this clause shall not apply-

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or

(c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry.

(3)If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final."

8. The issue as to whether the Government employee can be punished by imposing major penalty of dismissal, removal or reduction in rank without holding any disciplinary inquiry against him where such Government employee is convicted on a criminal charge, has been examined by a Constitution Bench of Apex Court in **Union of India and another Vs. Tulsiram Patel A.I.R. 1985 SC 1416**, wherein it has been held that if the Government servant is convicted on a criminal charge it is not necessary to hold disciplinary inquiry against him and such inquiry can be dispensed with by the Disciplinary Authority under clause (a) of second proviso to Article 311 (2) and the Disciplinary Authority can pass an order imposing any one of the major penalties viz. dismissal, removal or reduction in rank upon the Government servant without holding any disciplinary inquiry.

9. The pertinent observations made by Apex Court in para 127 of **Tulsiram Patel's** case (supra) are quoted as under:-

"Not much remains to be said about clause (a) of the second proviso to Article 311 (2). To recapitulate briefly, where a disciplinary authority comes to know that a government servant has been convicted

on a criminal charge, it must consider whether his conduct which has led to his conviction was such as warrants the imposition of a penalty and, if so, what that penalty should be. For that purpose it will have to peruse the judgment of the criminal court and consider all the facts and circumstances of the case and the various factors set out in challappan's case (AIR 1975 SC 2216). This, however, has to be done by it ex parte and by itself. Once the disciplinary authority reaches the conclusion that the government servant's conduct was such as to require his dismissal or removal from service or reduction in rank he must decide which of these three penalties should be imposed on him. This too it has to do by itself and without hearing the concerned government servant by reason of the exclusionary effect of the second proviso. The disciplinary authority must, however, bear in mind that a conviction on a criminal charge does not automatically entail dismissal, removal or reduction in rank of the concerned government servant. Having decided which of these three penalties is required to be imposed, he has to pass the requisite order. A government servant who is aggrieved by the penalty imposed can agitate in appeal, revision or review, as the case may be, that the penalty was too severe or excessive and not warranted by the facts and circumstances of the case. If it is his case that he is not the government servant who has been in fact convicted, he can also agitate this question in appeal, revision or review. If he fails in all the departmental remedies and still wants to pursue the matter, he can invoke the court's power of judicial review subject to the court permitting it. If the court finds that he was not in fact the person convicted, it will strike down the impugned order and order him to be reinstated in service. Where the court finds that the penalty imposed by the impugned order is arbitrary or grossly excessive or out of all proportion to the offence committed or not warranted by the facts and circumstances of the case or the requirements of that particular government service the court will also strike down the impugned order. Thus, in Shankar Dass v. Union of India (1985) 2 SCC 358 : (AIR 1985 SC 772) this Court set aside the impugned order of penalty on the ground that the penalty of dismissal from service imposed upon the appellant was whimsical and ordered his reinstatement in service with full back wages. It is, however, not necessary that the court should always order reinstatement. The court can instead substitute a penalty which in its opinion would be just and proper in the circumstances of the case."

10. Thus, from the aforesaid observations it is clear that where a disciplinary authority comes to know that a Government servant has been convicted in a criminal charge, it must consider whether his conduct which has led to his conviction was such as warrants the imposition of penalty and if so what that penalty should be? For that purpose it will have to peruse the judgment of criminal court and consider all the facts and circumstances of the case and other various relevant factors. But such exercise has to be done ex-parte by the disciplinary authority itself and once the disciplinary authority reaches the conclusion that Government servant's conduct was such as to require his dismissal or removal from service or reduction in rank, he must decide which of these three penalties should be imposed on him. This too has to

be done without hearing the concerned Government servant by reason of the exclusionary effect of IInd proviso to Article 311 (2) of the Constitution of India. The disciplinary authority must, however, bear in mind that a conviction on a criminal charge does not automatically entail dismissal, removal or reduction in rank of concerned Government servant. Having decided which of these three penalties is required to be imposed, he has to pass requisite order.

11. In instant case it appears that after conviction of the petitioner under Sections 366 and 376 I.P.C., the disciplinary authority has undertaken the aforesaid exercise required to be taken by him under law by seeking report of preliminary inquiry and by perusing judgment of conviction passed by the trial court against the petitioner and it was found that since the petitioner has been convicted under Section 366 and 376 I.P.C. with 7 years imprisonment and that the aforesaid offences involved moral turpitude and that he was not sure that the petitioner would be exonerated from the said charges in appeal or not, therefore, it was not found desirable to retain the petitioner in services by keeping him under suspension and since the petitioner was temporary employee, therefore, instead of removing or dismissing the petitioner from service he thought proper to terminate the services of the petitioner under 1975 Rules by simpliciter order of termination.

12. Now further question arises for consideration that as to whether being a repository of power under clause (a) of proviso IInd to Article 311(2) of the Constitution of India and under 1975 Rules the order passed by the District Judge terminating the services of the petitioner by order of simpliciter termination, in given facts and circumstances of the case, can be faulted with merely because of the reason that he has referred wrong provision of law and/or exercised his power under 1975 Rules instead of under clause (a) of IInd Proviso to Article 311 (2) of the Constitution of India. In this connection, it is to be noted that it is well settled that even a mentioning of a wrong provision or omission to mention the provisions which contains the power will not invalidate an order where the source of such power exist. Therefore, in my opinion, the omission to mention the relevant clause of IInd proviso to Article 311 (2) of the Constitution in the impugned order will not have the effect of invalidating the impugned order of termination and such order of termination can be saved by reading the same having been passed under the applicable clause of IInd proviso to Article 311 (2) of the Constitution of India. Having regard to the facts and circumstances of the case, since the petitioner has been convicted under section 366 and 376 I.P.C. which involves the offence of moral turpitude, therefore, I am of the considered opinion that the petitioner's removal from service on account of his conviction in aforesaid offence cannot be faulted with and further the order passed by the District Judge, Allahabad terminating his services by way of simpliciter termination in purported exercise of power under 1975 Rules should be treated to be the removal of the petitioner from service under clause (a) of IInd proviso of Article 311 (2) of the Constitution of India.

13. Lastly a further question arises for consideration that as to whether the disciplinary authority was required to hold his hand and continue to keep the petitioner in service after his conviction under section 366 and 375 I.P.C. till disposal of his pending appeal before this Court or not? In this connection, learned counsel for the petitioner could not point out any specific rule under which during the pendency of said criminal appeal the disciplinary authority could stay his hand and could not pass the order of termination or punishment removing the petitioner from service on account of his conviction in aforesaid offences.

14. The Apex Court has occasion to consider the same issue in **Deputy Director of Collegiate Education (Administration) Madras Vs. S. Nagoor Meera A.I.R. 1995 SC 1364**, wherein it has been held that taking proceedings of and passing orders of dismissal, removal or reduction in rank of a Government servant who has been convicted by a criminal court is not barred merely because the sentences or the order is suspended by appellate court or on the ground that the said Government servant-accused has been released on bail pending appeal. It was further observed that it cannot be said that until appeal against conviction is disposed of, action under clause (a) of IInd proviso to Article 311 (2) is not permissible. It was further held that more appropriate course in all such cases is to take action under clause (a) of IInd proviso to Article 311 (2) once a Government servant is convicted on a criminal charge and not to wait for the disposal of appeal or revision, as the case may be. If, however, the Government servant-accused is acquitted in appeal or other proceeding, the order can always be revised and if the Government servant is reinstated, he will be entitled to all the benefits to which he would have been entitled to had he continued in service.

15. The pertinent observations made by the Apex Court in aforesaid case in paras 7 and 9 of the decision are quoted as under:-

"7. This clause, it is relevant to notice, speaks of "conduct which has led his conviction on a criminal charge". It does not speak of sentence or punishment awarded. Merely because the sentence is suspended and/or the accused is released on bail, the conviction does not cease to be operative. Section 389 of the Code of Criminal Procedure, 1973 empowers the appellate court to order that pending the appeal "the execution of the sentence or order appealed against be suspended and also if he is in confinement that he be released on bail or on his own bond." Section 389(1), it may be noted, speaks of suspending "the execution of the sentence or order", it does not expressly speak of suspension of conviction. Even so, it may be possible to say that in certain situations, the appellate court may also have the power to suspend the conviction - an aspect dealt with recently in Rama Narang v. Ramesh Narang (1995 (1) J.T. 515). At pages 524 and 525, the position under Section 389 is stated thus:

"Section 389(1) empowers the Appellate Court to order that the execution of the sentence or order appealed against be suspended pending the appeal. What can be suspended under this provision is the execution of the sentence or the execution of the order. Does 'Order' in Section 389(1) empowers the Appellate Court to order that the execution of the sentence or order

appealed against be suspended pending the appeal. What can be suspended under this provision is the execution of the sentence or the execution of the order. Does 'Order' in-Section 389(1) mean order of conviction or an order similar to the one under Sections 357 or 360 or the Code? Obviously, the order referred to in Section 389(1) must be an order capable in execution. An order of conviction by itself is not capable of execution under the Code. It is the order of sentence or an order awarding compensation or imposing fine or release on probation which are capable of execution and which if not suspended, would be required to be executed by the authorities...... In certain situations the order of conviction can be executable, in the sense, it may incur a disqualification as in the instant case. In such a case the power under Section 389(1) of the Code would be invoked. in such situations, the attention of the Appellate Court must be specifically invited to die consequence that is likely to fall to enable it to apply its mind to the issue since under Section 389(1) it is under an obligation to support its order 'for reasons to be recorded by it in writing'. If the attention of the Court is not invited to this specific consequence which is likely to fall upon conviction how can it be expected to assign reasons relevant thereto?...... If such, a precise request was made to the Court pointing out the consequences likely to fall on the continuance of the conviction order, the Court would have applied its mind to the specific question and if it thought that case was made out for grant of interim stay of the conviction order, with or without conditions attached thereto, it may have granted an order to that effect.

9. ....If, however, the government servant- accused is acquitted on appeal or other proceeding, the order can always be revised and if the government servant is reinstated, he will be entitled to all the benefits to which he would have been entitled to had he continued in service. The, other course suggested, viz., to wait till the appeal, revision and other remedies are over, would not be advisable since it would mean continuing in service a person who has been convicted of a serious offence by a criminal court. It should be remembered that the action under clause (a) of the second proviso to Article 311(2) will be taken only where the conduct which has led to his conviction is such that it deserves any of the three major punishments mentioned in Article 311(2). As held by this court in Shankardass v. Union of India (1985 (2) S.C.R. 358):

"Clause (a) of the second proviso to Article 311(2) of the Constitution confers on the government the power to dismiss a person from services "on the ground of conduct which has led to his conviction on a criminal charge." But that power like every other power has to be exercised fairly, justly and reasonably. Surely, the Constitution does not contemplate that a government servant who is convicted for parking his scooter in a no-parking area should be dismissed from service. He may perhaps not be entitled to be heard on the question of penalty since clause (a) of the second proviso to Article 311(2) makes the provisions of that article inapplicable when a penalty is to be imposed on a Government servant on the ground of conduct which has led to his conviction on a criminal charge. But the right to impose a penalty carries with it the duty to act justly."

16. In view of settled legal position and foregoing discussion I am of the considered opinion that once the petitioner

is convicted on criminal charge u/s 366/376 I.P.C. involving offence of moral turpitude until the order of conviction is set aside in pending appeal or other proceeding, its effect and impact cannot be completely wiped off or ceased to operate merely because of execution of sentence or order appealed against was suspended or stayed and the petitioner was released on bail during the pendency of said appeal. However, in case petitioner's appeal would be allowed and he would be exonerated from the criminal charge or acquitted in appeal or other proceeding, it will always be open for the petitioner to approach the District Judge, Allahabad, who in turn will pass appropriate order. But in given facts and circumstances of the case, at this stage it is very difficult for this Court to interfere in the impugned order of termination of services of the petitioner.

17. Writ petition accordingly stands dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.03.2013

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI,J.

Civil Misc. Writ Petition No. 13238 Of 2013

Mahip Narayan Singh ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Girijesh Tiwari

Counsel for the Respondents:
C.S.C.
Sri Jay Ram Pandey

<u>Constitution of India, Art.-226-</u> Cancellation of appointment of A.B.R.C.-made by Distt. Basic Education Officer-on stop gap arrangement basis-till regular selection made-argument unless regular selection made-can not be ousted-held-in absence of provision regarding stop gap arrangement -appointment itself illegal-cancellation-held-proper.

Held: Para-6

I have perused the appointment order which categorically recites that the petitioner was being appointed till selections are held. In the aforesaid circumstances, the appointment of the petitioner does not appear to have been made in accordance with the prevalent rules. The Government Order nowhere indicates that the Basic Education Officer has the authority to make an appointment by way of a stop gap arrangement. In the circumstances, appointment of the petitioner does not appear to have been made in accordance with the Government Order.

(Delivered by Hon'ble Amreshwar Pratap Sahi, J)

1. Heard learned counsel for the petitioner who prays for quashing of the order dated 18.12.2012 and 20.2.2013 whereby his continuance as an Assistant Block Resource Coordinator has been annulled on the ground that the petitioner's appointment was not in accordance with rules.

2. The contention of Sri Tripathi, is that this order has been passed at the behest of the direction issued by the District Magistrate who is no authority in the matter, and therefore, the order having been passed on the dictate of the superior authority who is not the statutory authority amounts to surrender of jurisdiction. He therefore contends that the impugned order deserves to be quashed.

3. It is further stated in Para 36 as an alternative argument that the petitioner's engagement was in a stop gap arrangement as A.B.R.C. (English) till a regular selection is made in terms of the Government Order applicable. It has been stated that no regular selection has been held so far. He contends that even otherwise the petitioner should be made to continue till such arrangement is made and therefore the impugned order is erroneous.

4. Having heard Sri Tewari, the engagement of a Block Resource Coordinator or an Assistant is governed by the provisions of the relevant Government Orders one of them being dated 2nd February, 2011 copy whereof has been filed as Annexure 1 to the writ petition.

5. It is admitted to the petitioner that he was never selected or appointed in terms of the procedure prescribed under the said Government Order. His appointment by the District Basic Education Officer, Mirzapur was by way of a stop gap arrangement vide order dated 22nd July, 2011 till selections are held in accordance with the same.

6. I have perused the appointment order which categorically recites that the petitioner was being appointed till selections are held. In the aforesaid circumstances, the appointment of the petitioner does not appear to have been made in accordance with the prevalent rules. The Government Order nowhere indicates that the Basic Education Officer has the authority to make an appointment by way of a stop gap arrangement. In the circumstances, appointment of the petitioner does not appear to have been made in accordance with the Government Order.

7. The issue therefore as to whether the District Magistrate had issued a direction or not to the Basic Education Officer becomes purely academic and irrelevant on the facts of the present case when the appointment cannot be sustained on merits. In view of the reasons given hereinabove the discontinuance of the petitioner therefore does not suffer from any infirmity, inasmuch as, fresh selections have to be held by the authority in accordance with the said Government Order. Accordingly, I do not find any reason to interfere with the impugned order.

8. A feeble opposition had been raised to the qualification of the petitioner that he is a science graduate and therefore he could not have been appointed as a coordinator in the subject of English. Since the petitioner's very appointment is not founded on the procedure prescribed, therefore, it is not necessary to go into this question.

9. The writ petition is dismissed with the said observations.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.03.2013.

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

Civil Misc. Writ Petition No. 13702 Of 2013

Khurkhur and another ...Petitioner
Versus
Union of India and others ...Respondents

Counsel for the Petitioner:
Sri Risu Mishra
Sri Umakant

Counsel for the Respondents:
Sri Sudhir Bharti, Sri M.K. Sharma
Sri M.P. Sharma

Constitution of India,Art.-226- Principle of Constructive Res-judicata- scope explained-first writ petition dismissed without liberty to file fresh-second writ petition seeking direction to decide representation-held-not maintainable.

Held: Para-8

In our considered view, a party is required to take all available grounds and raise all available pleas available to him and if he fails to do so, the principle of constructive res judicata comes into play. Otherwise also, only by finding out better or more grounds, the legal position would not change because there is no scope to take a different view than what was taken by this Court earlier in the judgments noted above as well as in another Division Bench Judgement in the case of Ashok Pratap Singh vs. State of U.P. and others, (2004) 2 UPLBEC 1909.

Case Law discussed:
AIR 1979 SC 1328; (1999) 4 SCC 149; (1997)2 SCC 534; (1999)1 UPLBEC 513; AIR 1987 SC 88; (2004) 2 UPLBEC 1909

(Delivered by Hon'ble Shiva Kirti Singh, Chief Justice)

1. Heard learned counsel for the petitioners and Mr. M.P. Sharma, learned counsel appearing for the respondents no. 1 and 2.

2. On 12.3.2013, we had indicated the preliminary objection taken by learned counsel for respondents no. 1 and 2 that this second writ petition by the petitioners is not maintainable in view of facts disclosed in paragraph 34 of the writ petition. In paragraph 34, the petitioners have stated that earlier Writ Petition No. 60061 of 2012 (**Khurkhur and another vs. Union of India and others**) was filed challenging the proceeding of compensation but due to faulty pleadings, it was not pressed and withdrawn. Consequently, it was dismissed as not pressed on 21.11.2012.

3. After the dismissal of the earlier writ petition, the petitioners claim to have made another representation before respondent no. 3 on 27.11.2012 and it has been alleged that no decision is being taken by respondent no. 3 on that representation filed for setting aside the award on various grounds.

4. The prayer in this writ petition is for a direction to the Special Land Acquisition Officer to dispose of petitioners' representation dated 27.11.2012 and also for issuance of a mandamus to award compensation on the basis of market value of the land and on some other principles along with interest. A prayer has also been made for a writ of certiorari to quash the award dated 6.6.2011.

5. Learned counsel for the petitioners has submitted that the preliminary objection has no substance because no issue was decided while dismissing the petitioners' earlier writ petition as not pressed vide order dated 21.11.2012. He has placed reliance upon the judgement of the Supreme Court in the case of **Hoshnak Singh vs. Union of India and others, AIR 1979 SC 1328** and another judgement in the case of **Ferro Alloys Corporation Ltd. and**

another vs. Union of India and others, (1999) 4 SCC 149.

6. In reply, learned counsel for the respondents has submitted that principle of res judicata will no doubt arise only when issues are determined and are decided by the Court in a previous litigation between the same parties, but he has submitted that the bar to maintainability of subsequent writ petition, when no leave of the Court was sought at the time of withdrawal or dismissal of the first writ petition, is on account of public policy and principles flowing from Rule 1 of Order XXIII of the Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC'). In support of this contention, he has placed reliance upon a judgement of the Supreme Court in the case of **Avinash Nagra vs. Navodaya Vidyalaya Samiti and others, (1997) 2 SCC 534.** In paragraph 13, it has been held that where the first writ petition challenging the order of termination of service was withdrawn without grant of liberty by the Court to file a second writ petition, the second writ petition for that very purpose would attract the principle of constructive res judicata and would, therefore, not be maintainable. He has further placed reliance upon a judgement of this Court in the case of **Shyam Narain Dwivedi vs. The State of Uttar Pradesh and others (1999) 1 UPLBEC 513.** In paragraph 29 of this judgement, reliance was placed upon principle of Order XXIII of CPC and it was held that this principle is applicable in writ proceedings, by way of public policy, if the writ petition is withdrawn without the leave or liberty. In this judgement, learned Single Judge considered large number of earlier judgments including Division Bench Judgement of this Court taking similar view and also judgement of the Supreme Court in the case of **Sarguja Transport Service vs. State Transport Appellate Tribunal, Gwalior and others, AIR 1987 SC 88. Paragraph 9** of the judgement in the case of **Sarguja Transport Service (supra)** clinches the legal issue that is clearly in favour of preliminary objection raised on behalf of respondents.

7. Learned counsel for the petitioners drew our attention to several grounds indicated in the present petition for claiming the reliefs noted above. The grounds include challenge to the provisions of Sections 20E (1), 20F (4) and 20F (6) of The Railways (Amendment) Act, 2008. It has been submitted that vires of sub-section was not challenged as a ground for claiming the reliefs in the earlier writ petition.

8. In our considered view, a party is required to take all available grounds and raise all available pleas available to him and if he fails to do so, the principle of constructive res judicata comes into play. Otherwise also, only by finding out better or more grounds, the legal position would not change because there is no scope to take a different view than what was taken by this Court earlier in the judgments noted above as well as in another Division Bench Judgement in the case of **Ashok Pratap Singh vs. State of U.P. and others, (2004) 2 UPLBEC 1909.**

9. In view of aforesaid discussion, the writ petition is dismissed on the preliminary ground as not being maintainable because no liberty was sought for filing another writ petition by the petitioners and nor was it granted

when their earlier writ petition was dismissed as not pressed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.03.2013

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI,J.

Civil Misc. Writ Petition No. 15106 Of 2013

Smt. Reeta Singh ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Ashok Khare
Sri Deepak K. Jaiswal

Counsel for the Respondents:
C.S.C., Sri B.P.Singh

Constitution of India, Art.-226.- **compassionate appointment-claimed by divorced daughter-whether the divorces 'Daughter' within definition of family-view taken in Kusum Devi-deferred-matter referred to larger Bench-Secretary may take appropriate steps for necessary amendment if desired.**

Held: Para-11

A divorced daughter is not included in the list of dependants. In such circumstances by including a divorced daughter also in the Rules would be increasing the ambit of the Rules, which will fall within the realm of legislation and cannot be stretched by judicial interpretation. Accordingly, the reasoning given in the paragraphs 9, 10 and 11 of the judgment in the case of Smt. Kushum Devi (supra) may require reconsideration as I am unable to respectfully subscribe to the reasoning given in the aforesaid judgment.

(Delivered by Hon'ble Amreshwar Pratap Sahi, J)

1. Heard learned counsel for the petitioner Sri Ashok Khare, Senior Counsel, learned Standing for Respondent No. 1 and Sri V.P. Singh for the Respondent Nos. 2 to 5.

2. The petitioner is the daughter of late Shyam Dulari Singh her mother, who was an Assistant Teacher in primary school Kakrahi and died in harness on 12th September, 2009. The petitioner's father had already died leaving behind her and her mother.

3. The petitioner claimed compassionate appointment on the ground that she is a divorced lady and was dependent on her mother.

4. It is undisputed that the petitioner was divorced on a date, later than the death of her mother in 2010. The petitioner earlier filed Writ Petition No. 35687 of 2012 which was disposed of with a direction upon the Respondent No. 5 to decide the matter of her appointment on compassionate grounds.

5. Vide order dated 25.7.2012, the District Basic Education Officer rejected the representation of the petitioner on the ground that a divorced daughter does not fall within the definition of a dependant. A copy of the order impugned has been annexed as Annexure No. 7 to the writ petition.

6. Sri Khare has relied upon on the decision in the case of Smt. Kushum Devi Vs. State of U.P. and others (2001) Vol.3 Education and Service cases Page 1283 to contend that a divorced daughter would

also fall within the definition of the word 'family', and the petitioner being a dependent, she was entitled for the benefit of compassionate appointment. Thus it is prayed that the impugned order be quashed.

7. It has been stated by the learned counsel for the petitioner at the Bar that the judgment in the case of Smt. Kushum Devi is still intact.

8. Having perused the relevant Rules and the judgment aforesaid, the Government Order dated 22nd December, 2011 recites the definition of the word family as wife or husband, son/ adopted son, unmarried daughters, widowed daughter, widowed daughter-in-law, unmarried brother and sister dependent on the deceased employee and a widowed mother (if the deceased employee had died unmarried). The claim, therefore, has been rejected as a divorced daughter does not fall within the definition of a widowed daughter.

9. The judgment which has been relied upon by Sri Khare, places a divorced daughter at par with a widowed daughter and, according to the interpretation given in paragraph 11 of the said judgment, she was found entitled to get the benefit of the compassionate appointment for the reasons stated in support thereof. As such the petitioner whose case is also on the same footing, is entitled to the same benefit. The Rule is descriptive so as to only include unmarried and widowed daughter, who are eligible and dependant on the deceased employee, for the purpose of seeking compassionate appointment.

10. The Rules under consideration in Kushum Devi's case (supra) were Rule 2(C) of the 1974 Rules about which reference has been made in the Government Order which is under consideration.

11. A divorced daughter is not included in the list of dependants. In such circumstances by including a divorced daughter also in the Rules would be increasing the ambit of the Rules, which will fall within the realm of legislation and cannot be stretched by judicial interpretation. Accordingly, the reasoning given in the paragraphs 9, 10 and 11 of the judgment in the case of Smt. Kushum Devi (supra) may require a reconsideration as I am unable to respectfully subscribe to the reasoning given in the aforesaid judgment.

12. Loosing the status of a married daughter upon divorce is by operation of law, recognized on a decree of divorce passed by a Court having competent jurisdiction. The daughter automatically, therefore, does not become dependant upon her parents so long as the decree of divorce is not granted. The dependency of the daughter would therefore directly be dependant upon the decree being granted which in the present case as well as in Smt. Kushum Devi's case (supra) came to occur later on, much after the death of the employee. The employee had died and the decree was passed later on. Under such circumstances as on the date of death of the employee neither the petitioner herein nor the petitioner in the aforesaid decision had been divorced so as to claim dependency.

13. Apart from this the definition of the said clause nowhere indicates that it is

illustrative and, thus, for the aforesaid reasons, I do not find the judgment in Smt. Kushum Devi's case to be laying down the correct law.

14. Since there is a judgment to the contrary, it would be appropriate that the matter be disposed of by a larger Bench of this Court on this issue authoritatively "as to whether a divorced daughter would also be included within the definition of word 'family' under the relevant Rules or not". Accordingly, after notice the Respondents are directed to file counter affidavit within three weeks and rejoinder affidavit may be filed within a week.

15. Let this matter now placed before the Hon'ble Chief Justice in terms of Chapter-5 Rule 2(b)(ix) read with Rule 6 of the Allahabad High Court Rules, 1952 for getting the matter resolved by a larger Bench for which appropriate orders may be passed and in the mean-time, the parties may exchange their affidavits.

16. At the same time learned Standing Counsel shall communicate this order to the Respondent No. 1 who may on this reference, proceed to get the matter examined by the State Government in as much as a divorced daughter is also placed under the same circumstances becoming dependant on her parents in such peculiar circumstances where a husband deserts her, having no means of livelihood to sustain herself, and therefore the State Government can reasonably amend the Rules for the purpose of including a divorced daughter as well within the definition of the word family for compassionate appointment subject to such conditions as may be necessary for grant of such benefit.

17. A copy of this order be issued to the learned Standing Counsel Sri Upendra Singh free of charges within three days.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.03.2013

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI,J.

Civil Misc. Writ Petition No. 16010 Of 2013

Ved Prakash Pandey ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Rama Nand Pandey
Sri Pradeep Narayan Pandey

Counsel for the Respondents:
C.S.C.

U.P. Intermediate Education Act-1921-Chapter III, Regulation-2- Appointment of Head Clerk-vacancy fall under promotional reserve quota-non of the junior clerk possess minimum experience of 5 years of junior clerk-management to fulfill said post by direct recruitment.

Held: Para-11.

So far as qualifications are concerned, the post of the Head Clerk or even otherwise of a Class III employee is the same as provided for, in the government run secondary institutions. The management will therefore, have to take in to account the said qualification for the purpose of filling up of the post of the Head Clerk in a peculiar situation that has cropped up in the present case. The management can also take into account the fact that a candidate available who has put in more than five years of service in any other institution may apply for direct recruitment. In such a situation, it is open for the Committee of management to apply the said

principle also for the purpose of recruiting a Head Clerk in a privately managed educational institution under the U.P. Intermediate Education Act, 1921 in addition to the other statutory qualifications as are prescribed for such a post in government run institutions.

Case Law discussed:
[(2011) 1 UPLBEC 361]

(Delivered by Hon'ble Amreshwar Pratap Sahi, J)

1. Heard learned counsel for the parties.

2. This is a case relating to the claim of promotion of the petitioner as Assistant Clerk in Higher Secondary School, governed by the provision of U.P. Intermediate Education Act, 1921. The undisputed facts are that the post of Head Clerk is vacant. One post of Assistant Clerk has already been f filled up by way of direct recruitment of one Akhilesh Kumar. One Prem Shankar Mishra was already promoted as Assistant Clerk against another post from a class IV category.

3. Thus, the post of Head Clerk was available by way of promotion but no clerk of the institution, namely, Akhilesh Kumar or Prem Shankar Mishra were eligible for being considered for promotion as they have not completed five years of continuous substantive service as required under Chapter III Regulation 2 of the regulation framed under the U.P. Intermediate Education Act, 1921.

4. The petitioner contends that the post of Head Clerk could be occupied by any person who otherwise is eligible for promotion from class IV category. In the opinion of the court, a class IV employee cannot be directly promoted as Head Clerk, inasmuch as the regulation clearly provides for promotion from one grade to the next grade and reasonably construed it means that the post of Head Clerk has to be filled up by way of promotion from amongst the Assistant Clerks of the Institution who have put in five years of service.

5. The post of Assistant Clerk are occupied but none of them are qualified to be promoted as Head clerk.

6. The issue is that can in such a situation the post of Head Clerk be filled up by way of direct recruitment.

7. The decision in the case of **Malkhan Singh and others vs. State of U.P. and others reported in [(2011) 1 UPLBEC 361]** does not answer this question as this issue was not involved therein.

8. Thus, the plea of the learned counsel for the petitioner resting on such a decision does not advance the cause any further.

9. The petitioner claims that his representation for consideration against the post of Head Clerk should be directed to be decided.

10. In view of what has been discussed hereinabove, the post of Head Clerk has, therefore, to be filled up by way of direct recruitment. There is no bar or prohibition under Chapter III Regulation-I2 of the 1921 Act that may prevent the management from making appointment on the post of Head Clerk by way of direct recruitment. As in the instant case, there is no candidate available for promotion, then

the only option is to fill up the post by way of direct recruitment. The very provision of 50% promotion quota clearly entails that the post which is left vacant, has to be filled up by way of direct recruitment. Thus on both counts the Committee of Management will have the power to fill up the post by way of direct recruitment.

11. So far as qualifications are concerned, the post of the Head Clerk or even otherwise of a Class III employee is the same as provided for, in the government run secondary institutions. The management will therefore, have to take in to account the said qualification for the purpose of filling up of the post of the Head Clerk in a peculiar situation that has cropped up in the present case. The management can also take into account the fact that a candidate available who has put in more than five years of service in any other institution may apply for direct recruitment. In such a situation, it is open for the Committee of management to apply the said principle also for the purpose of recruiting a Head Clerk in a privately managed educational institution under the U.P. Intermediate Education Act, 1921 in addition to the other statutory qualifications as are prescribed for such a post in government run institutions.

12. Accordingly the committee of management, respondent no. 4, herein, shall be at liberty to proceed to take steps for filling up of the post in the light of the observations made hereinabove.

13. The writ petition is disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.03.2013

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 33860 Of 2009

Santram Singh ...Petitioner
Versus
Workshop Manager and another ...Respondents

Counsel for the Petitioner:
Sri A.D. Saunders

Counsel for the Respondents:
S.C.
Sri Ritvik Upadhyay
Sri V.K. Upadhyay

Constitution of India, Art.-226- **Labor Court award-petitioner/workman found working on temporary capacity as electrician-working more than 240 days-continuous working without break for 9 years-in lieu of reinstatement-given lum-sum amount of Rs. three lacs-held-not proper-where working for 9 years accepted no evidence about closure of project-not an easy task to get re-appointment in another industry-reinstatement with back wager of 20% from retrenchment to the date of reinstatement-would be proper-award modified accordingly.**

Held: Para-26

Considering the aforesaid facts and in order to settle the matter once and for all, instead of remitting the matter to the labour court, the Court is of the opinion that the petitioner is entitled for 20 per cent of the back wages from the date of the order of the termination till the date of the award. From the date of the award, till he is reinstated, the petitioner is not entitled for any back wages on the principle of "no work no pay".

Case Law discussed:
AIR 2006 Supreme Court 586; 2006(11) SCC 684; 2006(7) SCC 752; 2008(1) SCC 575; 2011(3) U.P.L.B.E.C. 2568; 2005(5) SCC 591; 2009 LIC 415; 2005(2) SCC 363; W.P. No. 8749 of 2002

(Delivered by Hon'ble Tarun Agarwala, J)

1. The workman being aggrieved by the award of the labour court has filed the present writ petition. The facts leading to the filing of the writ petition is that the petitioner was appointed as an Electrician in the year 1989 and, since then, has been working without any break in service. The services of the petitioner was dispensed with on 13th August, 1998 without giving any notice and without assigning any reason. The petitioner, being aggrieved by the termination of his services, raised an industrial dispute, which was referred to the labour court. The reference was "whether the employers were justified in terminating the service of the workman w.e.f. 13th August, 1998 ? If not, to what relief was the workman entitled to."

2. Upon the exchange of pleadings, the labour court held that the workman had worked for more than 240 days in a calender year and had worked for almost 9 years, and consequently, the employer was not justified in terminating the services of the petitioner without assigning any reason. The labour court also found that the provision of Section 6-N of the U.P. Industrial Disputes Act was not complied with. The labour court also found that the petitioner was entitled to be given a notice and retrenchment compensation as provided under Section 6-N of the U.P. Industrial Disputes Act. The labour court, however, instead of reinstating the petitioner in service moulded the relief and paid compensation amounting to Rs. 3 lacs. The workman, being aggrieved by this portion of this award, namely, payment of compensation in lieu of reinstatement, has filed the present writ petition.

3. Heard Sri A.D. Saunders, the learned counsel for the petitioner and Sri Ritvik Upadhyay, the learned counsel for the employers.

4. The contention of the petitioner is, that having worked for almost 9 years continuously without any break in service and, in the absence of any misdemeanour of his part, the petitioner was entitled for reinstatement in service and that compensation in lieu of reinstatement was not justified in the present facts and circumstances of the case.

5. On the other hand, the learned counsel for the employer vehemently contended that the award of the labour court was perfectly correct and that the workman was not a regular employee and that he was working as a temporary employee, and consequently, the petitioner was not entitled to be reinstated as a matter of right. The learned counsel submitted that in the given circumstances, compensation in lieu of reinstatement was the appropriate relief given to the workman. It was also urged that the workman did not allege before the labour court that he was not gainfully employed and therefore the question of reinstatement in the service does not arise. The learned counsel further contended that in similar circumstances, the labour court directed reinstatement of service of some other workers in the construction department of the employer, against which, the employer filed a writ petition, which was partly allowed and instead of reinstatement, the Court modified the award by giving compensation in lieu of reinstatement. The learned counsel submitted that in the light of the aforesaid decisions of this Court, the award of the labour court awarding compensation in

lieu of reinstatement was perfectly justified.

6. When an order of termination is set aside by a labour court, the normal rule is reinstatement in the service of the employer. In exceptional cases, reinstatement in service can be denied for valid reasons, otherwise the normal rule is reinstatement in service. This trend of reinstatement in service continued for several decades, but recently, the trend has been changed and a departure has been made through various judgements of the Supreme Court. Before elucidating on the subject, reinstatement with back wages and reinstatement without any back wages needs to be clarified.

7. In **U.P. State Brassware Corporation Ltd. Vs. Uday Narain Pandey AIR 2006 Supreme Court 586**, the Supreme Court held that in every case of reinstatement, the entire back wages ought not to be awarded even if there has been a violation of the provision of 6-N of the U.P. Industrial Disputes Act.

8. In **Jaipur Development Authority Vs. Ram Sahai 2006 (11) SCC 684**, the Supreme Court held that where the dispute was raised belatedly and there was a long delay in making the reference, the relief of reinstatement was not justified and in such circumstances, lumpsum compensation should have been awarded.

9. In **U.P.S.R.T.C. Vs. Man Singh 2006 (7) SCC 752**, the Supreme Court held that where the workman was not appointed in accordance with the Rules and the dispute was raised after a long lapse of time, in such circumstances, the relief of reinstatement was not justified and that compensation was the adequate remedy in lieu of reinstatement.

10. In **Mehboob Deepak Vs. Nagar Panchayat Gajraula and another 2008 (1) SCC 575**, the Supreme Court held that a daily wager who may have worked for more than 240 days in a calender year and their services were terminated in violation of the provisions of Section 6-N of the U.P. Industrial Disputes Act was not entitled for reinstatement in service as he does not hold a right on that post, and consequently, a daily wager was only entitled for compensation.

11. Similar view was held by this Court in S**tate of U.P. and another Vs. Hind Mazdoor Sabha and others 2011 (3) U.P.L.B.E.C. 2568**.

12. On the other hand, with regard to the back wages, the Supreme Court held that where the termination was held to be illegal, the labour court was justified in reinstating the workman, but was not justified in granting full back wages. In **General Manager, Haryana Roadways Vs. Rudhan Singh 2005 (5) SCC 591**, the Supreme Court held that the order for backwages should not be passed mechanically. There are other factors, which are required to be considered before granting backwages, namely, length of service whether it was an ad hoc appointment or a permanent appointment, whether the workman was working on daily wage, temporary or permanent or whether he was in a position to get another employment during the pendency of the dispute.

13. Similar view was again reiterated in **Kanpur Electric Supply Co. Ltd. Vs. Shamin Mirza 2009 LIC 415.**

14. In **Kendriya Vidyalay Sangathan and Another Vs. S.C.Sharma 2005 (2) SCC 363**, the Supreme Court held that the workman was not entitled to back wages as a matter of right and that the employee had to show that he was not gainfully employed and that the initial burden was upon him.

15. In the light of the aforesaid, the Court finds that the petitioner was appointed as a temporary employee, but had worked continuously for 9 years. There is an order passed by the Controlling Authority under the payment of Gratuity Act awarding gratuity to the petitioner on the ground that he had worked 240 days in a calender year for 9 continuous years and consequently was entitled for gratuity. This order has become final interse between the parties.

16. The appointment of a daily wager is a different and distinct from an appointment on a temporary basis. Appointment on a daily wages is on account of exigencies of work whereas a person appointed on a temporary basis means that there is requirement for work and is not appointed on a day to day basis, but the appointment is for a considerable period of time.

17. In the instant case, the Court finds from the written statement of the employers that the petitioner was engaged in the Electricity Department for various projects and according to the employers upon the completion of the project, the work comes to an end. The nature of work specified by the employer indicates the temporary nature of work. However, the Court finds that this temporary nature of work continued unabated for 9 long years and the petitioner continued to remain a temporary workman. The petitioner alleges that when he came into the zone of regularization, the employers passed an order of termination of the services of the workman. The Court further finds that there is nothing to indicate that the construction work, in which, the petitioner was engaged had come to an end and that the petitioner's services was no longer required thereafter.

18. In the light of the aforesaid, the contention of the employer that the petitioner was only a temporary employee and was therefore not entitled for reinstatement in services does not hold good especially when no evidence has been brought on record to justify the termination of the workman. There is also no evidence to prove that the project, in which, the petitioner was employed had come to an end or that there was no further requirement of work. The Court further finds that the petitioner having worked for more than 240 days in a calendar year and having worked 9 years was entitled for reinstatement in service. The labour court has misinterpreted the judgments cited and has erred in granting compensation in lieu of reinstatement. The Supreme Court has denied the relief of reinstatement in those cases, where the dispute was belatedly referred for adjudication or where the workman was a dailywager. In the instant case, the petitioner was not a dailywager, but was a temporarily employed. The Court does not find that there has been an unreasonable delay in raising the dispute.

19. Employment in an industry is not an easy task and in these modern times, when there is a huge unemployment, it is difficult for a

workman to get reemployment, especially when a workman has worked for some length of time and seeks employment at a later stage in another industry. A question is normally asked by a new employer, whether the workman had worked at at another place earlier and when it comes to the knowledge of the new employer that the services of the workman was terminated earlier for whatever reasons, a shadow of doubt creeps in the mind of the employer with regard to his re-employment. Consequently considering this aspect, reinstatement in service is the normal rule. Once the order of termination is found to be illegal and is set aside, unless a departure is made for strong reasons, reinstatement in service should be granted.

20. The Court is of the opinion that this is not a case whether a departure can be made denying the petitioner reinstatement in service and giving compensation in lieu thereof.

21. In **Writ petition No. 8784 of 2002 M/s Hindalco Industries Ltd. Vs. Sri Bhuvnesh Kumar Dwivedi and Another**, the Court considered the factum of resignation of the workman and even though he had worked for almost 8 years held that in the given circumstances was only entitled for compensation instead of compensation. The High Court, accordingly modified the award of the labour court granting compensation of Rs. One lac instead of reinstatement in service. In **Writ petition no. 8749 of 2002, M/s Hindalco Industries Ltd. Vs. Surendra Pratap Singh and Anothers** decided on 04th July, 2011, the Court considered the factum that the workman was appointed for limited period of time and in view of the provision of Section 2 (oo)(bb) of the Industrial Disputes Act, the Court was of the opinion that the workman was entitled for payment of compensation in lieu of reinstatement.

22. The aforesaid decisions cited by the learned counsel for the petitioner, in the opinion of the Court, is distinguishable.

23. In the light of the aforesaid, the Court is of the opinion that the award of the labour court directing payment of compensation of Rs. 3 lacs in lieu of reinstatement was not correct, and consequently, to that extent, the award of the labour court can not be sustained and is modified to the extent that the workman petitioner would be reinstated in service.

24. In so far as, the back wages are concerned, the Court finds that the petitioner has pleaded before this Court as well as before the labour court that he has not been gainfully employed from the date of his termination of his services.

25. In the light of the aforesaid and in view of the decision of the Supreme Court, in the case of **Kendriya Sangathan (Supra)**, the petitioner has discharged the initial burden and the onus was upon the employer to prove that he was gainfully employed.

26. Considering the aforesaid facts and in order to settle the matter once and for all, instead of remitting the matter to the labour court, the Court is of the opinion that the petitioner is entitled for 20 per cent of the back wages from the date of the order of the termination till the date of the award. From the date of the award, till he is reinstated, the petitioner is not entitled for any back wages on the principle of "no work no pay".

27. In view of the aforesaid, the award of the labour court is modified, the Court further directs the employer to reinstate the workman within four weeks from today, from which date, the petitioner would be entitled for wages.

28. The writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.02.2013

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

Civil Misc. Writ Petition No. 39495 Of 1998

Lakhan Lal Gupta ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Hariom Khare

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226- Recovery of excess amount-on ground of wrong fixation-after four years from the retirement-without disclosing any reason-without affording opportunity of hearing-no allegation of misrepresentation against petitioner- a class 4th employee-held-impugned order wholly arbitrary illegal-quashed.

Held: Para-14 & 23

14-It is trite law that if any administrative or qusi judicial order which entails civil consequences, then the person is entitled for opportunity before any such order is passed. Having regard to evidence on record, it can be safely held that there is complete violation of principles of natural justice in the present case, and on this ground alone, the impugned order is unsustainable.

23- That order is also vitiated for another reason; The petitioner is retired Class-IV employee, the impugned order has been passed after four years of his retirement. It may be that due to inadvertent mistake by authority concerned, he was granted higher pay scale.

Case Law discussed:
(1991)1 SCC 588; AIR 1978 SC 851; (1969) 2 SCC 262; AIR 1981 SC 818; (2011)2 SCC 258; 2010(9)SCC 496; 2010 (9)SCC 486; 2003(11)SCC 519; AIR 1990 SC 1984; (2012)8 SCC 417; (2009)3 SCC 475; 1995 Supp. (1) SCC 18; [1994] 2 SCC 521; [1996] 4 SCC 416; [1997] 6 SCC 139; (2006) 11 SCC 709; [2006] 11 SCC 492; [2006] 8 SCC 647; [2000] 10 SCC 99

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

1. By way of this petition, a Class-IV employee who retired from his service way back in 1998, is seeking to impugn an order for recovery of excess amount paid to him.

2. A few facts may be set out, which would be relevant for considering the issue which arise in present case are:

3. The petitioner was initially appointed as Class-IV employee on 31.12.1962 in Horticulture Department. It is stated that his service record was excellent. After completing 12 years of service, petitioner was granted selection grade on 01.05.1984 and after 16 years, he was sanctioned higher pay scale of Rs. 775- 1025 on 01.05.1990. A copy of the order dated 14.06.1990 is Annexure-1 to the writ petition.

4. The petitioner's case is that in terms of the another Government Order dated 19.06.1993, the petitioner was allowed higher pay scale i.e Rs. 975-1660 from 01.05.1990. The said Government Order is Annexure-2 to the writ petition. The petitioner continued to draw the higher scale in compliance of the order dated 16.08.1994 till he reached his age of superannuation on 31.01.1998.

5. It is stated that by the impugned order, the earlier order dated 16.08.1994 whereby, the petitioner was given higher pay scale of 975-1660 has been cancelled.

6. A counter affidavit has been filed on behalf of the State. It is stated in the counter affidavit that in view of Government Order dated 03.06.1989, a Class-IV employee was not entitled for promotion in higher grade i.e. Rs. 975-1660. For the said reason, the order has been cancelled.

7. I Have heard Sri Hariom Khare, learned counsel for the petitioner and learned standing counsel.

8. Learned counsel for the petitioner submits that there was no allegation against the petitioner that he has made misrepresentation of fact or he was aware about wrong calculation. Petitioner belong to Class-IV service. The impugned order is arbitrary and illegal as it has been passed after the retirement of the petitioner without affording any opportunity to the petitioner. Since order has been passed without notice/opportunity, it is nullity.

9. Learned counsel for the petitioner has drawn the attention of the Court to paragraph 8 of the writ petition wherein, it is stated that no notice or opportunity was given to the petitioner prior the cancellation of the order dated 16.08.1994.

10. Learned standing counsel submits that the order granting higher pay scale has been rightly recalled as the petitioner was not entitled for higher pay scale. He has further submitted that the mistake was committed by respondent has been rectified, therefore, there is no illegality.

11. I have considered the rival submissions of learned counsel for the parties and perused the record.

12. Indisputably, the petitioner was granted the higher pay scale by the Competent Authority, the Deputy Director. The said order has been cancelled after four years of the retirement of the petitioner.

13. From the perusal of the impugned order, it is evident that no reason has been mentioned in the impugned order. It is also established from the pleadings that the petitioner was not given any opportunity of hearing. The statement of fact made by the petitioner in paragraph 8 of the writ petition has not been specifically denied in paragraph 9 and 13 of the counter affidavit. The stand taken in the counter affidavit is that there was no necessity to afford opportunity to the petitioner.

14. It is trite law that if any administrative or qusi judicial order which entails civil consequences, then the

person is entitled for opportunity before any such order is passed. Having regard to evidence on record, it can be safely held that there is complete violation of principles of natural justice in the present case, and on this ground alone, the impugned order is unsustainable.

15. Prof. Wade in Administrative Law, 5th Edition, Page 470 has aptly mentioned about natural justice in following words. "The right to natural justice should be as firm as the right to personal liberty."

16. Supreme Court in the case of **Union Of India Vs. Mohd. Ramzan Khan (1991) 1 SCC 588**, at page 596 has quoted "Prof. Wade has pointed out

"The concept of natural justice has existed for many centuries and it has crystallized into two rules: that no man should be judge in his own cause; and that no man should suffer without first being given a fair hearing....They (the courts) have been developing and extending the principles of natural justice so as to build up a kind of code of fair administrative procedure, to be obeyed by authorities of all kinds. They have done this once again, by assuming that Parliament always intends powers to be exercised fairly"

17. Justice Krishna Iyer in **Mohinder Singh Gill Vs. The Chief Election Commissioner AIR 1978 SC 851** has traced the root of natural justice in Kautiyla's Arthasastra. He opined as under: "the rule of law has had the stamp of natural justice which makes it social justice.

18. Supreme Court in **A.K. Kraipak Vs. Union of India (1969) 2 SCC 262** held an unjust decision in an administative enquiry may have more fair reaching effect that a decision in quasi judicial enquiry. The purpose of the rules of natural justice is to prevent miscarriage of justice. The Court has referred the classic case of State of Orissa Vs. Dr. Binapani Dei AIR 1967 SC 1269; Supreme Court in Binapani Case (Supra) observed that if "there is power, duty to act judicially is implicit in the exercise of such power".

19. **Swadeshi Cotton Mills Vs. Union of India AIR 1981 SC 818**, Justice R.S. Sarkaria held as under:

"Rules of natural justice are not embodied rules. Being means to an end and not an end in themselves, it is not possible to make an exhaustive catalogue of such rules. But there are two fundamental maxims of natural justice vis. (i) audi alteram partem, and (ii) nemo judex in re sua. The audi alterm partem rule has many facets, two of them being (a) notice of the case to be met; and (b) opportunity to explain. This rule cannot be sacrificed at the alter of administrative convenience or celerity. The general principles as distinguished from an absolute rule of uniform application seems to be that where a statute does not, in terms, exclude this rule of prior hearing but contemplates a post decisional hearing amounting to a full review of the original order on merits, then such a statute would be construed as excluding the audi alteram partem rule at the pre-decisional stage. Conversely if the statute conferring the power is silent with regard to the giving of a pre-decisional hearing to the person affected and the administrative decision taken by the authority involves civil consequences of a grave nature, and

no full view or appeal on merits against that decision is provided, courts will be extremely reluctant to construe such a statute as excluding the duty of affording even a minimal hearing, shorn of all its formal trappings and dilatory features at the pre-decisional stage, unless, viewed pragmatically, it would paralyse the administrative process or frustrate the need for utmost promptitude. In short, this rule of fair play must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands. The court must make every effort to salvage this cardinal rule to the maximum extent possible, with situational modifications. But, the core of it must, however, remain, namely, that the person affected must have reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise."

20. Recently Supreme Court in the case of **Automotive Tyre Manufacturers Association Vs. Designated Authority (2011) 2 SCC 258** held about the natural justice in following terms:

"It is thus, well settled that unless a statutory provision, either specifically or by necessary implication excludes the application of principles of natural justice, because in that event the court would not ignore the legislative mandate, the requirement of giving reasonable opportunity of being heard before an order is made, is generally read into the provisions of a statute, particularly when the order has adverse civil consequences which obviously cover infraction of property, personal rights and material deprivations for the party affected. The principle holds good irrespective of whether the power conferred on a statutory body or Tribunal is administrative or quasi judicial. It is equally trite that the concept of natural justice can neither be put in a straitjacket nor is it a general rule of universal application."

21. Apart from the aforesaid ground, a perusal of the impugned order would also indicate that no reason has been mentioned in the impugned orders. Without any reason, the orders become arbitrary. The Supreme Court in the case of **Kranti Associates (P) Ltd. Vs. Masood Ahmed Khan; 2010 (9) SCC 496, Maya Devi (Dead). Through LRS. Vs. Raj Kumari Batra (Dead) through LRS. And Others; 2010 (9) SCC 486 and in Raj Kishore Jha Vs. State of Bihar; 2003(11) SCC 519** has laid the emphasis for giving reasons by administrative and quasi judicial authorities.

22. The Court has observed that the reasons are heart and soul of the orders and in absence of the reason, the order becomes arbitrary. Supreme Court in **S.N. Mukherjee Vs. Union Of India; AIR 1990 SC 1984** has held that except in cases where the requirement has been dispensed with, an administrative authority is required to record the reason for its decision/order.

23. That order is also vitiated for another reason; The petitioner is retired Class-IV employee, the impugned order has been passed after four years of his retirement. It may be that due to inadvertent mistake by authority concerned, he was granted higher pay scale.

24. Supreme Court in a recent judgement **Chandi Prasad Uniyal Vs. State of Uttarakhand (2012) 8 SCC 417** has considered the law in this respect. The Court held that the concept of fraud or misrepresentation has no role to play because it is public money, if it is wrongly paid, the recipient should return the money. But in that case, employee/recipient was in service when it was found that excess amount was paid to him.

25. In the present case, petitioner stood retired and he is a Class IV employee.

26. In Chandni Prasad Uniyal (Supra) Supreme Court has referred its decision in **Syed Abdul Qadir Vs. State of Bihar (2009) 3 SCC 475**. In the said case, recovery was initiated against retired teacher, and the department sought the recovery of excess payment after the retirement.

27. Supreme Court in Syed Abdul Qadir (Supra) has held as under:

"57. This Court, in a catena of decisions, has granted relief against recovery of excess payment of emoluments/allowances if (a) the excess amount was not paid on account of any misrepresentation or fraud on the part of the employee and (b) if such excess payment was made by the employer by applying a wrong principle for calculating the pay/allowance or on the basis of a particular interpretation of rule/order, which is subsequently found to be erroneous.

58. The relief against recovery is granted by courts not because of any right in the employees, but in equity, exercising judicial discretion to relieve the employees from the hardship that will be caused if recovery is ordered. But, if in a given case, it is proved that the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or in cases where the error is detected or corrected within a short time of wrong payment, the matter being in the realm of judicial discretion, courts may, on the facts and circumstances of any particular case, order for recovery of the amount paid in excess. See **Sahib Ram vs. State of Haryana, 1995 Supp. (1) SCC 18, Shyam Babu Verma vs. Union of India, [1994] 2 SCC 521; Union of India vs. M. Bhaskar, [1996] 4 SCC 416; V. Ganga Ram vs. Regional Jt., Director, [1997] 6 SCC 139; Col. B.J. Akkara [Retd.] vs. Government of India & Ors. (2006) 11 SCC 709; Purshottam Lal Das & Ors., vs. State of Bihar, [2006] 11 SCC 492; Punjab National Bank & Ors. Vs. Manjeet Singh & Anr., [2006] 8 SCC 647; and Bihar State Electricity Board & Anr. Vs. Bijay Bahadur & Anr., [2000] 10 SCC 99."**

28. In the case in hand, petitioner stood retired in the year 1998. After his retirement, it was found that there was wrong fixation. Petitioner immediately moved to the Court and interim protection was granted to him. More than 15 years have passed. At this distance of time, I do not find it in the interest of justice to remit the matter back to the authority concerned.

29. In the counter affidavit, there is no allegation that the petitioner was guilty of any misconduct or misrepresentation.

30. No plausible reasons have been given for not rectifying the alleged mistake within reasonable period. The reasonable period vary on facts of each case, there is no straitjacket formula in this regard. Having regard to facts of the present case, four years time cannot be said to be reasonable time.

31. After careful consideration of facts, I am of the view that for the reasons stated above, the impugned order dated 22.09.1998 and consequential orders dated 24.09.1998 and 08.10.1998 needs to be set aside. Accordingly, they are set aside.

32. In peculiar facts and circumstances of the case, it is directed that no further deduction/recovery shall be made against the petitioner and matter shall be treated to be closed.

33. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.03.2013

BEFORE
THE HON'BLE VINEET SARAN, J.
THE HON'BLE MANOJ MISRA, J.

Civil Misc. Writ Petition No. 40031 Of 2012

Dr. Dwarika Nath Rai ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Neeraj Pandey

Counsel for the Respondents:
C.S.C., Sri Gautam Baghat
Sri Harshita Raghuvanshi
Sri K.K. Roy, Sri R.K. Rai
Sri Vivek Verma

V.B.Singh Purvanchal University- First statute-15.24-benefit of academic session-petitioner being substantive appointee on post of Principal-retired on 04.07.02-whether entitled for academic session benefit?- held-'yes'-word teacher-includes principal also-benefit of academic session-mandatory-not depend upon discretion of authorities-entitled to continue as re-appointed principal till end of 30th June 2003.

Held: Para-10

As there is no dispute with regard to the fact that the petitioner was regularly appointed Principal on the date of his superannuation and that he superannuated on 04.07.2012, he would be treated as on re-employment, as per the proviso to statute 15.24, up to 30 June 2013. Since the definition of teacher includes a Principal, in the light of the decisions of this Court in the cases of Udai Narayan Pandey (supra) and Meerut College Parivar Kalyan Samiti, Meerut (supra), the petitioner would be deemed to have been re-employed as a Principal of the college and would continue, in such capacity, till 30.06.2013.

Case Law discussed:
(1999)3UPLBEC 1887; (2001) 1 UPLBEC 201; Civil Misc. Writ Petition No. 41457 of 2010; (2001) 9 SCC 377;

(Delivered by Hon'ble Vineet Saran, J)

1. We have heard learned counsel for the petitioner, Sri K.K. Roy appearing for the newly impleaded respondent No.7 and the learned Standing Counsel for the State-respondents.

2. The short question involved in this petition is whether the petitioner, who was regularly appointed Principal of

Khardiha Mahavidyala, Ghazipur (hereinafter referred to as the College), a college affiliated to Veer Bahadur Singh Purvanchal University, Jaunpur (hereinafter referred to as the University) was entitled to session's benefit, on account of his superannuation in mid-session i.e. 04.07.202, in accordance with statute 15.24 of the first statutes of the University.

3. The undisputed facts of the case are that the petitioner was appointed Principal of the aforesaid College on recommendation of the U.P. Higher Education Service Commission. He attained the age of superannuation on 04.07.2012 i. e. on completion of 62 years in age. According to the proviso to statute 15.24 of the first statutes of the University, if the date of superannuation of a teacher does not fall on June 30, the teacher shall continue in service till the end of the academic session i.e. June 30 following and he will be treated as on re-employment from the date immediately following the date of his superannuation till June 30 following. As the petitioner attained the age of superannuation on 04.07.2012, he applied for the session's benefit in accordance with the first statutes. The authorized controller, who was appointed for managing the affairs of the College, vide letter dated 28.07.2012 informed the petitioner that his matter was referred to the Government and the Government vide order dated 26.07.2012 decided not to provide session's benefit to the petitioner.

4. A perusal of the Govt. Order dated 26.7.2012 reveals that the session's benefit was denied to the petitioner on the ground that prior to his retirement, on account of an inquiry pending against the petitioner, vide order dated 5.6.2012, the Authorized Controller had withdrawn all the powers attached to the office of Principal from the petitioner and assigned it to the senior most teacher of the College whereas the matter with regards to suspension of the petitioner was also pending at the level of the Vice Chancellor. Besides that there were two criminal cases pending against the petitioner. Further, it was observed that under Government Order No. 1587/70-2-2001-16(129)/2001 dated 02.06.2001 read with Government Order No. 2493/70-2-2001-16(129)/2001 dated 05.07.2001 session's benefit was to be provided to an officiating Principal in the capacity of a teacher only.

5. Challenging the Government Order dated 26.07.2012 as also the communication letter dated 28.07.2012, the learned counsel for the petitioner submitted that refusal of session's benefit to the petitioner was not legally justified inasmuch as the said Government Orders dated 02.06.2001 and 05.07.2001 related to the case of an Officiating Principal and, as such, were not applicable to the case of the petitioner who being a regularly appointed Principal was entitled to the session's benefit, as of right, by virtue of Statute 15.24 of the first statutes of the University. It was also submitted that the refusal to provide session's benefit to the petitioner on the ground that two criminal cases were pending and that the matter of his suspension was pending consideration with the Vice-Chancellor was not legally justified inasmuch as under the Statute 15.24 of the first statutes of the University as also under the proviso to sub-rule (3) of Rule 3 of the U.P. State Universities First Statutes (Age of Superannuation, Scales of Pay and Qualification of Teachers), 1975, the petitioner, who was a regularly

appointed Principal and, as such, a teacher within the meaning of Section 2(19) of the U.P. State Universities Act, 1973, was entitled to the session's benefit, as of right, and the authorities had no discretion to deny the session's benefit to the petitioner on ground of any charges. It was further submitted that, in any case, the Vice-Chancellor of the University, by his order dated 18.06.2011, had suspended the operation of the suspension order. In support of his submissions, the learned counsel for the petitioner has placed reliance on two division bench decisions of this Court in the case of **Udai Narayan Pandey v. Director of Education (Higher Education), Allahabad (1999) 3 UPLBEC 1887** and **Meerut College Parivar Kalyan Samiti, Meerut v. State of U.P. and others (2001) 1 UPLBEC 201**, wherein it has been held that as teacher includes Principal, by virtue of the definition clause i.e. Section 2(18) {now Section 2(19)}, a Principal of an affiliated college would also be entitled to session's benefit as a Principal. Paragraph No.15 of the judgment in **Udai Narayan Pandey (supra)** is being reproduced below:-

"15. In the present facts the Respondent No.5 admittedly was appointed on substantive post of Principal of the institution concerned and while holding the said post, date of superannuation came. Admittedly, apart from the said appointment as Principal, the Respondent No.5 never held any post of teacher in the said institution. Therefore, applying the law as aforesaid, after the date of superannuation the Respondent No.5 was to continue in service on re-employment as Principal."

6. Per contra, learned counsel for the respondents submitted that as the petitioner had been suspended and had also been facing criminal prosecution, the session's benefit ought not to be provided to the petitioner and in any case the petitioner ought not to be permitted to function as Principal of the College during the extended period of service. Reliance has been placed on a Division Bench decision of this Court in the case of **Om Saran Tripathi v. State of U.P. and others (Civil Misc. Writ Petition No. 41457 of 2010 decided on 19.07.2010), wherein relying on an apex court's decision in the case of S.K. Rathi V. Prem Hari Sharma (2001) 9 SCC 377** it was held that the session's benefit allowed to a teacher, who had been officiating as Principal, would not enable him to officiate as Principal as it is a case of re-appointment and not extension of the period of officiating charge of the Principal.

7. Having considered the submissions of the learned counsel for the parties as also on perusal of the record, we find that there is no dispute with regard to the fact that the petitioner was regularly appointed Principal of the College and that he retired mid-session on 04.07.2012. According to the definition of "teacher" under the U.P. State Universities Act, 1973, a teacher includes a Principal also. Statute 15.24 of the University provides as under:-

"15.24 इस परिनियमावली के प्रारम्भ के दिनांक के पश्चात किसी अध्यापक की सेवा में अधिवर्षिता की आयु के उपरान्त कोई वृद्धि नहीं की जायेगी।

परन्तु यदि किसी अध्यापक की अधिवर्षिता का दिनांक 30 जून को न हो तो वह अध्यापक शिक्षा सत्र के अन्त तक अर्थात अनुवर्ती 30 जून तक सेवा में बना रहेगा और वह अपनी अधिवर्षिता के दिनांक के ठीक

अनुवर्ती दिनांक से आगामी 30 जून तक फिर से नियोजित समझा जायेगा।

परन्तु यह और कि शारीरिक और मानसिक रूप से स्वस्थ ऐसे अध्यापकों को जिन्हे 1942 के स्वतंत्रता संग्राम में भाग लेने के कारण कारावास का दण्ड दिया गया हो और स्वतंत्रता संग्राम सेनानी पेंशन मिल रही हो, उनकी अधिवर्षिता के दिनांक से आगामी 30 जून के पश्चात दो वर्ष की अग्रतर अवधि के लिये पुनर्नियुक्त किया जायेगा।''श्श्

8. The proviso to Statute 15.24 is pari materia to the proviso to sub-rule (3) of Rule 3 of U.P. State Universities First Statutes (Age of Superannuation, Scales of Pay and Qualification of Teachers), 1975, which reads as follows:-

"Provided that if the date of superannuation of a teacher does not fall on June 30, the teacher shall continue in service till the end of the academic session i.e. June 30 following and he will be treated as on **re-employment** from the date immediately following the date of his superannuation till June 30 following."

9. A careful reading of the proviso to the statute 15.24 reveals that there is mandate that if the date of superannuation of a teacher does not fall on June 30, the teacher shall be treated as on re-employment from the date immediately following the date of his superannuation till June 30 following.

10. As there is no dispute with regard to the fact that the petitioner was regularly appointed Principal on the date of his superannuation and that he superannuated on 04.07.2012, he would be treated as on re-employment, as per the proviso to statute 15.24, up to 30 June 2013. Since the definition of teacher includes a Principal, in the light of the decisions of this Court in the cases of **Udai Narayan Pandey (supra)** and **Meerut College Parivar Kalyan Samiti, Meerut (supra)**, the petitioner would be deemed to have been re-employed as a Principal of the college and would continue, in such capacity, till 30.06.2013.

11. The decisions in the case of **Om Saran Tripathi (supra) and S.K. Rathi (supra)** are of no help to the respondents inasmuch as they related to an officiating principal and not a regularly appointed principal, as is the petitioner.

12. We further find that in refusing session's benefit to the petitioner,wrongly reliance was placed on Government Order dated 02.06.2001 inasmuch as by Government Order dated 05.07.2001, issued by way of corrigendum, it was made clear that the Government Order dated 02.06.2001 would be applicable to an Officiating Principal. As the petitioner, admittedly, was a regularly appointed principal, reliance placed on the Government Order dated 02.06.2001 read with Government Order dated 05.07.2001, was misconceived. Furthermore, we do not find any material on record to infer that providing a session's benefit to a teacher is at the discretion of the authorities. As the proviso to statute 15.24 uses the words "will be treated as on re-employment from the date immediately following the date of his superannuation", discretion with the authorities to grant or not to grant such benefit is excluded, inasmuch as the benefit would be available by operation of law. Even otherwise, we find that the Vice-Chancellor of the University, by his order dated 18.06.2011, had suspended the operation of the suspension order. Thus, we are of the considered view that

refusal to grant session's benefit to the petitioner cannot be legally sustained. Accordingly, the order 26.07.2012 (Annexure No.10) and the consequential communication /order dated 28.07.2012 (Annexure No.9) are hereby quashed. The petitioner will be entitled to the session's benefit and would be entitled to continue as Principal of the said college till the date of his retirement i.e. 30.06.2013, with all the consequential benefits. However, this will not preclude the respondents to take action against the petitioner, in accordance with law.

13. The writ petition is allowed as above.

ORIGINAL JURISDICTION
CIVIL. SIDE
DATED: ALLAHABAD 14.02.2013

BEFORE
THE HON'BLE SATYA POOT MEHROTRA, J
THE HON'BLE ZAKI ULLAH KHAN, J.

Civil Misc. Writ Petition No. 43383 OF 2001

Dr. Ashok Kumar Misra and others ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri A.N. Pandey

Counsel for the Respondents:
C.S.C.

Constitution of India, Art-226- Regularisation of Guest Lecturer-petitioner working as guest lecturer in Homeopathic Medical College-stand merged with Lal Bahadur Shashtri Medical College Allahabad-calim of petitioner either continuation or regularisation-can not be accepted in view of Division Bench judgment of Dr. V.P. Singh and Dr. K.K. Singh. cases.

Held: Para-18

18. We are in respectful agreement with the above decisions. The petitioners in the present Writ Petition were merely appointed as Guest Lecturers in the Year 1998 in the erstwhile Tilakdhari Homeopathic Medical College, Jaunpur. After merger of the said college with Shri Lal Bahadur Shastri Medical College, Allahabad, the college did not find necessity of having Guest Lecturers for teaching the subjects which the petitioners had been teaching, and therefore, the petitioners were not continued as Guest Lecturers. The petitioners have no right to claim continuation as Guest Lecturers or seek regular employment in Shri Lal Bahadur Shastri Medical College, Allahabad.

Case Law discussed:
Civil Misc. Writ Petition No. 21496 of 2001; Civil Misc Writ Peition No. 273 of 2001

(Delivered by Hon'ble , Zaki Ullah Khan, J)

1. The present Writ Petition has been filed by the petitioners under Article 226 of the Constitution of India, inter-alia, praying for quashing the Order dated 13.9.2001 passed by the respondent no.4 (Annexure 13 to the Writ Petition).

2. It appears that the petitioners were appointed as Guest Lecturers in various departments in Tilak-dhari Homeopathic Medical College, Jaunpur.

3. It further appears that by the Government Order dated 1st May, 2000, the scheme of appointment as Guest Lecturers was suspended by the State Government whereupon the petitioners filed a Writ Petition before this Court

being Civil Misc. Writ Petition No. 24257 of 2000. This Court passed the following Interim Order dated 19.5.2000 in the said Writ Petition:

" Until further orders petitioner shall be allowed to continue functioning as adhoc Lecturer till regular selection is made on the post. "

4. Thereafter, it appears that the Government Order dated 17.2.2001 was issued by the State Government in exercise of powers conferred under the Uttar Pradesh Homeopathic Medical Colleges (Acquisition and Miscellaneous Provisions) Act, 1981.

5. As per the provisions of the said Government Order, the aforesaid Tilakdhari Homeopathic Medical College, Jaunpur was merged with Shri Lal Bahadur Shastri Medical College, Allahabad.

6. The petitioners were relieved from the erstwhile Tilakdhari Homeopathic Medical College, Jaunpur for joining in the aforesaid Shri Lal Bahadur Shastri Medical College, Allahabad. However, the respondent no.4 did not allow the petitioners to join in the said College.

7. Thereupon, the petitioners filed another Writ Petition before this Court being Civil Misc. Writ Petition No. 8507 of 2001. This Court by the Order dated 12.3.2001 disposed of the said Writ Petition, inter-alia, permitting the petitioners to make a Representation to the authority concerned, and the authority concerned was directed to decide the same in accordance with law by a speaking order within the period mentioned in the said Order dated 12.3.2001.

8. Pursuant to the said Order dated 12.3.2001, the respondent no.4 considered the Representation submitted by the petitioners and rejected the same by the Order dated 13.9.2001, inter-alia, observing that no extra lecturer was required for teaching the subjects which the petitioners had been teaching as Guest Lecturers, and as such, there was no justification or necessity to invite the petitioners as Guest Lecturers for teaching the said subjects. Copy of the said Order dated 13.9.2001, as mentioned above, has been filed as Annexure 13 to the Writ Petition.

9. Thereafter, the petitioners have filed the present Writ Petition before this Court seeking the reliefs, as mentioned above.

10. Affidavits have been exchanged between the parties in the present Writ Petition, and the same is being disposed of at this stage with the consent of the learned counsel for the parties.

11. We have heard Shri A.N. Pandey, learned counsel for the petitioners and the learned Standing Counsel appearing for the respondent nos. 1 to 4.

12. It is submitted by Shri A.N. Pandey, learned counsel for the petitioners that the respondent no.4 acted illegally in rejecting the Representation submitted by the petitioners. It is submitted that the petitioners ought to have been permitted to join Shri Lal Bahadur Shastri Medical College, Allahabad after the merger of the

erstwhile Tilakdhari Homeopathic Medical College, Jaunpur with Shri Lal Bahadur Shastri Medical College, Allahabad.

13. The learned Standing Counsel appearing for the respondent nos. 1 to 4 submits that the petitioners were only Guest Lecturers and they were not entitled to claim any regular employment in Shri Lal Bahadur Shastri Medical College, Allahabad.

14. It is further submitted by the learned Standing Counsel appearing for the respondent nos. 1 to 4 that the controversy involved in the present Writ Petition has already been decided by this Court in cases of certain other doctors, who were similarly situated as the petitioners in the present Writ Petition.

15. The learned Standing Counsel appearing for the respondent nos.1 to 4 refers to the following decisions:

(1) Judgment dated 17.1.2002 in Civil Misc. Writ Petition No. 21496 of 2001 (Dr. Vijay Pratap Singh and another vs. State of U.P. and others).

(2) Judgment dated 30.6.2009 in Civil Misc. Writ Petition No. 273 of 2001 (S/B) (Dr. K.K. Singh and others vs. State of U.P. and others).

16. In **Dr. Vijay Pratap Singh case (supra)**, a Division Bench of this Court has held that appointment as Guest Lecturers confers no right to continue on the post, and the engagement can be discontinued at any time.

17. In **Dr. K.K. Singh case (supra)**, a Division Bench of this Court has opined that the petitioners, who were merely Guest Lecturers, have no right to claim regular employment or continuation in the college as "Guest Lecturers".

18. We are in respectful agreement with the above decisions. The petitioners in the present Writ Petition were merely appointed as Guest Lecturers in the Year 1998 in the erstwhile Tilakdhari Homeopathic Medical College, Jaunpur. After merger of the said college with Shri Lal Bahadur Shastri Medical College, Allahabad, the college did not find necessity of having Guest Lecturers for teaching the subjects which the petitioners had been teaching, and therefore, the petitioners were not continued as Guest Lecturers. The petitioners have no right to claim continuation as Guest Lecturers or seek regular employment in Shri Lal Bahadur Shastri Medical College, Allahabad.

19. In view of the above discussion, the Writ Petition filed by the petitioners lacks merits, and the same is liable to be dismissed.

20. The Writ Petition is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.03.2013

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 49555 Of 2010

Vishal Gupta @ Vishwapati Madan **...Petitioner**
Versus
Sardar Mohindar Singh and others **...Respondents**

Counsel for the Petitioner:
Sri Yasharth, Sri Nitin Yasharth
Sri S.K. Mishra

Counsel for the Respondents:
C.S.C., Sri Manish Tandon

<u>(A) U.P. Urban Buildings(Regulation of letting, Rent and eviction)Act-1972-Section 20 (2)(c):</u> Eviction of ground of material alteration-no specific finding regarding diminishing value due to alternation-in absence of pleading no question of evidence.

<u>(A) U.P. Urban buildings(Regulation of letting, Rent and eviction)Act 1972-Section 3(g):</u> whether adopted son-within definition of family-revisional court wrongly treated adopted son as strangers to family of land lord-on pertext adoptive mother being alive not produced as witness-held erroneous.

Held: Para-11

All other ingredients necessary for making an adoption valid in accordance with provisions of Hindu Adoption and Maintenance Act, 1956 have been proved. The Revisional Court did not find any otherwise infirmity except the fact that, according to him, in absence of adoptive mother, who was alive but not produced as witness, the valid adoption whether valid, would remain unproved. This approach of Revisional Court, as already discussed, I am not inclined to approve. The judgment of Revisional Court thus is unsustainable and deserve to fall.

<u>Case Law discussed:</u>
Criminal Appeal U/S 374 Cr.P.C. no. 358 OF 1982; AIR 1996 SC 591

(Delivered by Hon'ble Sudhir Agarwal, J)

1. The writ petition having been restored to its original number vide order of date passed on restoration application, as requested by learned counsel for the parties, I proceed to decide the matter finally at this stage.

2. Heard Sri Yasharth, learned counsel for the petitioner and sri Manish Tandon, learned counsel for the respondent.

3. Sardar Mohindar Singh (now deceased and substituted by his legal heirs i.e. respondents no.1/1 to 1/5) instituted Small Cause Suit No.180 of 1989 against Mulkraj, father of petitioner, for ejectment from the building in dispute, which is a non-residential building namely a shop on the ground of sub-letting and structural alteration. The suit was dismissed by Small Cause Court vide judgment dated 4th September, 2009 but the said judgment has been reversed by Revisional Court by allowing S.C.C. Revision No.61 of 2009 of the plaintiff-rvisionist vide impugned judgment dated 31st May, 2010. The Revisional Court has held that tenant incurred liability for ejectment on both the counts namely structural alteration and sub letting.

4. Learned counsel for petitioner submitted that judgment of Revisional Court is patently illegal and perverse. He submitted that under Section 20(2)(c) of Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as "Act, 1972") a material alteration is wholly irrelevant and what is required to be proved by landlord is that, tenant has made construction or structural alteration so as to have resulted in diminishing its value or utility or its disfigurement. In the present case, Revisional Court has observed that structural alteration allegedly made by tenant have resulted in material alteration but there is not even a whisper in the entire

Revisional Court's judgment that it has resulted in diminishing value or utility of property in question or has resulted in its disfigurement.

5. Sri Manish Tandan, learned counsel for the respondents while confronting aforesaid aspect of the matter could neither dispute nor place anything from judgment of Revisional Court to show that Revisional Court has at all found anything so as to satisfy requirement of statute i.e. Section 20(2)(c) of Act, 1972 that alleged alteration or construction in building is likely to diminish its value or utility or to disfigure it.

6. In fact, I find that in the plaint itself there is no such pleading at all and if that is so, there is no question of any evidence to be adduced on this aspect. It is well established that no evidence can be adduced in respect to a fact not pleaded. Therefore, findings of Revisional Court about liability of tenant for ejectment under Section 20(2)(c) of Act, 1972 is clearly illegal, erroneous and cannot sustain.

7. Now, coming to the second aspect of the matter about sub letting. The petitioner Vishal Gulati claimed to be adopted son of original tenant Mulkraj. The Trial Court has found that he proved his valid adoption which took place in 1970. The Revisional Court has taken an otherwise view by observing that adoption could not be proved validly and therefore, premises in question having been occupied by petitioner, is stranger to the family, being not within the ambit of definition of 'family' under Section 3(g) of Act, 1972, the suit for ejectment of tenant is liable to be decreed on the ground of sub-letting.

8. Here also I find that Revisional Court has clearly erred in law. It has proceeded to observe that DW 1 and 2 both stated that the child under adoption was given to only adoptive father i.e. Mulkraj Gulati and there is no averment that he was also given to adoptive mother. On the contrary, from the judgment of Trial Court, I find that DW 1 has categorically stated that child was given by his natural parents to the adoptive parents. This finding of Trial Court has not been shown perverse and Revisional Court has not stated anywhere in the judgment in revision that this finding of Trial Court is misleading or misreading of the statements of DW 1 and 2. The Revisional Court has also proceeded to observe that since adoptive mother was not produced as a witness to verify about handing over of child to her, meaning thereby the adoption was not proved. This approach of Revisional Court is patently erroneous, inasmuch as, brother of natural parents of child under adoption and adoptive parents himself appeared as witness i.e. DW 1. He said that he was present at the time of adoption and categorically asserted that child was given by natural parents to the adoptive parents, both. It is not necessary that a large number of persons or parents themselves should come in the witness box to prove this fact particularly when what has been said by witness, who had personal knowledge of the event, is not found to be doubtful or incorrect or there is any other reason to disbelieve his deposition.

9. In taking the above view, I am fortified by decision of this Court in Criminal Appeal U/S 374 Cr.P.C. No.358 of 1982 (Autan (Atan) Singh & Ors. Vs. State of U.P.) Decided on 9th November,

2012, where in para 21 of the judgment, this Court said:

"....it is not the number of witnesses examined which would be of any importance but it is the reliability and credibility of a witness or evidence which would determine whether the prosecution has been successful in substantiating the guilt against accused or not. Even a single piece of evidence, whether oral, documentary or circumstantial, if credible and trustworthy, is sufficient to record conviction against a person."

10. I also find support from Apex Court's decision in Smt. Chandan Bilasini (Dead) by L.R. Vs. Aftabuddin Khan & Ors., AIR 1996 SC 591.

11. All other ingredients necessary for making an adoption valid in accordance with provisions of Hindu Adoption and Maintenance Act, 1956 have been proved. The Revisional Court did not find any otherwise infirmity except the fact that, according to him, in absence of adoptive mother, who was alive but not produced as witness, the valid adoption whether valid, would remain unproved. This approach of Revisional Court, as already discussed, I am not inclined to approve. The judgment of Revisional Court thus is unsustainable and deserve to fall.

12. The writ petition is accordingly allowed. The impugned order dated 31.05.2010 (Annexure No.7 to the writ petition) passed by Additional District Judge II, Kanpur Nagar, is hereby set aside. The judgment dated 4.9.2009 of Trial Court is restored and confirmed.

13. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.02.2013

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

Civil Misc. Writ Petition No. 55196 of 2007

Ram Autar Sharma ...Petitioner
Versus
District Inspector Of Schools And Others ...Respondents

Counsel for the Petitioner:
Sri Indra Raj Singh

Counsel for the Respondents:
C.S.C.

U.P. Intermediate Education Act 1921, Chapter III Regulation-2-out of 5 sanctioned post of class III employee including head clerk-2 already occupied by direct promotee-under 50 % promotion quota 2.05 posts round of as 3-petitioner being senior most class 4th employee-promoted as clerk-disapproval by DIOS on ground single post fall under SC/ST quota-held-against single post-no reservation available-hence existing vacancy can not be filled up either by direct recruitment or under reserve quota-except by promotion.

Held: Para-11

In the present case admittedly only one post is available and the same could not have been filed up by Scheduled Caste candidate either in a promotee quota or by releasing it for being filled up by direct recruitment.

Case Law discussed:
(1998) 2 SCC 214; (1998) 4 SCC 1; 2010 (3) ESC 2091; (2006) 6 SCC 430

(Delivered by Hon'ble B.Amit Sthalekar, J.)

1. By this writ petition, the petitioner is challenging the order dated 20.7.2010, whereby, the D.I.O.S. has directed that since the reservation quota in class III post is not completed, therefore, the post in question should be released for direct recruitment relying upon the G.O. dated 18.12.1990 for promotion in class III post.

2. Briefly stated the facts of the case are that there is an Intermediate College known as Shambhu Dayal Inter College, Ghaziabad (hereinafter referred to as 'the Institution') which is recognised under the U.P. Intermediate Education Act, 1921 and the Payment of Salary Act, 1971 is also applicable thereto. The petitioner is working on the post of Class-IV employee in the Institution. There are five sanctioned posts in the cadre of class-III including the post of head clerk. One Sri Prakash Chandra (OBC) has been promoted and one Sri Panna Lal Gupta has been promoted on the post of Assistant Clerk from class-IV. Out of the two remaining posts of Assistant Clerk one Sri Gajendra Kumar Mittal and Sri Rajeev Kumar Tyagi have been appointed by direct recruitment. Thus, according to the petitioner one post of Assistant Clerk is lying vacant due to the retirement of Sri B. P. Mangalik on 30.11.2006.

3. It is further pointed out that for promotion for the post of Assistant Clerk in class-III against the 50% promotee quota, the Committee of Management submitted the requisite papers before the D.I.O.S., Ghaziabad on 24.2.2007 for approval. The D.I.O.S. Ghaziabad, however, declined to grant approval and instead by the impugned order dated 27.10.2007 has directed that the single post in the promotee quota of class III be filled up by direct recruitment. A reference has been made to the G.O. dated 18.12.1990.

4. I have heard Sri Indra Raj Singh, learned counsel for the petitioner and the learned Standing Counsel representing respondents 1 to 4. Notices were served to the respondent no.5 on 15.4.2011 but till date no one has appeared on behalf of respondent no.5.

5. The facts as stated in para 4 of the writ petition regarding the number of posts and the persons working against the respective posts had not been denied in para 3 of the counter affidavit rather they are admitted as being matter of record. However, in the counter affidavit the only reason given is that since there was a shortfall of S.C. quota, therefore, the D.I.O.S. by the impugned order has directed that one post in the promotee quota of Assistant Clerk is to be filled up by direct recruitment from the S.C. candidate.

6. The contention of the respondents is fallacious in view of the legal position settled by the Supreme Court reported in **(1988) 2 SCC 214, Chakradhar Paswan(Dr.) Vs. State of Bihar** and the Constitution Bench in the case reported in **(1998) 4 SCC 1, Post Graduate Institute of Medical Education and Research, Chandigarh Vs. Faculty Association and others** that the reservation cannot be applied to a single post and therefore, in view of the said judgment the single post of Assistant Clerk could not be filled up through Scheduled Caste Candidates by releasing it to the direct recruitment quota.

7. Even otherwise the total cadre strength in class III admittedly is 5 posts, out of which two and half post would be available for being filled up. In terms of Chapter III Regulation 2 of the U.P. Intermediate Education Act, 1921, while calculating the number of posts for distributing the same for promotee quota or for direct recruitment .5 shall be treated as one in terms of the explanation to Regulation 2 (2) of Chapter III. It is not in dispute that two posts of promotee quota have already been filled up and only one post remains.

8. Sri I. R. Singh further referred to the judgment of the Full Bench of this Court reported in **2010 (3) ESC 2091 (Heera Lal Vs. State of U.P.)**, wherein, the Full Bench relying upon the Supreme Court decision in the case of **R.S. Garg Vs State of U.P (2006) 6 SCC 430** has held as follows:

"25. The decision in R.K. Sabharwal's case is a five judges pronouncement which still holds the field. The question of giving the benefit or reservation in excess of the percentage of quota of reservation has been put to rest by the decision in the case of R.S. Garg V. State of U.P. (2006) 6 SCC 430 . Paragraph 40 which is quoted herein below:

"We are not concerned with the reasonableness or otherwise of the percentage of reservation. 21% of the posts have been reserved for the Scheduled Tribe (Sic Caste) candidates by the State itself. It, thus, cannot exceed the quota. If is not dispute that in the event of any conflict between the percentage of reservation and the roster, the former shall prevail. This, in the peculiar facts and circumstances of this case, the roster to fill up the posts by reserved category candidates, after very four posts, in our considered opinion, does not meet the constitutional requirements."

9. However relevant para 32 the Full Bench decision reads as follows:

"32. There may be cases where there is a rule making provision for different sources of recruitment within the same cadre, then reservation has to be applied to the posts available for being filled up in accordance with the source of recruitment. This issue may arise in the context where a candidate is not available for filling up the post by way of promotion and the same has to be diverted to be filled up by direct recruitment. Such a situation will arrive in cases where the number of posts may be five or more so as to make the rule of reservation applicable. Taking for instance were there are say 8 posts in a cadre and the rule is, as presently involved, namely that 50% posts have to be filled up by way of promotion, in that event four posts have to be filled up by promotion and four by direct recruitment. The rule of reservation for appointment by way of promotion is availably only to scheduled castes in the State of U.P. and no such rule is available for other backward categories. They are entitled to the benefit of reservation only in the process of direct recruitment. In the example given above where four posts out of eight are to be filled up by direct recruitment one post will have to be given to the other backward category keeping in view the 27% mandate of reservation in favour of such category under the 1994 Act. Against four posts of promotion quota, reservation to a scheduled caste category cannot be granted as there as to be a minimum of five posts for applying the 21%

reservation for promotion. In a given situation where no other candidate of any category is available for promotion against the four posts, then such a vacancy to be filled up by promotion may have to be carried over for direct recruitment. This would bring about a change of strength in the source of recruitment thus fluctuating the strength of the post available by direct recruitment. A scheduled caste candidate would therefore, get the benefit of reservation if the cadre strength is increased to five for direct recruitment, even though the same candidate would not get the benefit of reservation if the promotion quota of 50% is adhered to. It would be appropriate to point out that taking a case where there are five posts for being filled up by promotion and five by direct recruitment in the cadre then in such an event the rule of reservation to the extent of 21% in both the sources can be conveniently made applicable without disturbing the ratio in either of the sources."

10. This Court in Writ Petition (A) No. 47207 of 2008, Amarnath Goswami Vs. State of U.P. & others, wherein also similar controversy was involved, has held as under:

"This G.O. came up for consideration before this Court in the case of Ramesh Chandra Yadav Vs. Director of Education U.P. (Madhyamik Allahabad) and others reported 2004 (1) E.S.C. (Alld.) 324 and this Court was pleased to hold that the said G.O. has no application in the case. The relevant paragraph 6 of the said judgment is quoted as under:

"I am of the view that since the vacancy has been caused from the promotion quota and since there is a 50% quota for promotion of Class IV employees under the Intermediate Education Act and Regulations, the vacancy in question is to be filled up by promotion only. The District Inspector of Schools is not authorised under any Act to convert the post of promotion quota into direct recruit quota."

11. In the present case admittedly only one post is available and the same could not have been filed up by Scheduled Caste candidate either in a promotee quota or by releasing it for being filled up by direct recruitment.

12. Secondly, the post in the promotee quota, could not have been released to the direct recruitment quota for being filled up by a Scheduled Caste candidate. This view has been taken by me in the case of Amar Nath Goswami (supra) and C.M.W.P.No. 59429 of 2006, Mahendra Pal Yaduvanshi Vs. State of U.P. and others and I see no reason to take any other view.

13. Taking into consideration all the above facts and law laid down by the Supreme Court as well as the Full Bench and Single Judge decisions the impugned order dated 27.10.2007 is quashed.

14. The writ petition is allowed.

15. A direction is issued to the respondent no.1 to consider the matter for grant of approval to the appointment of the petitioner in the class II post in the promotee quota of 50%. This exercise shall be completed by the respondent no.1 within a period of one month from the date of certified copy of this order is received by him.