APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 28.05.2014

BEFORE
THE HON'BLE ZAKI ULLAH KHAN, J.

Second Appeal No. 55 of 1988

Babu Ram... ... Appellant
Versus
Daya Ram ...Respondent

Counsel for the Petitioner:
Sri A.S. Chaudhary, Sri Ran Vijay Yadav

Counsel for the Respondents:
Sri C.B. Verma, Sri Ajmal Khan, Sri Durga Prasad Verma, Sri Vimal Yadav

C.P.C.-Section 100-Second Appeal- Suit for partition-on allegation being copartionary property-entitled for equal share-partition between family already became final-one brother serving and maintaining the mother-given extra share towards services-no denial of this fact lower appellate Court correctly set-a-side the findings of Trial Court-appeal Allowed.

Held: Para-30
Thus legal position is now very clear that the family partition on the basis of above pronouncement of Hon'ble the Apex Court cannot be re-opened. The father was living with the appellant-defendant, therefore, he was given an advantage in the share but nevertheless that will be covered by the mutual settlement and during his life time, the respondent-plaintiff did not utter a single word and did not dispute the rights or claim of the appellant-defendant. Even the suit filed by the respondent-plaintiff before the trial court was not in accordance with the norms as he did not implead the mother as party. Therefore, there can be no fresh division of the portion of the parties in dwelling house which was partitioned long back and such partition which has already been settled in past and consented to by the respondent-plaintiff cannot be re-opened.

Case Law discussed:
A.I.R.(38) 1951 Supreme Court 120; AIR 2011 S.C. 1557; 2002 A.I.R. SCW 2686; 2013(13) LCD 1593; 2003(2)SCC 355; 1968 2 SCWR 335; [2013(31)LCD 1593; AIR 1968 SC 1018.

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

1. The instant second appeal has been preferred against the judgment and decree dated 6.11.1987 passed by the II-Additional Civil Judge, Faizabad, allowing Civil Appeal No.32 of 1987 (Daya Ram Vs. Babu Ram). The First Appellate Court has allowed the appeal preferred against the judgment and decree dated 13.1.1987 passed by Munsif Haveli, Faizabad, bearing Civil Suit No.219 of 1985. The trial court decreed the suit in part.

2. Learned counsel for the appellants raised the substantial questions of law to be decided by this Court. Substantial questions of law raised by the learned counsel for the appellants are as under :-

(a) Whether there can be a re-partition of the joint property at the instance of a separated member of a Hindu co-parcenery ?

(b) Whether the 'Iqrarnama' set up by a party could be read in evidence even though the same was not registered?

(c) Whether a separated son can claim a share in the share of the father who was living with his other son jointly since long before his death ?

(d) Whether in a partition suit all the co-sharers should be impleaded ? In the present case, the mother of the parties was

alive but was not impleaded as party, though definitely she had share.

(e) Whether there can be a fresh division of the portions of the parties in a dwelling house which was partitioned long before ?

(f) Whether the suit for the portion of a grove will be in civil court ?

3. Learned counsel for the appellants argued that all the questions are very material and these are substantial questions of law and the order passed by learned First Appellate Court suffers from gross illegality and infirmity. The appellant was defendant in original suit no.219 of 1985, which was decreed in part and partly it was dismissed. The trial court has partly decreed the suit regarding land which was allocated in defendant share, which has been demarcated in the Commissioner's map paper no.11C/2, which is in southern side of the appellant-defendant grove and the appellant was granted half of the share of the portion. The trial court has specifically ordered that in southern portion of the grove, the respondent/plaintiff has no share and the suit was dismissed regarding that share. Aggrieved by the decree and order, he preferred the civil appeal before the II-Additional Civil Judge, Faizabad, and the II-Additional Civil Judge, Faizabad vide order dated 6.11.1987 allowed the appeal and set aside the order dated 13.1.1987 passed by the lower court and he passed the order that respondent/plaintiff shall be allocated half of the share in the disputed property and final decree be prepared accordingly.

4. During the arguments before this Court in the second appeal, most important question is that whether a re-partition of the joint property at the instance of separated member can take place because both the parties during trial admitted that initially there was a partition and respondent/plaintiff was allocated share in north of the grove of the appellant-defendant, which has been marked in the Commissioner's map 11C/2. The factual matrix is not to be discussed here but the important question is that whether a second partition can take place. On the contrary, respondent-defendant was of the view that initial partition was not a partition as it was the ascertainment of share in the Hindu coparcenery between father and his two sons and after the death of father the division of the remaining portion is must and from the share of father each of them will be given half share, therefore, the previous partition, if any, will not hit the matter. The second and third questions of law framed by the appellant will not create hurdle in partition because the appellant was taking care and looking after his father. The appellant has raised fourth question i.e. mother is also co-sharer in the property of father but she was not impleaded as party, therefore, the suit was bad for non-joinder of the necessary party and accordingly fresh partition of the portion of dwelling house cannot take place. Therefore, in all, there are only two debatable questions of law involved, one relating to re-partition and whether that agreement will cover the separate share for father. There is also one other question related to this query is that whether there can be fresh division only regarding portion of dwelling house apart from previous partition. The second important legal question is that when the respondent-plaintiff claimed before the trial court that he wants a partition and he claimed regarding the share allocated to father then why the mother who was living then was not impleaded as party ?

5. Learned counsel for the appellant-defendant has cited judgment of Hon'ble the Apex Court in the case of Ratnam Chettiar and others v. S.M. Kuppuswami Chettiar and others, reported in AIR 1976 S.C. Page 1, in which Hon'ble the Apex Court has held as under :

"A partition effected between the members of Hindu Undivided Family by their own volition and with their consent cannot be reopened, unless it is shown that the same is obtained by fraud, coercion, misrepresentation or undue influence. In such a case the court should require a strict proof of facts because an act inter-vivos can not be lightly set aside."

6. In para - 19 of the aforesaid case, the Hon'ble the Apex Court has held as under :

"Thus on a consideration of the authorities discussed above and the law on the subject, the following propositions emerge:

(1) A partition effected between the members of the Hindu Undivided Family by their own volition and with their consent cannot be reopened, unless it is shown that the same is obtained by fraud, coercion, misrepresentation or undue influence. In such a case the Court should require a strict proof of facts because an act inter vivos cannot be lightly set aside.

(2) When the partition is effected between the members of the Hindu Undivided Family which consists of minor coparceners it is binding on the minors also if it is done in good faith and in bona fide manner keeping into account the interests of the minors.

(3) Where, however a partition effected between the members of the Hindu Undivided Family which consists of minors is proved to be unjust and unfair and is detrimental to the interests of the minors the partition can certainly be reopened whatever the length of time when the partition took place. In such a case it is the duty of the Court to protect and safeguard the interests of the minors and the onus of proof that the partition was just and fair is on the party supporting the partition.

(4) Where there is a partition of immovable and movable properties but the two transactions are distinct and separable or have taken place at different times. If it is found that only one of these transactions is unjust and unfair it is open to the Court to maintain the transaction which is just and fair and to reopen the partition that is unjust and unfair."

7. Learned counsel for the appellant-defendant has also relied on judgment of Hon'ble the Apex Court in the case of Sarju Pershad Ramdeo Sahu v. Jwaleshwari Pratap Narain Singh & others, reported in A.I.R. (38) 1951 Supreme Court 120, in which, "it has been held that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate Court should not interfere with the finding of the trial Judge on a question of fact." In para 7 of the said judgment the Hon'ble Supreme Court held as under :

"The question for our consideration is undoubtedly one of fact, the decision of which depends upon the appreciation of the oral evidence adduced in the case. In such cases, the appellate court has got to bear in mind that it has not the advantage which the trial Judge had in having the witnesses before him and of observing the manner in which they deposed in court. This certainly does not mean that when an appeal lies on facts, the appellate court is not competent to reverse a finding of fact arrived at by the trial Judge. The rule is--and it is nothing more than a rule of practice --that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of the witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate court should not interfere with the finding of the trial Judge on a question of fact(1). The gist of the numerous decisions on this subject was clearly summed up by Viscount Simon in Watt v. Thomas (2), and his observations were adopted and reproduced in extenso by the Judicial Committee in a very recent appeal from the Madras High Court(3). The observations are as follows: "But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a Judge of first instance, when(1) Vide Lord Atkin's observations in W.C. Macdonald v. Fred Latinmer, AI.R. 1929 P.C. 15, 18. (2) [1947] A.C. 484. at p. 486.(3) Vide Saraveeraswami v. Talluri, A.I.R. 1919 P.C.p. 3'2. 785 estimating the value of verbal testimony, has the advantage (which is denied to Courts of appeal)of having the witnesses before him and observing the manner in which their evidence is given."

8. Learned counsel for the appellant-defendant has also cited on the decision of Hon'ble the Apex Court in the case of Saygo Bai v. Cheeru Bajrangi, reported in AIR 2011 S.C. 1557. In para 10 of the said judgment the Hon'ble Supreme Court held as under :

"We are not satisfied on the appreciation of evidence by the lower Courts. We have gone through the evidence of the appellant and the other witnesses. She has very specifically stated that after the marriage till the children were born, her relationship was cordial with her husband. Thereafter, the respondent brought a second wife, namely, Gulab Bai at village Chalani where she was residing in her matrimonial home. She was very specific in stating that when the husband brought the second wife, he declared that he would not keep the appellant and started ill- treating her and threw her along with children out of the house. In her cross-examination, she admitted that on her husband's request she

was not prepared to go to his house. This question was put to her in a very tricky manner. It was not stated as to at what point of time the husband came to take her back. She has also stated in her cross-examination that her children were with her but for the last one year they were with the respondent. She also admitted very fairly that the respondent was educating the children. She also asserted that for the last 4 years her entry to the house of her husband was stopped. It is true that in paragraph 13 of the cross-examination she had stated that she had not been to the house of the non-applicant (respondent herein) for 4-5 years and then the non-applicant i.e. the respondent herein entered into the second marriage with Gulab Bai. All the Courts below have relied only on this so-called admission to hold that she had abandoned her husband for 4-5 years and it is as a result of her refusal to come to the house of her husband that the husband took the second wife. In fact, this is a totally incorrect and perverse appreciation of the evidence. The Court must read whole evidence. One stray admission cannot be read in isolation with the other evidence. She has very specifically stated that she was thrown out of the matrimonial house on account of the second wife. All the Courts below have ignored all her evidence and chosen to rely on two lines in paragraph 13 of her cross-examination. In our opinion, this was wholly perverse appreciation of evidence. The Courts have also made a point that she did not call for a Panchayat and, therefore, have held against her. We do not understand the implication of this. Even if she did not call a Panchayat, it did not mean that the respondent was justified in throwing her out of the house and getting married second time."

9. Learned counsel for the appellant-defendant has also cited a judgment in the case of Jagbir Sharma v. Babli, reported in 2002 A.I.R. SCW 2686, in which Hon'ble the Supreme Court held as under :

"Evidence led by parties not considered objectively. Reasons given by trial court not discussed. Manner adopted by appellate court not commendable. Order set-aside and matter remitted."

In para 5 of the said judgment the Hon'ble Supreme Court held as under :

"Suffice it to state that on a plain reading of the judgment of the High Court, it is clear that the Court while deciding the first appeal neither considered the evidence led by the parties objectively nor has discussed the reasons stated in the trial court judgment for accepting the case of the appellant. The High Court appears to have proceeded on the assumption that a mother can never be cruel towards her children. The appeal has been disposed of on some general discussions without considering the case of the parties on merits. We are unable to commend the manner in which the first appeal has been disposed of. We have avoided delving further into the merits of the case pleaded by the parties lest it should affect any of them when the decree is reconsidered by the High Court."

10. Replying to the arguments, learned counsel for respondents-plaintiffs submitted that suit bearing no.219 of 1985 (Daya Ram v. Babu Ram) was filed for partition of the house shown with letters ABIE in the commissioner"s report and

the Sahan land shown as M B A J K L in the Commission report dated 25.5.195.

11. Appellant-defendant appeared before the Court below and filed written statement and admitted that the plaintiff-respondent and the appellant-defendant are the real brothers and also admitted that entire land in question belongs to their father. Appellant-defendant also admitted that half of the share in the house is of the respondent-plaintiff.

12. During the life time of the father of appellant-defendant as well as respondent-plaintiff no partition was done. Only some portion of the house was given to the respondent-plaintiff to live along with his family members, in which the respondent-plaintiff is living with his family.

13. After the death of father of the appellant-defendant as well as respondent-plaintiff, when the appellant-defendant denied the share of the respondent-plaintiff in the house as well as in other property, the dispute arose which necessitated to file the suit before the trial court for partition of the house.

14. The witnesses D-2 and D-1 admitted the share of the respondent-plaintiff in the parental house but the trial court dismissed the suit of respondent-plaintiff regarding share in house and thus ousted the respondent-plaintiff to live in open sky.

15. Learned counsel for the respondent-plaintiff further reiterated that on the ground above, the trial court allowed the suit in part by giving half share of the land shown as M B A J K L, however, the suit was dismissed regarding the portion marked by the Commissioner's letters A B I E. Learned counsel pointed out that at no point of time the appellant-defendant has ever denied about the share of the respondent-plaintiff in the house. On the contrary, he admitted the portion of the respondent-plaintiff in the house, therefore, the decree of the learned trial court is liable to be set aside as no decree can be passed against the admission. The prayer sought has to be allowed or denied in toto, it cannot be considered in part and, therefore, the First Appellate Court was rightly set aside the order passed by the trial court. The appellant-defendant is trying to give impression against the pleadings and admission made on record. The father has given portion of the house, it cannot be said that it was partitioned between the parties, although, the suit was decreed in part but the appellant-defendant did not challenge the findings of the trial court dated 13.01.1987 by filing the civil appeal against that portion of order which was against his interest, whereas the learned First Appellate Court decreed the entire suit by setting-aside the order passed by the trial court by way of order in appeal.

16. Learned counsel for the respondent-plaintiff further pleaded that in case this Hon'ble Court allowed the instant appeal, the respondent-plaintiff will be ousted from house having no room to live and will be bound to live in open sky as the respondent-plaintiff has no house except the ancestral house. Not only this but also the share of respondent-plaintiff is admitted at every stage by the

appellant-defendant as well as the defendant witnesses.

17. During life time of father, there was no partition between the brothers (i.e. Babu Ram appellant-defendant and Daya Ram, respondent-plaintiff), however, father has given some portion of house to his sons to live along with their family members, which is no manner can be said to be a partition in the house or property. When there is no partition, the second partition does not arise. The appellant-defendant has not annexed any documentary proof regarding partition of the house.

18. During pendency of the instant second appeal the sole respondent-plaintiff Daya Ram died and in his place his sons and legal heirs have been substituted as respondents-plaintiffs.

19. Learned counsel for the respondents-plaintiffs has cited reliance on the decision of this Court in the case of Harey Krishna Agrawal and Others v. Jairaj Krishna (D) and Others, reported in [2013 (31) LCD 1593]. In paras 39 and 40 of the said judgment this Court held as under :

"39. So far as right of defendants to challenge the judgment and decree of T.C. even though had not contested the suit by filing written statement, counsel for respondent could not show any statutory prohibition or dis-entitlement on their part in challenging final decision in suit, even if they did not contest the suit by participating before T.C. Not only this, if such an appellants can demonstrate that despite non-filing written statement, sill there is/are manifest error, illegality etc. in the judgment and decree passed by courts below, on account whereof the same are unsustainable or have resulted in a manifest grave injustice, in violation of some legal principle or statutory provision etc., I find no bar or disability on their part in challenging the judgment and decree of T.C. Or LAC on merits also.

40. Accordingly the Issue No. 2 is answered in affirmative, i.e., in favour of defendants-appellants holding that not only they can file appeal but contest the matter on merits also despite, they had not filed written statement or led evidence before T.C. The only restriction would be that these appellants will have to confine to the record of proceedings and cannot be allowed to lead any evidence or bring a new fact before Appellate Court. They also cannot be allowed to fill in the gap at this stage."

20. A co-ordinate Bench of this Court (Supra) has also held in paras 48, 49 and 52 as under :

"48. The intention to break joint family by effecting partition in respect of joint family property has always been considered with great respect, where amicably and peacefully, interacting love and affection, the members of joint family have settled their rights mutually. It can be given effect, orally, as also in writing.

49. In Appovier Vs. Ramasubba Aiyan (1866) 11 MIA 75 Lord Westbury

took a view that the partition covers both, a division of right and a division of property. This is also reiterated in Girja Bai Vs. Sadashiv Dhundiraj (1916) 43 IA 151. When the members of undivided family agreed amongst themselves either with respect to a particular property or with reference to entire joint estate that it shall thenceforth be the subject of ownership in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject matter so agreed to be dealt with; and in the estate, each member has thenceforth a definite and certain share which he may claim the right to receive and to enjoy in severalty although the property itself has not been actually severed and divided.

52. Further whenever there is a partition, the presumption is that it was a complete one both as to parties and property. There is no presumption that any property was excluded from partition. On the contrary, it has been held that burden lies upon him who alleges such exclusion to establish his assertion."

21. I have gone through the submissions raised by learned counsel for the appellant-defendant as well as learned counsel for the respondents-plaintiffs and perused the case law cited by the respective parties in support of their contention.

22. The main question is that whether re-partition can take place or not. It is an admitted fact before the trial court that oral family partition took place between the parties and father's share remained with the appellant-defendant whereas the respondent-plaintiff was given another share. In addition, advantage was given as per agreement between the parties to the appellant-defendant because he was caring his father and looking after his livelihood. At that time, respondent-plaintiff remained silent and accepted the family verdict but subsequently after the death of his father he staked his claim for additional share which was allocated to the portion of the appellant-defendant in lieu of the services he rendered to his father. The plea has been substantiated by the fact that in Hindu co-parcenery, every co-parcener member has got equal share but equal share was not given to the respondent-plaintiff, on the contrary, differential treatment took place. Whatever may be the reason, the respondent-plaintiff, alleged that the distinction should be scraped of and he should be allocated an equal share. The other point is that even, if, the partition took place, it was not effected with respect to the dwelling house and the respondent-plaintiff ought to have been given share in dwelling house also as far as factual matrix is concerned.

23. The only legal question remained is whether a partition which was effected between the parties can be re-opened and whether there can be estopple regarding the conduct of the respondent-plaintiff. The legal position regarding reopening of the partition is very clear and Hon'ble the Apex Court in the case Ratnam Chettiar and others v. S.M. Kuppuswami Chettiar and others (Supra) has clearly ruled out that a partition effected between the members of Hindu Undivided Family by their own volition and with their consent cannot be reopened, unless it is

shown that the same is obtained by fraud, coercion, misrepresentation or undue influence. And in the instant appeal there is nothing like any misrepresentation or undue influence.

24. The respondent-plaintiff himself pleaded before the trial court that since the appellant-defendant was taking care of his father he was given an added share to with stand the expenses and for taking care of the father. There is no dispute that respondent-plaintiff was living away and was not taking any responsibility of his father. The partition was effected keeping in view all these facts. In Hindu Law there can be oral family partition and as per evidence taken place and there is no dispute about it. Section 115 of the Evidence Act is reproduced hereinbelow;

"115. Estoppel.- When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

25. Estoppel is based on the maxim allegans contraria non est audiendus (a party is not to be heard to allege the contrary) and is that species of presumption juries et de jure (absolute or conclusive or irrebuttable presumption), where the fact presumed is taken to be true, not as against all the world, but against a particular party, and that only be reason of some act done, it is in truth a kind of argumentum ad hominem. This principle has been upheld by Hon'ble the Apex Court in 2003 (2) SCC 355, B.L. Sreedhar v. K.M. Munireddy.

Representation to form the basis of an estoppel may be made either by statement or by conduct. Further, in order to found an estoppel a representation must be of an existing fact, not of a mere intention. A representation may be a representation of fact although it involves and includes that which is also a matter of law. It is now popularity known as 'promissory estoppel'. The Hon'ble Apex Court has given the ratio in Seth Satnarain v. Dominion of India 1968 2 SCWR 335.

A person may waive a right either expressly or by necessary implication. He may be given a case disentitle himself from obtaining an equitable relief particularly when he allows a thing to come to an irreversible situation.

26. Thus, it was the appellant-defendant who by his own conduct accepted the previous partition effected between the parties and in that partition with mutual consent the extra share was allocated to the appellant-defendant and the reason was also advanced. The defendant maintained silence till death of his father. Now, question arises that whether after the death can respondent-plaintiff raise this issue leaving aside his own admission. The other fact is also very important that parties are Hindu and they rely on Hindu law of coparcenary, though there is procedure that after the death of coparcener how the share is devolved but at one time he relies on Hindu law of coparcenary but at the same time he left his own mother, who was then alive, to be impleaded as party to have

share in his late father's property. The simple question is why he ignored his mother and insisted on claiming the share of his father by way of succession. The facts on record suggest that it was not a coparcenery division but it was family partition that took place and in view of the case of Ratnam Chettiar and others v. S.M. Kuppuswami Chettiar and others(Supra), the partition so effected cannot be reopened.

27. I have also gone through the judgment and order of co-ordinate Bench of this Court in Harey Krishna Agrawal and Others v. Jairaj Krishna (D) and Others, reported in [2013 (31) LCD 1593] in which, it has been ruled out that "whenever there is a partition, the presumption is that it was a complete one both as to parties and property. There is no presumption that any property was excluded from partition. On the contrary, it has been held that burden lies upon him who alleges such exclusion to establish his assertion" and even the trial court and before the First Appellate Court, who could have examined the factual matrix, have not commented any thing regarding the bias partition.

28 The co-ordinate Bench of this Court (Supra) in para 51 of the judgment held that "family arrangements" also stand and enjoy same status. It is an agreement arrived by members of family, either by compromise doubtful or disputed rights, or by preserving a family property or by avoiding litigation for the peace and security of family or saving its honour. The co-ordinate Bench has based its finding on the case of Ram Narain Sahu v. Musammat Makhana, ILR (1939) All. 680 (PC) and Puttrangamma and Ors. v. M.S. Ranganna and Ors., AIR 1968 SC 1018)

29. In para 58, the co-ordinate Bench of this Court (Supra) held as under :

"58. In Sita Ram v. Board of Revenue, AIR 1979 All 301, this Court observed that the expression "settlement" means a non-testamentary disposition of property by an instrument in writing, containing even a declaration of trust, for distribution of property among the settlor's family or his dependent or those for whom the settlor desires to provide or for religious or charitable purpose. In other words, settlement among members of family in respect of the property jointly owned by them is a kind of compromise/mutual concession and arrangement between the members of family to settle their rights in respect of the member of the family."

30. Thus legal position is now very clear that the family partition on the basis of above pronouncement of Hon'ble the Apex Court cannot be re-opened. The father was living with the appellant-defendant, therefore, he was given an advantage in the share but nevertheless that will be covered by the mutual settlement and during his life time, the respondent-plaintiff did not utter a single word and did not dispute the rights or claim of the appellant-defendant. Even the suit filed by the respondent-plaintiff before the trial court was not in accordance with the norms as he did not implead the mother as party. Therefore, there can be no fresh division of the portion of the parties in dwelling house which was partitioned long back and such partition which has already been settled in past and consented

to by the respondent-plaintiff cannot be re-opened.

31. In view of above discussions, all the legal questions framed above in para 6 of the judgment are decided in affirmative in favour of the appellant-defendant and against the respondent-plaintiff i.e. family partition cannot be re-opened. It is binding on all the family members in succession because it was in good faith and no fraud and malice has been alleged by the party who has claimed otherwise. Similarly, the division of property was as a whole and shall be binding upon each family member irrespective of its dimension. It will not be open to challenge the family settlement arrived at between the parties earlier on the ground that the portion allocated to one party is short of his share. Both these issues have been dealt in detail by the coordinate Bench of this Court in Harey Krishna Agrawal and Others v. Jairaj Krishna (D) and Others (supra). The appeal is, therefore, liable to be allowed.

32. The appeal is, therefore, allowed with cost and the judgment and order passed by the First Appellate Court dated 6.11.1987 is set-aside and the order and decree dated 13.01.1987 passed by the learned trial court shall remain effective.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.05.2014

BEFORE
THE HON'BLE MRS. VIJAY LAKSHMI, J.

Criminal Revision No. 263 of 2014

Arvind Kumar..... Revisionist
Versus
State of U.P..... Opposite Party

Counsel for the Revisionist:
Sri Pradeep Kumar Singh

Counsel for the Opposite Party:
A.G.A.

Cr.P.C. 401-Criminal Revision- Release of Tractor-application rejected by learned Magistrate-in absence of complaint-no power to pass order on release application-revision-against-not maintainable-applicant has alternative remedy to approach before the authority concern under section 207(2) of M.V. Act itself.

Held:Para-13
In wake of the crystal clear statutory legal position discussed by several division benches of this Court cited above, I do not find any good ground to take a different view. Accordingly, I am of the considered view that the application moved by the petitioner for release of the vehicle seized by Mining Officer was not maintainable before the learned Chief Judicial Magistrate and learned Chief Judicial Magistrate has rightly rejected it by the impugned order. There appears no illegality or irregularity in the order impugned requiring interference by this Court. The revision being devoid of merit is liable to be dismissed and is dismissed accordingly. However, it will be open to the revisionist to move application for release of his vehicle before the appropriate authority under Section 207 (2) of the Act and the said authority will pass appropriate orders in accordance with law and keeping in view the law laid down by Hon'ble Apex Court in Sunderbhai Ambalal Desai Vs. State of Gujrat; 2003 (46) ACC 223 (SC).

Case Law Discussed:
2011(1) ADJ 498; 2003(46) ACC 223; 1995(2) AWC 849; [2001(1) AWC 551]; [2010(69) ACC 259]

(Delivered by Hon'ble Mrs. Vijay Lakshmi, J.)

1. The present criminal revision has been preferred against the order dated

23.1.2014 passed by Chief Judicial Magistrate, Chitrakoot in Miscellaneous Case No. 31A/xii/2014 under Section 4/21 Mines and Mineral (Development and Regulation Act, P.S. Mau, District Chitrakoot whereby the learned Magistrate has rejected the application of the revisionist for release of his tractor.

2. I have heard learned counsel for the revisionist and learned A.G.A. for the State and have carefully perused the records.

3. The learned counsel for the revisionist has submitted that the revisionist is registered owner of the tractor in question. The vehicle in question was duly insured by Oriental Insurance Company. His tractor was seized by the Mining Officer, Chitrakoot on 6.1.2014 on the allegation that it was found carrying illegal sand without proper transportation pass (MM 11). The learned counsel for the revisionist has argued that the sand was not illegal but it was purchased by the revisionist from a contractor holding valid license to store the sand. The contractor has issued Form (MM 11) to the revisionist but his tractor, was seized in a malafide manner by the Mining Officer, Chitrakoot. The revisionist moved an application before the Chief Judicial Magistrate, Chitrakoot for release of his tractor but the learned Magistrate dismissed his application on the ground that without filing of a complaint by the Mining Officer, he has no jurisdiction to pass an order of the release of vehicle especially keeping in view the fact that the applicant has not even deposited any compounding amount.

4. The learned counsel for the revisionist has questioned the validity of the aforesaid order dated 23.1.2014 by arguing that the learned Chief Judicial Magistrate has passed the order in a cursory manner and has illegally rejected the application moved by the revisionist for release of his tractor merely on the ground that as no complaint has been filed in the court regarding the offence, therefore he has no jurisdiction to take cognizance in the matter. Learned counsel for the revisionist has contended that the Magistrate was fully competent and empowered to release the vehicle even if the complaint was not filed, in view of Section 457 Cr.P.C. In this regard learned counsel for the revisionist has relied upon a judgment of this Court passed by the Hon'ble Single Judge in case of Smt. Sudha Kesarwani Vs. State of U.P. and others reported in 2011(1) ADJ 498. He has also placed reliance on the law laiddown by the Apex Court in landmark case of Sunderbhai Ambalal Desai Vs. State of Gujrat; 2003 (46) ACC 223 (Supreme Court). On the aforesaid ground it has been prayed that the impugned order be set aside and the learned Chief Judicial Magistrate be directed to release the tractor alongwith trolly in favour of the revisionist.

5. The State has filed counter affidavit opposing the revision mainly on the ground that the vehicle in question was seized under Section 207 of Motor Vehicle Act. The sand was found loaded on the tractor but the driver had failed to show any valid paper or permit to carry such sand, so the vehicle was seized by the Mining Officer, Chitrakoot. When the revisionist moved an application for release of the tractor before the learned Chief Judicial Magistrate, the learned C.J.M. called for a report from the District Magistrate, Chitrakoot. After receiving

such report, it was found that no complaint has been filed in this matter. Moreover the compounding fee has also not been deposited by the applicant, so learned C.J.M. rejected the release application on the ground of lack of jurisdiction. The learned A.G.A. has contended that the release application has rightly been rejected by the impugned order. There is no illegality or irregularity in the order. The revision being devoid of merit, is liable to be dismissed.

6. After hearing learned counsel for both sides and keeping in view the relevant legal provisions I am of the considered view that the revision is devoid of merit and is liable to be dismissed. The reasons are as follows :

1. Admittedly the tractor in question was seized by the Mining Officer, Chitrakoot because it was found loaded with sand (Morang) and its driver was unable to show any permit for carrying such sand. Section 207 of Motor Vehicle Act provides that "any police officer or other person authorised in this behalf by the State Government may, if he has reason to believe that a motor vehicle has been or is being used in contravention of the provisions of Section 3 or section 4 or section 39 or without the permit required by sub-section (1) of section 66 ?....., seize and detain the vehicle, in the prescribed manner and for this purpose take or cause to be taken any steps he may consider proper for the temporary safe custody of the vehicle.

7. Sub-section 2 of Section 207 provides that where a motor vehicle is seized and detained under sub-section 2, "the owner or person incharge of the motor vehicle may apply to the transport authority or any officer authorised in this behalf by the State Government together with the relevant documents for the release of the vehicle and such authority or officer may, after verification of such documents, by order release the vehicle subject to such conditions as the authority or officer may deem fit to impose."

8. Now, in view of the aforesaid legal provisions the question which arises for consideration is whether the vehicle seized by Mining Officer, Chitrakoot under Section 207 of Motor Vehicle Act could have been released by C.J.M. even when no criminal case/complaint case was pending before him.

9. A Division Bench of this Court in the case of Phool Chandra Vs. Assistant Regional Transport Officer, Banda and others has held that where a vehicle was seized by the Transport Authority under Section 207 of the Act, the registered owner or the person incharge of the vehicle, could move application for release of the vehicle either under Section 207 (2) of the Act before the Transport Authority or the Officer authorized by the State Government in this behalf or under Section 457 of the Code but in the case of Mazhar Ali Khan Vs. Chief Judicial Magistrate and Others; 1995(2)AWC 849 (DB) decided by Division Bench of this Court, it had been specifically held that where a vehicle is sized by Transport Authority under Section 207 of the Act, only transport Authority or any Officer authorized by the State Government in this behalf has power to release the vehicle. The relevant observation of the court finds place in para 4 of the judgment which is being reproduced below:

"Sub-section (2) of Section 207 provides for release of the Vehicle. Although under sub-section (1), any

police officer or any other person authorized in this behalf can seize and detain the vehicle, but under sub-section (2), only transport authority or the officer authorized in this behalf by the State Government has the power to release the vehicle irrespective of the fact that the vehicle was seized and detained by some one else but for this purpose the owner or the person incharge of the motor vehicle has to apply before them. For the reasons given above, the Regional Transport Officer was not justified to refuse to entertain the application for release on the ground that it was seized by police officer."

10. In the case of Jagat Pal Singh VS. State of U.P. and Others [2001 (1) AWC 551] the same view as above had been expressed by one more Division Bench of this Court. The relevant observation of the court finds place in para 4 of the judgment which is being extracted below:

"From a perusal of Section 207 of the Act is appears that the remedy available to the petitioner is to apply to the transport authority or any officer authorized in this behalf by the State Government together with relevant documents for the release of the vehicle in terms of sub-section (2) of Section 207 of the Act. We are of the view that since statue provides power to release the vehicle on the concerned authority under sub-section (2) of section 207 of the Act and the application of the writ petitioner, the writ petitioner should act according to the statute and take appropriate steps in terms of section 207 (2) of the Act and make appropriate application before the concerned authority. We are of the further view that it is incumbent on the part of the parties to follow the procedure laid by the statute and have no jurisdiction or authority to direct release of the vehicle through Chief Judicial Magistrate."

11. In the case of Deoraj Singh Vs. State of U.P. [2010 (69) ACC 259], this court relying on earlier case laws cited therein has laid down the same principle of law as laid down in the above cited case. The relevant observation of the Hon'ble Court finds place in para 10 of the judgment which is being extracted below:

"From a perusal of the Section 207 (2) of the Motor Vehicles Act, 1988 the remedy available to the applicant is to apply to the transport authority or to officer authorized in this behalf by the State Government together with relevant documents for the release of the vehicle. This issue has been considered by the Division Bench of this Court on case of Jagat Pal Singh V State of U.P. And others in Criminal Misc. Writ Petition No. 5528 of 2000 (M/B) as reported in 2001 (1) AWC 551."

12. The judgment in the case of Smt. Sudha Kesarwani relied upon by the revisionist is of no help to him as the judgment in this case has been passed by a learned Single Judge whereas various division benches in judgments cited above, have clearly expressed the view that the Chief Judicial Magistrate has no jurisdiction to release the vehicle seized under Section 207 of the Motor Vehicle Act.

13. In wake of the crystal clear statutory legal position discussed by several division benches of this Court cited above, I do not find any good ground to take a different view. Accordingly, I am of the

considered view that the application moved by the petitioner for release of the vehicle seized by Mining Officer was not maintainable before the learned Chief Judicial Magistrate and learned Chief Judicial Magistrate has rightly rejected it by the impugned order. There appears no illegality or irregularity in the order impugned requiring interference by this Court. The revision being devoid of merit is liable to be dismissed and is dismissed accordingly. However, it will be open to the revisionist to move application for release of his vehicle before the appropriate authority under Section 207 (2) of the Act and the said authority will pass appropriate orders in accordance with law and keeping in view the law laid down by Hon'ble Apex Court in Sunderbhai Ambalal Desai Vs. State of Gujrat; 2003 (46) ACC 223 (SC).

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.05.2014

BEFORE
THE HON'BLE DEVI PRASAD SINGH, J.
THE HON'BLE ASHWANI KUMAR SINGH, J.

Special Appeal No. 570 of 2012

Pawan Kumar Misra... Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri S.E. Chirambar, Sri S.P. Misra

Counsel for the Respondents:
C.S.C.

U.P. Government Servant(Conducts)Rules, 1956-Section-29-Removal from service-on account of second marriage during life time of first wife-without divorce-amounts to misconduct-dismissal held proper-sbsequent withdrawl of complaint by first wife-meaningless.

Held: Para-17
In the case in hand, the appellant-petitioner had committed an offence of bigamy after enjoying 11 years of matrimonial life. Once the 1956 Rules provides that second marriage by a government servant during the lifetime of first wife is an offence, and it amounts to misconduct, then it is not open for the court to take a different view than what has been considered by the disciplinary authority.

Case Law discussed:
2006 (2) SCC 670; AIR 2007 SC 2742; AIR 2007 SC 2625; AIR 2008 SC 1797; 2006(2) GLT 569.

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

1. Heard learned counsel for the appellant-petitioner, Sri S.P. Mishra and learned Standing Counsel Sri Pushkar Baghel, appearing for respondents.

2. This is an appeal under Chapter VIII Rule 5 of the High Court Rules, 1952 against the impugned order dated 31.7.2012 passed by Hon'ble Single Judge in Writ Petition No.1343 (S/S) of 2004.

3. The appellant-petitioner, a police constable, has been punished pursuant to disciplinary proceedings, being remarried to another lady without seeking permission of the state government in pursuance to U.P. Government Servants Conduct Rules, 1956 (in short '1956 Rules'). The factum of remarriage by the appellant-petitioner seems to be not disputed. The appellant-petitioner also does not dispute that he has remarried himself in spite of the fact that his first wife survives.

4. The appellant-petitioner was married to one Smt. Sunita, daughter of

Shri Raghuwar Tiwari according to Hindu rites and rituals in the year 1991. Since wedlock of his first wife, he could not get child for almost 11 years, hence he again married to another lady. Feeling aggrieved, first wife submitted a complaint to D.I.G., Lucknow on 11.7.2001 with the allegation that the appellant-petitioner has solemnized second marriage with another lady, namely Smt. Deep Mala, without divorcing her and also threatened to kill her and her parents. On account of ill-treatment due to remarriage by the appellant-petitioner, the first wife has gone back to her parental house (maika). The departmental enquiry was initiated, and finding has been recorded by the Enquiry Officer that the appellant-petitioner has remarried to another lady during lifetime of his first wife. The disciplinary authority has awarded major penalty of dismissal from service. Appeal and revision preferred by the appellant-petitioner were dismissed. Feeling aggrieved, he preferred a Writ Petition No.1343 S/S of 2004 before this court, which has been dismissed by Hon'ble Single Judge by the impugned order, which is under challenge in the instant appeal.

5. While assailing the impugned order, learned counsel for the appellant-petitioner submits that under compelling circumstances, he had remarried to another lady, so that he can have child to carry on social need. It is further submitted by appellant-petitioner's counsel that the marriage solemnized was perfectly in accordance to the provisions contained in sub-section (ii)(b) of section 5 of Hindu Marriage Act, 1955. Learned counsel for the appellant-petitioner further submits that in any case the punishment awarded to the appellant-petitioner is disproportionate to the misconduct. He relied upon an unreported judgment of this court dated 22.3.2010 passed in Civil Misc. Writ Petition No.25871 of 2009 'Pancham Giri vs. State of U.P. and others' by Hon'ble Single Judge. In this case, Hon'gle Single Judge had remanded the matter to the authorities, relying upon the judgment in the case of Bhagat Ram vs. State of Himachal Pradesh reported in 1983 (2) SCC 442, to take a fresh decision with the finding that the dismissal from service is disproportionate to his misconduct.

6. Learned counsel for the appellant-petitioner further submits that some of the reasons recorded in the impugned order are not sustainable and observation has been made without going through the records. Such argument does not seem to be available to the appellant-petitioner for the reason that the factum of remarriage has not been disputed. Once, the misconduct is admitted, then there is no option with the authorities except to award punishment in accordance to law.

7. On the other hand, learned counsel for the respondent has invited our attention to the judgment reported in (2006) 6 SCC Union of India and another vs. K.G. Soni, wherein Hon'ble Supreme Court held that punishment awarded to the delinquent employee on account of second marriage call for no interference by the court. Interference of the court under Article 226 is limited to the deficiency in the decision-making process and not the decision.

8. Rule 29 of the U.P. Government Servants Conduct Rules, 1956, which deals with service conditions and is relevant for adjudication of the present controversy, is reproduced:-

"Bigamous marriages- (1) No government servant who has a wife living shall contract another marriage without first obtaining the permission of the government, notwithstanding that such subsequent marriage is permissible under the personal law for the time being applicable to him.

(2) No female government servant shall marry any person who has a wife living without first obtaining the permission of the government."

9. A plain reading of Rule 29 reveals that a government servant cannot marry again without permission of the state government. The legislature to their wisdom has used the word "notwithstanding" which means, even if the marriage is permissible under personal law for the time being applicable to a government servant, such government servant cannot be allowed to marry again without permission of the state government.

10. It is settled proposition of law that when the language of the statute is clear and unambiguous, court can not make any addition or subtraction of words vide 2006 (2) SCC 670, Vemareddy Kumaraswami Reddy and another Vs. State of Andhra Pradesh,

11. In AIR 2007 SC 2742, M.C.D. Vs. Keemat Rai Gupta and AIR 2007 SC 2625, Mohan Vs. State of Maharashtra, their Lordship of Hon'ble Supreme Court ruled that Courts should not add or delete the words in statute. Casus Omisus should not be supplied when the language of the statute is clear and unambiguous.

12. In AIR 2008 SC 1797, Karnataka State Financial Corporation Vs. N. Narasimahaiah and others, Hon'ble Supreme Court held that while construing a statute, it can not be extended to a situation not contemplated thereby. Entire statute must be first read as a whole, then section by section, phrase by phrase and word by word. While discharging statutory obligation with regard to take action against a person in a particular manner, that should be done in the same manner. Interpretation of statute should not depend upon contingency but it should be interpreted from its own word and language used.

13. Accordingly, since rule 29 of 1956 Ruels does not give any liberty to a government servant to enter into second marriage without permission of the state government, no interpretation other than what is reflected from a plain reading of the provisions contained therein may be given.

14. We are of the view that the appellant-petitioner cannot take assistance of the provisions contained in Hindu Marriage Act or alike personal law being a government servant. The 1956 Rules has got statutory force and also got overriding effect over the provisions contained in the statute dealing with personal law.

15. Much reliance has been placed by the learned counsel for the appellant-

petitioner on the judgment dated 28.6.2012 of the Gauhati High Court passed in Writ Appeal No.320 of 2010 'Union of India and others vs. Shri Ramashankar Gupta'. In the case of Shri Ramashankar Gupta (supra), the Gauhati High Court has considered the earlier judgment in the case of Amal Kumar Baruah vs. State of Assam and others reported in 2006 (2) GLT 569, whereby the complaint, submitted by the wife, has been withdrawn by her and in the same case the Division Bench of Guahati High Court had affirmed the order of dismissal from service on a proven charge of bigamy. For convenience, para 26 of the judgment in Union of India and others vs. Shri Ramashankar Gupta (supra) is reproduced:-

"26. As has already been noticed above, bigamy is prohibited by Rule 21 of the Central Civil Services (Conduct) Rules, 1965. When bigamy is expressly prohibited under the law (except the two exceptions mentioned in the provision which are not attracted and applicable in the present case), it would not be correct to say that punishment of dismissal from service on a proven charge of bigamy would be disproportionate on the ground that under the criminal law bigamy is a compoundable offence, more so when the delinquent was a member of a disciplined force like the Assam Rifles. Continuation of such a person in force may have an adverse affect on the overall image of the force. It may affect the public perception that a person guilty of bigamy can still continue as a member of such force. Moreover, it may have a cascading effect on the overall morale and discipline of the force. The further view taken by the Single Bench that the second marriage has nothing to do with either the official position of the petitioner or the discharge of official duties does not appear to us to be a correct appreciation of the consequences of proven charge of bigamy."

16. In the case of Pancham Giri vs. State of U.P. and others (supra), Hon'ble Single Judge while deciding the writ petition has remanded the matter to the authorities to take a fresh decision on dismissal from service on account of the fact that the delinquent employee was at the verge of retirement. A lenient view was taken by Hon'ble Single Judge keeping the facts and circumstances of the case, which does not seem to be applicable to the present case.

17. In the case in hand, the appellant-petitioner had committed an offence of bigamy after enjoying 11 years of matrimonial life. Once the 1956 Rules provides that second marriage by a government servant during the lifetime of first wife is an offence, and it amounts to misconduct, then it is not open for the court to take a different view than what has been considered by the disciplinary authority.

18. In the case of Union of India and another vs. K.G. Soni (supra), relied upon by learned counsel for the appellant-petitioner, Hon'ble Supreme Court in identical situation held that the High Court ordinarily should not interfere in such a matter by exercising power conferred by Article 226; rather it has to look into the deficiency in the decision-making process and not the decision. For

convenience, relevant paras 3, 8, 13 and 14 of the aforesaid judgment are reproduced:-

"3. Background facts in a nutshell are as follows:

Respondent was a Store Attendant in the Bank Note Press, District Dewas (M.P). A charge-sheet was issued against him on the foundation that though he had got married with one Parvathibai in the year 1973, while filling up the attestation form on 16.3.1974, he did not show her name as his wife. It was further alleged that he got married for the second time in October, 1974 with one Ushabai. On the basis of this non-disclosure, which, authorities considered to be a misconduct, a disciplinary proceeding was initiated. It is to be noted that the non-disclosure came to the notice of the authorities when Parvathibai made a complaint about the second marriage. The enquiry was conducted under Central Civil Services (Classification, Control and Appeal) Rules, 1965 (in short the 'Rules'). The Enquiry Officer recorded findings in favour of the respondent. The Disciplinary Authority differed with the findings of the Inquiry Officer and came to hold that second marriage had in fact been performed and accordingly it issued show cause notice to the respondent and eventually came to hold that the respondent was guilty of misconduct and imposed the punishment of removal by order dated 2.4.1996.

8. The High Court was of the view that ordinarily it would have remanded the matter to Tribunal for fresh consideration on merits but it was of the view that this is a fit case where the matter should be remitted to the Appellate Authority for reconsideration with regard to the quantum of punishment. The only basis for coming to the conclusion that the complaint was made by the wife about the alleged second marriage belatedly, and this is not such a misconduct which warrants compulsory retirement before his superannuation.

13. In Union of India and Anr. v. G. Ganayutham (1997 [7] SCC 463), this Court summed up the position relating to proportionality in paragraphs 31 and 32, which read as follows:

"The current position of proportionality in administrative law in England and India can be summarized as follows:

(1) To judge the validity of any administrative order or statutory discretion, normally the Wednesbury test is to be applied to find out if the decision was illegal or suffered from procedural improprieties or was one which no sensible decision-maker could, on the material before him and within the framework of the law, have arrived at. The court would consider whether relevant matters had not been taken into or whether irrelevant matters had been taken into account or whether action was not bona fide. The court would also consider whether the decision absurd or perverse. The court would however go into the correctness of the made by the administrator amongst the various alternatives open to. Nor could the court substitute its decision to that of the administrator. This is the Wednesbury (1948 1 KB 223) test.

(2) The court would not interfere with the administrator's decision unless it was illegal or suffered from procedural

impropriety or was irrational \026 in the sense that it was in outrageous defiance of logic or moral standards. The possibility of other tests, including proportionality being brought into English administrative law in future is not ruled out. These are the CCSU (1985 AC 374) principles.

(3)(a) As per Bugdaycay (1987 AC 514), Brind (1991 (1) AC 696) and Smith (1996 (1) All ER 257) as long as the Convention is not incorporated into English law, the English courts merely exercise a secondary judgment to find out if the decision-maker could have, on the material before him, arrived at the primary judgment in the manner he has done.

(3)(b) If the Convention is incorporated in England making available the principle of proportionality, then the English courts will render primary judgment on the validity of the administrative action and find out if the restriction is disproportionate or excessive or is not based upon a fair balancing of the fundamental freedom and the need for the restriction thereupon.

(4)(a) The position in our country, in administrative law, where no fundamental freedoms as aforesaid are involved, is that the courts/tribunals will only play a secondary role while the primary judgment as to reasonableness will remain with the executive or administrative authority. The secondary judgment of the court is to be based on Wednesbury and CCSU principles as stated by Lord Greene and Lord Diplock respectively to find if the executive or administrative authority has reasonably arrived at his decision as the primary authority.

(4)(b) Whether in the case of administrative or executive action affecting fundamental freedoms, the courts in our country will apply the principle of "proportionality" and assume a primary role, is left open, to be decided in an appropriate case where such action is alleged to offend fundamental freedoms. It will be then necessary to decide whether the courts will have a primary role only if the freedoms under Articles 19, 21 etc. are involved and not for Article 14."

14. The common thread running through in all these decisions is that the Court should not interfere with the administrator's decision unless it was illogical or suffers from procedural impropriety or was shocking to the conscience of the Court, in the sense that it was in defiance of logic or moral standards. In view of what has been stated in the Wednesbury's case (supra) the Court would not go into the correctness of the choice made by the administrator open to him and the Court should not substitute its decision to that of the administrator. The scope of judicial review is limited to the deficiency in decision-making process and not the decision."

19. Keeping the principle emerging from Union of India and another vs. K.G. Soni (supra), there appears to be no reason to interfere with the order passed by Hon'ble Single Judge and the disciplinary authority, as held by their Lordships of Hon'ble Supreme Court that

the courts should not interfere with the administrator's decision unless it was illogical or suffers from procedural impropriety or was shocking to the conscience of the court. The department moved ahead to charge the appellant-petitioner in pursuance of complaint submitted by his own first wife and factum of remarriage has not been denied by the appellant-petitioner. Accordingly, the appellant-petitioner has been punished in pursuance to 1956 Rules (supra).

20. We have been informed that at later stage the appellant-petitioner's wife has withdrawn the complaint but it does not seem to make out a case to dilute the decision taken by the disciplinary authority. The entire allegation against the appellant-petitioner was raised by his own wife being aggrieved with his second marriage. Any withdrawal of complaint, at later stage, shall not dilute the merit of the case, since under Rule 29, the action of the appellant-petitioner constitutes a case of misconduct, which is also punishable under Section 494 of I.P.C.

21. Once the wife brought into notice of the authorities with regard to second marriage of the appellant-petitioner, then at later stage, ordinarily any application moved by the complainant-wife does not seem to make out a case for interference with the decision of the disciplinary authority.

22. Any liberty given by the courts or interference with such matters, may result with ill consequence in due course of time or may break the discipline in police force. It is not a case where misconduct has been committed by not an ordinary government servant. Being a member of disciplined police force, it is always expected that such person shall be abide law and in case, a member of the police or Armed forces is permitted to break the law and abuse the powers conferred by the statutes, it shall send a wrong message to the society.

23. In view of above, we are not inclined to interfere with impugned order passed by Hon'ble Single Judge. The appeal, being devoid of merit, is dismissed accordingly.

24. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 30.05.2014

BEFORE
THE HON'BLE RAKESH SRIVASTAVA, J.

Service Single No. 642 of 2008

Smt. Anara Devi... Petitioner
Versus
Ayukt Khadya Evam Rasad & Ors. ...Respondents

Counsel for the Petitioner:
Sri S.P. Dubey

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-Retirement benefits-denied on ground-even on compassionate ground appointment being-adhoc in nature-can not be taken into consideration-as regularization period less than 10 years of qualifying service-pension not payable-held-misconceived-compassionate appointment being regular

in nature-can not be treated as adhoc appointment-entitled for pension.

Held: Para-14
Admittedly, the petitioner was appointed under the Dying in Harness Rules. The fact that the initial appointment of the petitioner was made on ad-hoc and temporary basis, and by a subsequent order the services of the petitioner were alleged to have been regularized, is of no consequence. For all practical purposes, the appointment of the petitioner under the Dying in Harness Rules has to be treated to be a permanent appointment.

Case Law discussed:
(1994) 4 SCC 138; 1999(3) UPLBEC 2263; (2007) 25 LCD 469.

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

1. Sri Banwari Lal, the husband of the petitioner and an employee of the opposite parties, unfortunately died in harness. After the death of Sri Banwari Lal, by an order dated 05.09.1985 passed by the Regional Food Controller, Faizabad Region, Faizabad, the petitioner was appointed, on ad-hoc and temporary basis, to the post of Watchman under The Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 ("Dying in Harness Rules") and was posted at Bahraich Center. It was stated in the appointment order that since the petitioner was appointed on absolutely ad hoc and temporary basis, the services of the petitioner were liable to be terminated at any time, without notice.

2. In pursuance of her appointment order, the petitioner joined the department and started working. After completing ten years of service, by an order dated 30.04.1998, the services of the petitioner, along with other employees mentioned in the said order, were regularized. The petitioner continued to work in the department till she attained the age of superannuation on 30.09.2005. After her superannuation, the petitioner requested the opposite parties to pay to her the retiral dues to which she was entitled under law. On the representation made by the petitioner, the petitioner was paid Group Insurance, leave encashment etc. Insofar as the pension was concerned, the same was denied to the petitioner on the ground that the petitioner had not completed ten years of "qualifying service" in order to enable the petitioner to claim pension. This led to the filing of the present writ petition.

3. The learned counsel for the petitioner has submitted that the appointment under the Dying in Harness Rules is necessarily a regular appointment. He has submitted that the entire period from the date of initial appointment i.e. 05.09.1985 till the petitioner attained the age of superannuation on 30.09.2005, had to be taken into account while computing "qualifying service" for the purposes of grant of pension. 2

4. On the other hand, the learned Standing Counsel has submitted that the service rendered by the petitioner on ad-hoc basis could not be taken into account while computing the "qualifying service" for the purposes of payment of pension and since the petitioner had less than eight years of regular service to her credit, the petitioner was not entitled to pension.

5. Heard Sri S.P. Dubey, learned counsel for the petitioner and the learned Standing Counsel.

6. The short question to be answered in the present writ petition is as to

whether compassionate appointment under the Dying in Harness Rules could be made on ad-hoc, temporary or daily wage basis or appointment under the said Rules is a permanent appointment.

7. It is settled that appointment in public services are to be made strictly in accordance with merit and in accordance with the procedure provided in the rules. However, compassionate appointment under the Dying in Harness Rules is an exception to the general rule. When an earning member of a family unexpectedly passes away, his whole family is subjected to misery and privation. To mitigate the hardship caused on account of sudden change in the status and affairs of the family and to save the family of the deceased government servant from destitution, the concept of compassionate appointment has been carved out.

8. The object of compassionate appointment has been succinctly stated in the case reported in (1994) 4 SCC 138, Umesh Kumar Nagpal v. State of Haryana. At page 139 of the said report, the Apex Court has made the following observations:-

"As a rule, appointments in the public services should be made strictly on the basis of open invitation of applications and merit. No other mode of appointment nor any other consideration is permissible. Neither the Governments nor the public authorities are at liberty to follow any other procedure or relax the qualifications laid down by the rules for the post. However, to this general rule which is to be followed strictly in every case, there are some exceptions carved out in the interests of justice and to meet certain contingencies. One such exception is in favour of the dependants of an employee dying in harness and leaving his family in penury and without any 3 means of livelihood. In such cases, out of pure humanitarian consideration taking into consideration the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made in the rules to provide gainful employment to one of the dependants of the deceased who may be eligible for such employment. The whole object of granting compassionate employment is thus to enable the family to tide over the sudden crisis."

9. The Dying in Harness Rules have been made in exercise of the powerconferred by the proviso to Article 309 of the Constitution of India with the object of providing employment to one member of the deceased government servant in order to enable the family of the deceased to overcome the sudden financial crisis it finds itself facing.

10. The object of the Rules can be achieved only if the appointment under the rules is permanent in nature. An appointment made on ad-hoc, temporary or daily wage basis has no security of tenure. Such an appointment can be terminated at any point time, with or without notice. Compassionate appointment under the Rules, obviously, has to carry some security of tenure or else it would frustrate the very object of the scheme for compassionate appointment. The scheme for compassionate appointment is a rehabilitation scheme and the security of tenure is inherent in an appointment made under the said scheme.

11. The question whether an appointment under the Dying in Harness Rules is a permanent appointment or a

temporary appointment came up for consideration before the Division Bench of this Court in the case reported in 1999 (3) UPLBEC 2263, Ravi Karan Singh vs. State of Uttar Pradesh and the Division Bench concluded as follows:-

"1. This petition has come up before us on a reference made by the learned single Judge by his order dated 1 9.12.1997. The point involved is very simple, that is, whether an appointment under the Dying-in-Harness Rules is a permanent appointment or a temporary appointment. According to the learned single Judge, this Court had earlier held that an appointment under Dying - in - Harness Rules is a permanent appointment vide Budhi Sagar Dubey v. D. I. O. S., 1 993 ESC 21 ; Gulab Yadau u. State of U. P. and others, 1 991 (2) UPLBEC 9 95 and Dhirendra Pratap Singh v. D. I. O .S. and others, 1 991 (1) 4 UPLBEC 427. The learned single Judge who passed the referring order dated j 1 9.12.1997 disagreed with the above mentioned decisions and hence has referred the matter to a larger Bench.

2. In our opinion, an appointment under the Dying-in- Harness Rules has to be treated as a permanent appointment otherwise if such appointment is treated to be a temporary appointment, then it will follow that soon after the appointment, the service can be terminated and this will nullify the very purpose of the Dying-in-Harness Rules because such appointment is intended to provide immediate relief to the family on the sudden death of the bread earner. We, therefore, hold that the appointment under Dying-in-Harness Rules is a permanent appointment and not a temporary appointment, and hence the provisions of U. P. Temporary Government Servant (Termination of Services) Rules. 1975 will not apply to such appointments.

3. The petition is disposed of accordingly."

12. It is, thus, clear that an appointment under the Dying in Harness Rules is a permanent appointment. It is not open to the opposite parties to make an appointment under the Dying in Harness Rules on ad-hoc, temporary or daily wage basis.

13. In the case reported in (2007) 25 LCD 469, Kishan Lal vs. State of U.P. & Ors. this Court came to the rescue of Kishan Lal, who was appointed under the Dying in Harness Rules on daily wage basis, by directing the opposite parties in the said case, to pass a fresh order appointing Kishan Lal, as regular employee in the same cadre from the initial date of recruitment with all consequential benefits. Paragraph 4 of the said report is being quoted below:-

"4. In view of settled provisions of law appointment of the petitioner as daily wager seems to be not sustainable. Accordingly, a writ in the nature of mandamus is issued commanding the opposite parties to pass fresh order appointing the petitioner from the initial date of his recruitment as regular employee in the same cadre with all consequential benefits keeping in view the observation made hereinabove."

14. Admittedly, the petitioner was appointed under the Dying in Harness Rules. The fact that the initial appointment of the petitioner was made on ad-hoc and temporary basis, and by a subsequent order

the services of the petitioner were alleged to have been regularized, is of no consequence. For all practical purposes, the appointment of the petitioner under the Dying in Harness Rules has to be treated to be a permanent appointment.

15. In view of the discussion made above, the writ petition is allowed with cost quantified at Rs 3000. The petitioner is held entitled to the grant of pension with effect from October, 2005. The opposite parties are directed to compute and pay to the petitioner, her outstanding retiral dues including pension, to which she is entitled under law, treating the petitioner to have been substantially appointed w.e.f. 05.09.1985, the date of her initial appointment. The petitioner shall also be entitled to interest @ 8% per annum on the arrears from October, 2005 till the time of its actual payment. The payment shall be made within a maximum period of three months from the date of receipt of a certified copy of this order.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.05.2014

BEFORE
THE HON'BLE ANIL KUMAR, J.

Second Appeal No. 940 of 1978

Barkai and Others..... Petitioners
Versus
Mahmood Khan & Ors. ... Respondents

Counsel for the Petitioners:
Sri H.S. Sahai, Sri U.S. Sahai

Counsel for the Respondents:
B.K. Srivastava

(A)C.P.C.-Section-100- Second Appeal-substantial question of law?-explained-must be debatable-not settled by law of land-apart from having material bearing.

Held: Para-18
In the case of Santosh Hazari V. Purshottam Tiwari reported in 2001 (92) RD 336 (SC) had held that a point of law which admits of no two opinions may be preposition of law but cannot be a substantial question of law. To be 'substantial' a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, in so far as the rights of the parties before it are concerned. If will, therefore, depend on the facts and circumstances of the each case whether a question of law is substantial one and involved in the case or not. The same view has been expressed again by the Apex Court in the case of Govinda Raju Vs. Marriamman 2005 (98) RD 731.

(B)U.P.Z.A. & L R Act-Section-9- person found possession on date of vesting can claim benefit of presumption-admittedly purchase of land n question from zamindar after date vesting-can not get any benefit-court below rightly not given any benefit-can not be interfered under second appeal-in absence of substantial question of law.

Held: Para-12
In addition to the above said facts, the trial court has also given a finding that the allegation that defendant-appellant became owner of the land in dispute u/s 9 of U.P.Z.A.&L.R. Act is also not proved because defendants-appellants have failed in proving that they were in possession of the disputed land on the date when U.P.Z.A.&L.R. Act came into force. Therefore, defendants-appellants could not get any title over the land in dispute u/s. 9 of U.P. Z. A. & L. R. Act, so the argument advanced by learned counsel for the appellant has no forced and rejected.

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

1. Heard Shri U. S. Sahai, learned counsel for the appellants and perused the record.

2. Facts in brief of the present case are that the plaintiffs-respondents filed a suit for demolition of structures and also for possession over the land in dispute recorded as abadi plot no.3545 in which there is a dilapidated house over the land on the ground that the same has been purchased from Baleshwar who is tenure-holder, by way of sale deed dated 14.10.1965.

3. In the plaint, the plaintiffs had pleaded that the house has fallen down and the defendants have dispossessed the plaintiffs and raised structures and hence the suit for demolition and possession. Accordingly, the suit was registered having Regular Suit No.462 of 1996. Thereafter, the trial court by judgment and order dated 24.04.1971 has decreed the suit for possession in respect of the land in dispute. In this regard, both the courts below have given a concurrent finding which is based on the material on record.

4. The suit was resisted by the defendants-appellants on the ground that the land is suit is Sahan land of the defendants-appellants having their Ghari, Charni, pegs and Khalian and other agricultural structures/equipment etc. on it.

5. Aggrieved by the said observations made in the trial ocurt, plaintiffs filed an appeal bearing Civil Appeal No.73 of 1971 "Mahmood Khan vs. Barkayi & Ors.", allowed by judgment and decree dated 04.05.1972 and the matter was remanded back to the trial court with a direction that it shall register the suit at its original number. The trial court was further directed to frame additional issues in the light of observations made in the body of appellate judgment after giving opportunity to the parties concerned to issue commission for determination as to whether the land in dispute falls part of plot no.3545 or not and shall decide the case in accordance with law.

6. In view of the factual background, the matter again built up before the trial court. The trial court in order to decide the controversy involved in the present case has framed the following issues :-

"Whether the land in suit belongs to the plaintiffs ?

Whether the alleged construction and Khutas, as alleged in the plaint are new or old ? In either case its effect ?

Whether there existed any house belonging to one Baleshwar over the land in suit ?

Whether the suit is within time ?"

7. After considering the material on record (oral and documentary evidence) as well as commission report, the trial court by judgment and decree dated 29.08.1977 had decreed the suit of the plaintiffs challenged by filing an appeal bearing Civil Appeal No.118 of 77 "Sri Barkayee & 3 Ors. vs. Sri Mahmood Khan & 3 Ors.", dismissed by judgment and decree dated 8.8.1978.

8. In view of the above said facts, the present second appeal has been filed by the defendants-appellants (During the

pendency of the present appeal, appellant nos.1, 2 and 4 as well as respondent no.1 have died and substituted by their legal representatives).

9. Shri U. S. Sahai, learned counsel for the appellants has pressed the second appeal on the following questions of law :-

"Whether the land of abadi after the date of vesting having been vested in the State can be transferred by the Ex-zamindar and the transferre can have any title or right over the land so transferred ?

Whether a transfer of abadi land after the enforcement of U.P. Act No,1 of 1951 of abadi land is void and can create any right on the transferre ?

Whether assuming that the plaintiff taking a transfer of land from ex-zamindar of land appurtenant to the defendant's appellant's house and the land in suit being sahan darwaza land of the defendant-appellant the plaintiff can have any right over such a land having been vested under section 9 of U.P. Act No.1 of 1951 and settled with the defendant-appellant. ?

Whether non-framing of a vital issue with respect to the fact that whether Baleshwar had transferable rights over the land in dispute basically connected with the plaintiff's title and resulting the serious prejudice to the defendant's case results in vitiating the findings of the courts below in the absence of an important and basic issue having been framed and tried by the courts below ?"

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

11. The main question involved in the present case is whether the land in dispute was originally owned by Baleshwar or it was Sahan land of defendants. On the basis of survey map, the land in dispute lies in plot no.3545/0.10 and both the courts below have given a finding that the allegation of defendant nos.1 to 4 that the land in suit does not lie in plot no.3545/0.10, is incorrect or wrong and Baleshwar's father Hira Lal was Zamindar of this village and his sir was in this village. Copy of Khatauni 1359 f. Ex.1 is on record which shows that 3545/0.10 is recorded in the name of Hir Lal. There is another document, namely, Khatauni of 1356 f. Ex.2 and Ex.4 (revenue record) from which it is clearly established that the land in dispute is recorded in favour of Hira Lal, the father of Baleshwar from whom plaintiffs have purchased a land in question.

12. In addition to the above said facts, the trial court has also given a finding that the allegation that defendant-appellant became owner of the land in dispute u/s 9 of U.P.Z.A.&L.R. Act is also not proved because defendants-appellants have failed in proving that they were in possession of the disputed land on the date when U.P.Z.A.&L.R. Act came into force. Therefore, defendants-appellants could not get any title over the land in dispute u/s. 9 of U.P. Z. A. & L. R. Act, so the argument advanced by learned counsel for the appellant has no forced and rejected.

13. Further, P.W.1-Baleshwar has stated that he transferred the land in suit to the plaintiffs-respondents. The sale deed is on record which is paper no.30-ka.1, therefore from these documents as

well as from the documents and statement referred above. It is proved that plaintiff-respondent became owner of the disputed land as alleged in the plaint. So, the finding given by both the courts below are based on the basis of documentary and oral evidence are perfectly valid.

14. It is well settled proposition of law as laid down by Hon'ble Supreme Court and by this Court that while adjudicating the dispute in the second appeal the finding of fact, which is recorded by the Court below can only be set aside if the same is contrary to the facts and perverse in nature. However, in the present case, the learned counsel for the appellant fails to point out that under what circumstances the findings which are recorded in this regard by the court below are contrary to the records and perverse in nature thus the submission made in this regard by the learned counsel for the appellant that the civil court has got no jurisdiction to entertain the suit and the jurisdiction lies under section 41 of the Land Revenue Act, has got no force accordingly the same is rejected.

15. In view of the above said facts, findings recorded by the Courts below cannot be set aside on flimsy arguments advanced on behalf of the appellants and without there being any question of law. In the instant case, arguments of the counsel for the appellants are factual in nature and by no stretch of imagination can constitute substantial questions of law. Re-appraisal of evidence is not permissible. Interference of the facts from recital or content of the document or after shifting oral evidence does not leave any scope of re-appraisal in exercise of jurisdiction under section 100 C.P.C.

16. It is well settled by a long series of decisions of the Judicial Committee of the Privy Council and of this Court, that a High Court, in second appeal, cannot go into questions of fact, however, erroneous the findings of fact recorded by the courts of fact may be, the learned counsel for the appellant did not and could not contend that the High Court was competent to go behind the findings of fact concurrently recorded by the two courts of fact. (See Mustafa Vs. Vakil @ Iqbal and another 2008 (105) RD 392).

17. The Apex Court depreciated the liberal construction and generous application of provisions of section 100 C.P.C. Hon'ble Supreme Court was of the view that only because there is another view possible on appreciation of evidence that can not be sufficient for interference under section 100 C.P.C. For ready reference, extract of paragraph No.7, of the vase of Veerayee Ammal V. Seeni Ammal reported in 2002 (1) SCC 134=2001(45) ALR 691 (SC) is quoted below:

"7.....We have noticed with distress that despite amendment, the provisions of section 100 of the Code have been liberally construed and generously applied by some judges of the High Courts with the result that objective intended to be achieved by the amendment of section 100 appears to have been frustrated. Even before the amendment of section 100 of the Code, the concurrent finding of facts could not be disturbed in the second appeal."

18. In the case of Santosh Hazari V. Purshottam Tiwari reported in 2001 (92) RD 336 (SC) had held that a point of law which admits of no two opinions may be preposition of law but cannot be a substantial question of law. To be

'substantial' a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, in so far as the rights of the parties before it are concerned. If will, therefore, depend on the facts and circumstances of the each case whether a question of law is substantial one and involved in the case or not. The same view has been expressed again by the Apex Court in the case of Govinda Raju Vs. Marriamman 2005 (98) RD 731.

19. For the fore-going reasons, no substantial question of law involved in this appeal. The judgment and decree under challenged in the present case is perfectly valid and needs no interference.

20. In the result, the second appeal lacks merit and is dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.05.2014

BEFORE
THE HON'BLE MANOJ MISRA, J.

First Appeal From Order No. 2541 of 2006

The Oriental Insurance Co. Ltd. Petitioner
Versus
Smt. Mainaz & Ors. ... Respondents

Counsel for the Petitioner:
Sri Arun Kumar Shukla

Counsel for the Respondents:
Sri S.K. Gupta, Sri Sanjeev Kr. Tripathi

Motor Vehicle Act 1988-Section 163-A-Claim petition-for murder caused during traveling in bus-whether can be termed accidental murder or murder simplicitor? held-if finding regarding accidental murder found correct death shall be presumed as accidental-petition held-maintainable-not incumbent upon claimants to prove negligence.

Held: Para-13
In view of the above, the finding returned by the Tribunal that death occurred in an accident arising out of the use of the motor vehicle, cannot be faulted in the light of the decision of the Apex Court in the case of Rita Devi's case (supra). This court is, therefore, of the view that the claim was maintainable under Section 163-A of the Motor Vehicles Act.

Case Law discussed:
(2000) 5 SCC 113; 1993 Supp. (1) SCC 208; (1996) 9 SCC 46; (1997) 11 SCC 215.

(Delivered by Hon'ble Manoj Misra, J.)

1. The instant appeal has been filed against the judgment and award dated 22.07.2006 passed by the Motor Accident Claims Tribunal/Additional District Judge, Court No.9, Budaun in M.A.C.P. No. 21 of 2004 by which the claim petition, under Section 163-A of the Motor Vehicles Act, of the claimant-respondents, who are dependents of late Naseem Khan (the deceased), have been partly allowed thereby awarding compensation of Rs. 1,79,500/- plus interest from the date of filing of the claim petition.

2. The claim case, in short, was that on 09.04.2003, the husband of the claimant No.1, namely, Naseem Khan was traveling in Bus No. UGL 8580 from Aonla to Budaun when, at about 7:30 P.M., two unknown persons, with intent to rob the passengers, boarded the bus near village Parolia and, in the scuffle that ensued, shot at Naseem Khan thereby injuring him which resulted in his death, while taking him to the Hospital. It was claimed that Naseem Khan had a monthly

income of Rs. 5,000/- per month from an electric shop, which he was running, and as the death was caused in an accident arising out of the use of a motor vehicle, the claimants, who were dependents of the deceased, were entitled to compensation under the provisions of section 163-A of the Motor Vehicles Act.

3. The owner of the bus as well as the Insurance Company (the appellant herein) contested the claim on ground that the death was not caused in an accident arising out of the use of the motor vehicle. Instead, it was a case of murder simpliciter, therefore, the claim under Section 163-A of the Motor Vehicles Act was not maintainable. It was pleaded that in respect of the incident the father of the deceased lodged a first information report, upon which, the police after investigation laid a charge-sheet under Sections 302/307 I.P.C., which confirms that it was a case of murder, on account of enmity, and not a case of robbery. The owner as well as the Insurance Company further raised objection with regards to the income of the deceased.

4. From the claimants' side, two witnesses were examined in support of the claim, namely, Mainaz (the widow of the deceased) and Rakesh Chauhan, who was a fellow passenger and an eye-witness to the incident. Neither the owner of the bus nor the Insurance Company examined any witness.

5. The Tribunal recorded a finding that the incident took place while the bus was moving and that the deceased (Naseem Khan) was shot because he resisted the robbers. While holding as above, the Tribunal observed that the first information report did not disclose that the deceased was murdered on account of any enmity. The Tribunal found that from the evidence on record including the statement of the eye-witness, it appeared to be a case of accidental death, on account of resistance offered to the robbers, while traveling in the bus. In support of its conclusion reliance was placed on a decision of the Apex Court in the case of Smt. Rita Devi and others v. New India Assurance Company Ltd. and another : (2000) 5 SCC 113. The Tribunal, thereafter, found that as the income of the deceased, as claimed, was not substantiated, therefore, annual income would be taken at Rs. 15,000/-. After deducting one third from the annual income, a multiplicand of Rs. 10,000/- was determined to which a multiplier of 17 was applied on finding that the age of the deceased at the time of his death was 32 yrs so as to arrive at Rs.1,70,000/- as an amount payable towards loss of dependency. To the aforesaid amount, Rs. 2,000/- was added towards funeral expenses; Rs. 2,500/- towards loss of estate; and Rs. 5,000/- towards loss of consortium so as to arrive at a total of Rs. 1,79,500/- as the compensation payable. As the vehicle was found to be insured with the Insurance Company (the appellant herein) and the driver of the vehicle was having a valid licence, and there was no breach of any condition of the contract of insurance, the Tribunal awarded the compensation against the Insurance Company.

6. Assailing the award passed by the Tribunal, Sri Arun Kumar Shukla, who appeared on behalf of the appellant, submitted that from the charge-sheet, which was filed pursuant to the first information report lodged in respect of the incident, it appeared to be a case of

murder simpliciter and not an accidental murder, therefore, the claim under the provisions of the Motor Vehicles Act was not maintainable. Attention of the Court was invited to the first information report lodged by Jameel Khan (the father of the deceased) as also to the charge-sheet. Relying on the said documents, the learned counsel for the appellant submitted that from the first information report, it appears that while the bus was moving two persons boarded the bus near Parolia village and they shot at the son of the informant which caused panic amongst the bus passengers. The driver of the bus thereafter stopped the bus and the assailants alighted from the bus and escaped. It was submitted that in the first information report there is no statement that there was any act of robbery/looting to which resistance was offered by the deceased (Naseem Khan), which made the robbers fire at Naseem Khan. Relying on the charge-sheet, the learned counsel for the appellant submitted that one Nirbhai son of Ram Prakash was charge sheeted by the police for an offence punishable under Sections 302/307 I.P.C. and that no case of any robbery/looting was registered by the police. It was thus submitted that since the intention of the assailants was only to commit murder, therefore, it was not a case of accidental murder or an accidental death arising out of the use of motor vehicle so as to confer jurisdiction on the Tribunal to award compensation on a claim under section 163-A of the Motor Vehicles Act.

7. The learned counsel for the appellant did not assail the basis of calculation of the compensation awarded by the Tribunal and no other point was pressed.

8. On consideration of the submissions of the learned counsel for the appellant, the question that arise for adjudication in this appeal is as to whether the death of Naseem Khan, who was traveling in the bus, was due to an accident arising out of the use of the motor vehicle, or it was a murder simpliciter. Before answering the question it would be useful to note that the claim petition was filed under Section 163-A of the Motor Vehicles Act, therefore, it was not incumbent upon the claimant to prove any negligence on the part of the driver of the motor vehicle so as to maintain the claim.

9. To answer the aforesaid question it would be useful to examine the decision of the apex court in Rita Devi's case (supra) which has been relied by the Tribunal. In Rita Devi's case, the facts of the case were that an auto rickshaw driver was murdered in the process of stealing the auto-rickshaw. The question before the apex court was as to whether the death of auto rickshaw driver was on account of an accident arising out of the use of motor vehicle and, if so, whether a claim under section 163-A of the Motor Vehicle Act was maintainable. While deciding the said case, the apex court observed that from a reading of the provisions of section 163-A, a victim or his heirs are entitled to claim from the owner / Insurance Company a compensation for death or permanent disablement suffered due to accident arising out of the use of the motor vehicle, without having to prove wrongful act or neglect or default of any one. It was observed that if it is established by the claimants that the death or disablement was caused due to an accident arising out of the use of motor vehicle then they will be entitled for payment of compensation. As to whether murder, in a given situation, could be said

to be caused due to an accident arising out of the use of motor vehicle, the apex court observed as follows:-

"10. The question, therefore is, can a murder be an accident in any given case? There is no doubt that "murder", as it is understood, in the common parlance is a felonious act where death is caused with intent and the perpetrators of that act normally have a motive against the victim for such killing. But there are also instances where murder can be by accident on a given set of facts. The difference between a "murder" which is not an accident and a "murder" which is an accident, depends on the proximity of the cause of such murder. In our opinion, if the dominant intention of the Act of felony is to kill any particular person then such killing is not an accidental murder but is a murder simpliciter, while if the cause of murder or act of murder was originally not intended and the same was caused in furtherance of any other felonious act then such murder is an accidental murder."

Thereafter, the apex court proceeded to hold as follows:-

"14. Applying the principles laid down in the above cases to the facts of the case in hand, we find that the deceased, a driver of the autorickshaw, was dutybound to have accepted the demand of fare-paying passengers to transport them to the place of their destination. During the course of this duty, if the passengers had decided to commit an act of felony of stealing the autorickshaw and in the course of achieving the said object of stealing the autorickshaw, they had to eliminate the driver of the autorickshaw then it cannot but be said that the death so caused to the driver of the autorickshaw was an accidental murder. The stealing of the autorickshaw was the object of the felony and the murder that was caused in the said process of stealing the autorickshaw is only incidental to the act of stealing of the autorickshaw. Therefore, it has to be said that on the facts and circumstances of this case the death of the deceased (Dasarath Singh) was caused accidentally in the process of committing theft of the autorickshaw.

18. In the instant case, as we have noticed the facts, we have no hesitation in coming to the conclusion that the murder of the deceased (Dasarath Singh) was due to an accident arising out of the use of motor vehicle. Therefore, the trial court rightly came to the conclusion that the claimants were entitled for compensation as claimed by them and the High Court was wrong in coming to the conclusion that the death of Dasarath Singh was not caused by an accident involving the use of motor vehicle."

10. In the light of the law laid down by the apex court, in the instant case, what is, therefore, to be seen is whether from the evidence brought on record, it is proved that the death of Naseem Khan was as an incident of loot/ robbery/ dacoity, that is an "accidental murder", or "murder simpliciter". If this Court comes to a conclusion that it was a case of murder simpliciter that is, where the perpetrators of the crime had the intention of committing murder only, then, the claim under Section 163-A of the Motor Vehicles Act would not be maintainable. But, if this Court comes to a conclusion that it was a case of an accidental murder that is where the perpetrators of the act did not have any motive against victim but the death was a result of an act to ensure commission of

another act of felony, while the vehicle was in use, then, the claim under Section 163-A of the Motor Vehicles Act would be maintainable.

11. In the instant case, only two witnesses were examined. P.W.1 is the claimant, who is the widow of the deceased, whereas P.W.2 (Rakesh Chauhan) was a passenger traveling in the Bus when the husband of the claimant was shot at. From the statement of the claimant, it is not clear whether she was traveling in the bus at the time when the incident took place. But from the statement of Rakesh Chauhan, it is clear that he was traveling as a passenger in the bus and seated just behind the deceased (Naseem Khan). The statement of Rakesh Chauhan goes to show that two persons, with their face covered by a cloth, boarded the bus and when the deceased resisted their act of looting, they shot at the deceased. In the cross-examination, which was at the instance of the Insurance Company, the said witness stated that those persons had not only snatched money from Naseem Khan (the deceased) but they also took money from other two or three passengers. It was stated that the assailants had covered their face by a cloth and therefore they could not be identified.

12. The submission of the learned counsel for the appellant is that the story of robbery was not taken in the first information report; and the police, on investigation, found a case of murder and laid charge-sheet accordingly, therefore, the Tribunal fell in error by placing reliance on the testimony of Rakesh Chauhan, which had no value.

13. The above submission of the learned counsel for the appellant cannot be accepted, as it is well settled in law that a first information report is not a substantive piece of evidence, it could be used to contradict or corroborate its maker. It cannot be used as a substantive piece of evidence (vide Surjit Singh versus State of Punjab : 1993 Supp (1) SCC 208; State of M.P. Versus Surbhan: (1996) 9 SCC 46; Harkirat Singh versus State of Punjab: (1997) 11 SCC 215). In the instant case, the informant was not examined as a witness. Rakesh Chauhan, who was examined as an eye-witness, is not the author of the first information report. As no other person was examined either by the owner of the bus or by the Insurance Company to rebut the testimony of Rakesh Chauhan, there was no other admissible evidence to show that it was a case of murder simpliciter and not of accidental murder as an incident of loot/ robbery/ dacoity. In view of the above, the finding returned by the Tribunal that death occurred in an accident arising out of the use of the motor vehicle, cannot be faulted in the light of the decision of the Apex Court in the case of Rita Devi's case (supra). This court is, therefore, of the view that the claim was maintainable under Section 163-A of the Motor Vehicles Act. As there is no challenge by the learned counsel for the appellant to the quantum of the compensation awarded, the appeal fails and is dismissed. The interim order stands discharged.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.05.2014

BEFORE
THE HON'BLE ANIL KUMAR, J.

Misc. Single No. 2611 of 2012

Smt. Shushila Devi ...Petitioner
Versus
Union of India ...Respondent

Counsel for the Petitioner:

Sri Manish Kumar Srivastava, Sri Om Hari Tripathi

Counsel for the Respondent:
Sri Pankaj Srivastava, Sri Jagdish Prasad Maurya

C.P.C. Order VI Rule 17- Amendment-in claim petition-claim petition filed in 2009-with allegations deceased was traveling from Sultanpur to Allahabad-now in 2011 by proposed amendment-sought amend the pleading while returning from Allahabad to Sultanpur after medical check up-met in accident-barred by limitation are provided in section 17(i)(b) of Railway claims Tribunal Act 1987-held-rejection-proper.

Held: Para-15
Further, in the present case, the claim petition was filed on 19.05.2009 and an application for amendment was moved on 09.07.2011. So, the same cannot be allowed on the ground of limitation in view of the provisions as provided under Section 17 (1) (b) of the Railway Claims Tribunal Act, 1987 because Hon'ble the Apex Court in the case of Voltas Limited vs. Rolta India Limited (2014) 4 SCC 516

Case Law discussed:
AIR 1992 All. 25; (2009) 10 SCC 84; (2014) 4 SCC 516.

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

1. Heard Shri M. K. Srivastava, learned counsel for the petitioner, Shri J. P. Maurya, learned counsel for the respondents and perused the record.

2. Undisputed facts of the present case are that on 19.05.2009, petitioners filed a claim petition under Section 124-A of Railways Act, 1989 on the ground that Shri Rakesh Kumar, resident of Village-Ramapur Post-Kohadur, Police Station-Kohdaur, District-Pratapgarh (U.P.) on 24.06.2007, travelling from Sultanpur to Allahabad by train No.1067 -U.P. Saket Express, accidentally fell down from the said train at Kohndaur Railway Station due to jerk, jolt and pressure of passengers as a result thereof, he sustained grievous injuries and died on the spot due to ante-mortem injuries sustained by him, registered as O.A. No.II/u/355/09.

3. On 13.07.2009, respondent filed a written statement denying the allegation as made by claimants-petitioners in claim petition and also taken a plea/ground that the case of the applicants is not covered by the definition of "untoward incident" as provided under Railway Claims Tribunal, so the same is liable to be dismissed.

4. On 09.07.2011, petitioners moved an application for amendment of the claim petition with the prayer that the due to typographical error in paragraph nos.6 and 7-A of the claim petition, it has been wrongly typed that the deceased person was going for Allahabad for his medical checkup on 24.06.2007 by train No.1067 -U.P. Saket Express whereas it should be mentioned that "the deceased person was returning from Allahabad to Sultanpur after his medical checkup on 24.06.2007 by train No.1067 -U.P. Saket Express."

5. Amendment as sought opposed by the respondents on the ground that same changed in the entire cause of action/nature on which the claim petition has been filed as well as barred by statutory period of limitation.

6. The Railway Claims Tribunal, by order dated 09.01.2012, rejected the amendment as sought by the claimant with the following observations :-

"The object of this rule is that the Courts shouldtry the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other party."

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

8. The object of Order 6, Rule 17 primarily is that if because of certain facts not being pleaded or because of deficiencies in the pleadings, the question involved between the parties cannot be finally determined and unless it is finally determined, there is likelihood of multiplicity of proceedings. Order 6, Rule 17 empowers the Court to permit such amendments which are necessary for final determination of the issues in dispute or real point in dispute between the parties. Expression "new case" has been the subject matter of discussion and that expression has been defined to mean a new claim based on altogether new facts and new ideas. New case does not mean and include in itself where there is an additional approach to the same facts already in the pleadings as an alternative approach. So, in the context of the amendment application, an additional approach to same facts cannot amount to making out a new case.

9. The principles established by judicial decisions in respect of amendment of plaint are : (i) All amendments will be generally permissible when they are necessary for determination of the real controversy in the suit; (ii) All the same, substitution of one cause of action or the nature of the claim for another in the original plaint or change of the subject-matter of or controversy in the suit is not permissible; (iii) Introduction by amendment of inconsistent or contradictory allegations in negation of the admitted position on facts, or mutually destructive allegations of facts are also impermissible though inconsistent pleas on the admitted position can be introduced by way of amendment; (iv) In general, the amendments should not cause prejudice to the other side which cannot be compensated in costs; and (v) Amendment of a claim or relief which is barred by limitation when the amendment is sought to be made should not be allowed to defeat a legal right accrued except when such consideration is out-weighed by the special circumstances of the case.

10. Amendment can be refused in the following circumstances : (i) where it is not necessary for the purpose of determining the real question in controversy between the parties; (ii) where the plaintiff's suit would be wholly displaced by the proposed amendment; (iii) where the effect of amendment would take away from the defendant a legal right which has accrued to him by lapse of time; (iv) where the amendment would introduce totally different, new and inconsistent case and the application is made at a late stage to the proceeding; and (v) where the application for amendment is not made in good faith.

11. Accordingly, in brief, it can be held that all amendments should be allowed which satisfy the conditions (a) of not working injustice to the other side; and (b) of being necessary for the purpose of determining the real question in controversy between the parties. They

should be refused only when the other party cannot be placed in the same position as if the pleading had originally been correct but the amendment would cause him an injury which cannot be compensated by costs.

12. However, under the cover of seeking amendment it is not open to any party to substitute a new cause of action or to change the nature of the suit or to substitute the subject-matter of the suit except when the Court thinks it just and necessary. (See Ganeshi Rai v. Ist Additional District Judge A.I.R. 1992 All.25) and no amendment of plaint can be allowed if because of lapse of time some right has vested in the other party and the effect of allowing amendment would tantamount to the taking away of that right. Allowing such amendment cannot be compensated for by costs.

13. In the instant matter, as per undisputed facts, the claim petition has been filed by the claimant on 19.05.2009 with the cause of action that the deceased (Rakesh Kumar) was travelling from Sultanpur to Allahabad on 24.06.2007 by train No.1067 -U.P. Saket Express and due to accident, he died at Kohndaur Railway Station. Subsequently, the application has been moved for amendment with the prayer that the deceased person was returning from Allahabad to Sultanpur after his medical checkup on 24.06.2007 by train No.1067 - U.P. Saket Express. Thus, a new cause of action is sought to be incorporated by way of amendment in the claim petition which can not be allowed.

14. As in the case of Revajeetu Builders and Developers vs. Narayanaswamy and Sons and others (2009) 10 SCC 84, Hon'ble the Apex Court has observed as under:

The Courts have consistently laid down that for unnecessary delay and inconvenience, the opposite party must be compensated with costs. The imposition of costs is an important judicial exercise particularly when the courts

deal with the cases of amendment. The costs cannot and should not be imposed arbitrarily. In our view, the following parameters must be taken into consideration while imposing the costs. These factors are illustrative in nature and not exhaustive.

(i) At what stage the amendment was sought?

(ii) While imposing the costs, it should be taken into consideration whether the amendment has been sought at a pre-trial or post-trial stage;

(iii)The financial benefit derived by one party at the cost of other party should be properly calculated in terms of money and the costs be awarded accordingly.

(iv) The imposition of costs should not be symbolic but realistic;

(v) The delay and inconvenience caused to the opposite side must be clearly evaluated in terms of additional and extra court hearings compelling the opposite party to bear the extra costs.

(vi) In case of appeal to higher courts, the victim of amendment is compelled to bear considerable additional costs.

All these aspects must be carefully taken into consideration while awarding the costs.

The purpose of imposing costs is to:

(a) Discourage malafide amendments designed to delay the legal proceedings;

(b) Compensate the other party for the delay and the inconvenience caused;

(c) Compensate the other party for avoidable expenses on the litigation which had to be incurred by opposite party for opposing the amendment; and

d) To send a clear message that the parties have to be careful while drafting the original pleadings.

On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment.

(1) Whether the amendment sought is imperative for proper and effective adjudication of the case?

(2) Whether the application for amendment is bona fide or mala fide?

(3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) Refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case? and

(6) As a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

15. Further, in the present case, the claim petition was filed on 19.05.2009 and an application for amendment was moved on 09.07.2011. So, the same cannot be allowed on the ground of limitation in view of the provisions as provided under Section 17 (1) (b) of the Railway Claims Tribunal Act, 1987 because Hon'ble the Apex Court in the case of Voltas Limited vs. Rolta India Limited (2014) 4 SCC 516 held as under :-

"Paragraph no.30-In Revajeetu Builders and Developers v. Narayanaswamy and Sons (2009) 10 SCC 84 while laying down some basic principles for considering the amendment, the Court has stated that as a general rule the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application."

16. Thus, keeping in view the above said facts as well as finding given by Railway Claims Tribunal while rejecting the petitioners application for amendment, I do not find any illegality or infirmity in the impugned order under challenge in the writ petition.

17. In the result, writ petition lacks merit and is, accordingly, dismissed.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.05.2014

BEFORE
THE HON'BLE MRS. VIJAY LAKSHMI, J.

Criminal Revision No. 2637 of 2013

Smt. Suman & Anr. Petitioners
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri S. Kumar, Sri A.P. Tewari

Counsel for the Respondents:
A.G.A.

Criminal Revision-against order passed by Magistrate sending Nari Niketan-without considering her statement about age-without radiological opinion-placed reliance upon school leaving certificate-in statement under section 164 Cr.P.C.-stated living as husband and wife-having strong possibility of honor killing-even a minor girl can not be sent Nari Niketan against her will-held-order illegal-set-a-side with direction to send her husband's home with full security-revision allowed.

Held: Para-10
The aforesaid statement of the prosecutrix not only shows that both the revisionists are living together as husband and wife after performing marriage with their free will and consent but also shows the apprehension of prosecutrix that due to prestige issue, her family members may eliminate her. Killing a girl for securing honour of family is very common in India especially in rural areas.

Case Law discussed:
1997 All LJ 2197; 1982 All LJ 115; 1978 Cri LJ 1003.

(Delivered by Hon'ble Mrs. Vijay Lakshmi, J.)

1. Heard Mr. A.P. Tewari assisted by Mr. S. Kumar, learned counsel for the revisionists as well as learned A.G.A. on behalf of opposite party nos. 1 and 2. No one is present on behalf of opposite party no. 3 (informant) despite the fact that she has been personally served with the notice as per the report dated 10.12.2013 of the Chief Judicial Magistrate, Deoria.

2. Learned counsel for the revisionists prays that the case be decided on merits today as it is pending since long specially in the light of the note appended on the top of the cause list that "no case shall be adjourned on the ground that learned counsel for the informant is not present". Learned counsel has further submitted that even after expiry of one year from personal service of notice the opposite party no. 3 (informant) has neither appeared nor engaged any counsel to argue the case on his behalf.

3. In view of the aforesaid facts, I am deciding this criminal revision today on merits, after hearing learned counsel for the revisionist, learned A.G.A. and after carefully perusing the records.

4. The instant criminal revision is being preferred against the order dated 13.8.2013 passed by the Chief Judicial Magistrate, Court No. 17, Deoria in Criminal Case No. 310 of 2013 (State Vs. Udaiveer and others) under Sections 363 and 366 I.P.C., Police Station Khampur, district Deoria whereby the prosecutrix-revisionist no. 1 was sent to Nari Niketan.

5. The contention of the revisionist is that inspite of the fact that the revisionist no. 1/prosecutrix Smt. Suman was found to be major aged about 18 years in the medical report and as per her statement recorded under Section 164 Cr.P.C. refuting the allegations made in the F.I.R., the learned Magistrate has rejected the application of the revisionist and directed to send her to Nari Niketan, Jaitpura, Varanasi against her will.

6. Learned counsel for the revisionist has argued that on account of illegal detention of the revisionist against her will, her right to liberty is being infringed and violated. He has further argued that even a minor person cannot be ordered to be detained and kept in Nari Niketan against wishes. There is no provision in the Code or Criminal Procedure which authorises the learned

Magistrate to keep a woman in Nari Niketan against her will. Hence it has been prayed that by learned counsel for the revisionist that the impugned order which has been passed in a mechanical manner without application of judicial mind be set aside. The learned counsel for the revisionist has placed reliance on a Division Bench judgement of this Court reported in 1997 All LJ 2197 (Raj Kumari Vs. Superintendent, Women Protection House) in which, the Division Bench of this Court relying on two earlier Division Bench judgments in the matter of Smt. Parvati Devi (1982 All LJ 115) and Smt. Kalyani Chowdhary v. State of U.P. reported in 1978 Cri LJ 1003 has held that :

"...no person can be kept in a Protective Home unless she is required to be kept there either in pursuance of Immoral Traffic in Women & Girls Protection Act or under some other law permitting her detention in such a home.. In such cases, the question of minority is irrelevant as even a minor cannot be detained against her will or at the will of her father in a Protective Home."

7. In the case of Smt. Parvati Devi (supra) the Division Bench of this Court has held that :

"...confinement of an accused in Nari Niketan against her wishes could not be authorised either under Section 97 or under Section 171 Cr.P.C. and the respondents have failed to bring to the notice of the Court, any legal provision where under the Magistrate has been authorised to issue direction that a minor female witness shall against her wishes, be kept in Nari Niketan."

8. Per contra learned A.G.A. has contended that the learned Magistrate has committed no illegality while holding the prosecutrix as minor on the basis of her school certificates relying on two judgments of the Supreme Court cited in the impugned order and sending her to Nari Niketan.

9. After hearing the rival submissions of learned counsel for the parties and considering the materials on record I am of the considered view that this revision deserves to be allowed and the impugned order dated 13.8.2013 is liable to be quashed and set aside for the following reasons :-

1.The learned Magistrate while passing the impugned order has neither considered the radiological age of the prosecutrix, which was found to be of 18 years nor the statement of prosecutrix recorded under Section 164 Cr.P.C. and has passed the impugned order by relying blindly on school leaving certificate of the girl and judgment of connected criminal trial.

2.The statement recorded under Section 164 Cr.P.C. of the prosecutrix which is available on record as annexure-5 clearly shows that the prosecutrix has categorically stated that she is aged about 20 years and she understands her welfare. Her mother had came to Nari Niketan with two other family members to meet her and to take her home. All of them were talking that as she (the girl) has brought a bad name to the family they would kill her after taking her home. The prosecutrix has further stated that when they reached at the station, taking advantage of the crowd, present at railway platform she ran away. Udai Veer has not not done anything wrong with her. Udai Veer is her husband and she intends to live with him. Her mother has falsely implicated Udai Veer.

10. The aforesaid statement of the prosecutrix not only shows that both the revisionists are living together as husband and wife after performing marriage with their free will and consent but also shows the apprehension of prosecutrix that due to prestige issue, her family members may eliminate her. Killing a girl for securing honour of family is very common in India especially in rural areas.

11. In such situation, it was neither safe nor proper for the Magistrate to send the girl to Nari Niketan.

3.Even assuming for the sake of arguments, that the prosecutrix was minor at that time, she should not have been sent to Nari Niketan against her wishes in wake of the clear law as laiddown earlier by the Division Bench of this Court in the 3 decisions cited above.

12. For the abovesaid reasons, the revision is allowed. The impugned order dated 13.8.2013 is set aside. The opposite party nos. 1 and 2 are directed to release the prosecutrix forthwith, if not wanted in any other case, and send her to her husband's (revisionist no. 1 Udai Veer) home under proper security.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 29.05.2014

BEFORE
THE HON'BLE SHABIHUL HASNAIN, J.

Writ Petition No. 6046(S/S) of 2012
connected with W.P. No. 5352 of 2012, W.P. No. 6109 of 2012, W.P. No. 6169 of 2012, W.P. No. 5721 of 2012, W.P. No. 7551 of 2012 and W.P. No. 7534 of 2012

Sitaram Singh... Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Raj Kumar Singh

Counsel for the Respondents:
C.S.C., Miss Vina Sinha

Transport Corporation Act, 1950-Section 45-readwith U.P.S.R.T.C. Employees Services Regulation 1981-Regulation-37-Retirement age-58 years-as per provision of U.P. Fundamental(Amendment)Rules 2002-by notification 27.06.2002 govt. employee shall retire on 60 years-as per direction of court-retirement age shall by abide by decision of govt.-not govt. decided to enhance the age of retirement of corporation employee at 60 years-held-in terms of Court's direction petitioner shall deemed to continue in service till the age of 60 years-with all consequential benefits-petition allowed.

Held: Para-28
Taking the facts and circumstances of this case mentioned above and the law laid down by the Hon'ble Supreme Court, the court finds that a case has been made out by the petitioners. Although the permission has been given with prospective effect but the petitioners case was already covered by the court's order. As per the court's order passed in W.P. No. 527 of 2012 (Sitaram Singh and two others) dated 30.1.2012. The said order has already been quoted in the body of the order. Since the retirement of the petitioner was subject to the decision of the State Government and State Government has taken a positive decision on extending the age of retirement from 58 to 60 years, hence, the case of the petitioner should be included in the benefit given to others vide order dated 24.7.2012.

Case Law discussed:
(1994) 3 SCC 1; W.P. No. 527 of 2012.

(Delivered by Hon'ble Shabihul Hasnain, J.)

1. Heard Sri Raj Kumar Singh, Sri Rajendra Singh Chauhan learned counsel

for the peititoner and learned Standing Councel for the state, Sri C.S. Pandey and Ms. Veena Sinha for the U.P.S.R.T.C.

2. Petitioner has made following prayer :

"a. issue a writ, order or direction in the nature of certiorari thereby quashing the clause 3 of the impugned order dated 24.7.2012 (contained as Annexure no. 1 to the writ petition) wherein it is provided that this order will be effective with immediate effect and the last para of the order dated 26.7.2012 (contained in Annexure no. 2 to the writ petition) wherein it is said that the order will be effective with immediate effect, with respect to the petitioners only.

b. issue a writ, order or direction in the nature of mandamus directing the opposite parties treat the petitioners as if he was in continuous service on 24.7.2012 ignoring the clause 3 of the order dated 24.7.2012 and the last para of the order dated 26.7.2012.

c. issue a writ, order or direction in the nature of certiorari thereby quashing the impugned Notice/office dated 19.8.2011 issued by the opposite party no. 4.

d. issue a writ, order or direction in the nature of mandamus, commanding and directing the opposite parties to allow the petitioners to continue in service till he attains the age of 60 years i.e. till 31.1.2014 and to pay him salary each and every month when it falls due and give all the consequential benefits to the petitioners.

d1. issue a writ, order or direction in nature of certiorari thereby quashing the impugned order dated 16.4.2012 (contained as Annexure no. 5 to the writ petition) with respect to petitioners only.

e. issue any other suitable order or direction which this Hon'ble Court may deem fit, just and proper under the circumstances of the case in favour of the petitioner.

f. Allow the writ petition of the petitioners with cost."

3. The petitioner has argued that he has been deliberately denied the benefit of order dated 24.7.2012. By this order age of retirement in the department has been enhanced from 58 to 60 years with prospective effect.The enhancement of retirement age of the petitioners was subject to the decision taken by the State Government, as per the orders dated 24/30.1.2012 passed by this Hon'ble Court in the writ petition filed by the petitioner. Now the State Government has taken a decision on the basis of the letter dated 29.4.2012 and its G.O. dated 20.12.2011. On these two dates the petitioners were in service hence the petitioners are entitled to the benefit of order dated 24.7.2012 passed by the State Government but the State Government has denied the benefit of order dated 24.7.2012 to the petitioners by saying that the orders will be prospective in nature.

4. The matter relating to enhancement of age of superannuation of the employees of the Corporation from 58 to 60 years had been placed before the Board of Directors of the Corporation at Lucknow vide Resolution No. 3448, it was considered by the Board of Directors of the Corporation at Lucknow in its 168 meeting on 11.4.2008 and was duly

approved by them. As such Corporation and as such petitioners were entitled to continue in services till they attain the age of 60 years.

5. Petitioner has further argued that in pursuance to the letter dated 20.12.2011, in U.P. Housing and Development Board, Jal Nigam, Bridge Corporation & other corporations retirement age has been enhanced but in the Department of the petitioner the same has not been given effect even after completion of all the formalities. In other corporations the benefit of enhancement of retirement age has been been given with retrospective effect say Handloom Corporation.

6. As per the date of birth of the petitioners, they would have attained the age of superannuation on 31.1.2014, whereas the petitioners have been retired at the age of 58 years i.e. w.e.f. 31.1.2012 which is not sustainable in the eyes of law as the State Government has been pleased to grant approval to enhance the retirement age of the corporation's employees following the Government Order dated 20.12.2011 and the letter dated 29.4.2012 written by the Managing Director of the Corporation to the Principal Secretary.

7. The U.P. State Road Transport Corporation was created by the notification dated 31.5.1972 w.e.f. 1.6.1972 invoking the provision of Section 3 of the Road Transport Corporation Act, 1950 for providing efficient, adequate, economic and properly coordinated transport services in the State of U.P. and by means thereof the employees of U.P. Roadways the State Government came to be merged with the Corporation.

8. A Government Order dated 5.7.1972 was issued and thereby it was provided that whenever the Corporation shall frame service regulations for the employees in exercise of power under section 45 of the Road Transport Corporations Act, 1950, it shall include the assurance of the State Government that the service conditions of the corporations employees shall not be inferior to that of the State Government employees and further the span of service, seniority, promotion, pay fixation, leave and financial benefits shall remain same as it would have been if they would have continued under the State Government as State employees of U.P. Roadways.

9. The Corporation framed Service Regulations for its employees known as U.P. State Road Transport Corporation Employees Service Regulation - 1981 (this regulation was framed while exercising the powers under section 5(2 (c) of the Road Transport Act, 1950) for regulating the conditions of the services of thee employees appointed in the Corporation. It is specified that prior to framing of aforesaid regulations, the services of the employees of the corporation were governed by the rules, governing service conditions of the employees of State Government. It is admitted that as on date the petitioners are governed by the aforesaid regulations. Regulation 37 provides that the retirement age will be 58 years.

10. In exercise of powers under Article 309 of the Constitution of India, an amendment in Fundamental Rule- 56 of the U.P. Fundamental Rules, contained in Financial Handbook, Volume, Part II, Part II-IV, which came to be known as the Uttar Pradesh Fundamental (Amendment)

Rules, 2002 was incorporated under the notification dated 27.6.2002, whereby age of retirement of the Government employees was enhanced from 58 to 60 years.

11. The approval of the Board of Directors has got the Statutory Force because the Regulations have been made as per the provision of the Road Transport Act, 1950 and as per section 45 (2)(c) the regulations have been made and the following the regulations the Board of Directors have taken a decision to enhance the age of superannuation from 58 to 60 years then there is no scope to deny the benefit of extension of retirement age from 58 to 60 years to the petitioners from the date 20.12.2011 or 29.4.2012 by the State Government (the only thing which requires to be done that is the grant of approval) because the government on the basis of letter dated 29.4.2012 and the G.O. dated 20.12.2011 has taken the decision to enhance the retirement age.

12. Board of Directors in its meeting no. 168 which was held on 11.4.2008 decided that the retirement age of the employees of the corporation be enhanced from 58 to 60 years. Managing Director of the Corporation had sent the approval granted by the Board of Directors of the Corporation to Principal Secretary, Transport Department, Government of U.P., Lucknow for enhancing the age of retirement of the employees of the Corporation from 58 to 60 years.

13. After decision of State Government the opposite party no. 2 vide letter dated 20.12.2011 had informed to the Chairman / M.D./ C.E.O. of all the corporations regarding the enhancement of the retirement age. In pursuance to the aforesaid letter dated 20.12.2011, in U.P. Housing and Development Board, Jal Nigam, Bridge Corporation the retirement age has been enhanced but in the Department of the petitioner the same has not been given effect even after completion of all the formalities.

14. Uttar Pradesh State Control over Public Corporation Act, 1975 framed by the U.P. Act No. 41 of 1975, provide that every statutory body established / constituted under any U.P. Act shall discharge of its function guided by such directions on question of policy, as may be given by the State Government. Uttar Pradesh Power Corporation Ltd. is also public Sector Corporation but the State Government discriminated with the department of petitioner as in the Uttar Pradesh Power Corporation Ltd. and other corporations, the age of retirement of the employees has been enhanced from 58 years to 60 years.

15. On 8.7.2011 and 18.7.2011 the Hon'ble Court passed an order that the employees of the U.P. Jal Nigam may be permitted to continue as contract employee till they completes 60 years. On 3.9.2012 petitioner made representation to the authorities to enhance the age by giving the benefit of letter dated 24/26-7-2-2012.

16. On 30.3.2012 Government of U.P. Special Secretary wrote a letter to the Managing Director regarding enhancement of age. Managing Director wrote a letter to the Principal Secretary that the Board of Directors has already taken a decision to enhance the retirement age from 58 to 60 years. Managing Director wrote a letter on 29.4.2012 to the Principal Secretary.

17. A general letter was issued by the Principal Secretary regarding grant of dearness allowance to all the corporations. On 17.4.2012 an order was passed by the Principal Secretary for enhancement of age of the Handloom Corporation from 58 to 60 years with retrospective effect.

18. On 24.7.2012 an order was passed to the effect that the Corporation can enhance the retirement age of its employees from 58 to 60 years.

19. The Corporation in pursuance of the order dated 24.7.2012 accorded the benefit given by the State Government regarding enhancement of retirement age.

20. A perusal of Annexure no. 1, issued by the Principal Secretary Sri B.S. Bhullar dated 24.7.2012 addressed to the Managing Director, U.P. State Road Transport Corporation, Lucknow (hereinafter referred to as 'Nigam') shows that the government has granted permission for extending the age of superannuation of regular and full time employees of Nigam. It is interesting to note that this has been done with reference to the letter of the Managing Director bearing no. 37GCHQ/12592 CHEO/84 dated 29.4.2012. It has been mentioned that the financial burden arising out of this extension of age of retirement will be borne out by the Nigam itself. No financial assistance will be provided by the State Government and this scheme shall pay effective from immediate effect.

21. Annexure no. 2 is clearly an 'office order' issued by Sri Alok Kumar, Managing Director dated 26.7.2012 i.e. exactly after two days from the order of Principal Secretary. This order also clearly mentions that the permission has been granted by the government with reference to the letter written by he Managing Director dated 29.4.2012 (supra).

22. Annexure no. 5 is a government order issued by Sri B.S. Bhullar, Principal Secretary dated 16.4.2012 with regard to the extension of age of superannuation from 58 to 60 years in the Nigam. This rejection order has been passed on the various references made by the Managing Director to the Principal Secretary e.g. dated 23.2.2011, 5.11.2012, 10.2.2012, 30.3.2012 and 13.4.2012. It is important to note that last letter has been sent on 13.4.2012 and the rejection order has been passed three days' later on 16.4.2012 by the Principal Secretary. The Principal Secretary has rejected the recommendation of the Managing Director on the ground that the financial condition of the Nigam was not good with reference to the financial year 2009-10 and 2010-11. It has been mentioned that since the Nigam was running in loss, hence, there was no good ground to extend the age of the employees for superannuation from 58 to 60 years.

23. Comparative study of Annexure no. 1 and 5 gives contradictory picture. Vide Annexure no. 5 the case has been rejected on 16.4.2012 and on the last recommendation letter written on 13.4.2012. Vide Annexure no. 1 dated 24.7.2012 the age of superannuation has been allowed to be extended from 58 to 60 years on the recommendation of the same Managing Director vide his letter dated 29.4.2012. The recommendation made on 13.4.2012 is the ground for rejection and the recommendation dated 29.4.2012 is the ground of permission.

The Managing Director and the Principal Secretary are the same and both the recommendations are of April, 2012 i.e. the same month and the year.

24. If the court lifts the veil some interesting facts come to the fore. It transpires that there was a contempt petition pending against the Principal Secretary Mr. B.S. Bhullar for non-compliance of the orders passed by this court in W.P. No. 527 of 2012 (Sita Ram Singh and two others) vide order dated 30.1.2012. Following orders were passed which has been annexed as Annexure no. 4 to the writ petition. The order is as follows :

"Hon'ble Devendra Kumar Arora,J.

Notice on behalf of opposite party no.1 has been accepted by the learned Chief Standing Counsel, while Sri Mahesh Chandra, learned counsel has accepted notices on behalf of opposite parties no. 2 and 3.

Learned counsel for the petitioners submits that the present case is covered by the judgment and order dated 24.01.2012 passed in Writ Petition No.435 (S/S) of 2012, Saleem Akhtar vs. State of U.P. and others. The aforesaid order reads as under:-

"The issue with respect to enhancement of age of the employees of U.P. State Road Transport Corporation is pending before the State Government since 05.01.2012. The learned counsel for the petitioner informs that the Election Commission of India has already informed the Chief Election Officer of the State that the Commission has no objection with respect to take decision by the State Government regarding enhancement of age of the employees of the Corporation, but no propaganda/ advertisement be made.

As the matter is pending before the State Government regarding enhancement of age of the employees of the Corporation, accordingly the Principal Secretary, Transport Department, Civil Secretariat, Lucknow is hereby directed to examine and take decision on the recommendation sent by the Managing Director, U.P. State Road Transport Corporation for enhancing the age of the employees and take decision within one month from the date of receipt of a certified copy of this order.

The retirement of the petitioner will be subject to the decision of the State Government.

The present writ petition is disposed of finally in terms of the judgment & order dated 24.01.2012, passed in Writ Petition No. 435 (S/S) of 2012, Saleem Akhtar vs. State of U.P. & others.

The retirement of the petitioners will be subject to the decision of the State Government.

With the aforesaid observations and directions, the writ petition is disposed of finally. "

25. By this order the court had directed the opposite parties to take a decision on the recommendation sent by the Managing Director of the Nigam for enhancement of the age of the retirement of employees within one month from the date of receipt of the certified copy of that order. When this order was not complied with within the stipulated

period contempt petition was moved and orders were passed on 29.3.2012 for compliance of the resolution dated 5.1.2012 passed by the Board of Directors. It was directed that in case the decision has not been taken in compliance of the court's order respondent no. 1 i.e. Principal Secretary shall appear on 17.4.2012.

26. When the Principal Secretary was summoned he rejected the resolution / recommendation of the Managing Director on 16.4.2012 in great haste with malice towards the petitioner as well as contempt petitioners. The contempt petition naturally failed and the endeavour of the petitioner was thwarted. When the temperature cooled down in the office of the Principal Secretary the same officer granted the permission for extending the age of superannuation after three months on the recommendations made in the month of April itself. It was made prospective so that benefit may not accrue to the petitioners in a way it was a attempted to teach them a lesson.

27. In the case of S.R. Bommai Vs. Union of India & others (1994) 3 SCC 1, the Hon. Supreme Court has held that "when the Act is alleged to be malafide and there is no reason except which occasion to exercise the said powers, the said Act should be considered to be ex-facie arbitrary and malafide. In those circumstances, the Court has to interject itself, otherwise, it would result into failure and / or miscarriage of justice."

28. Taking the facts and circumstances of this case mentioned above and the law laid down by the Hon'ble Supreme Court, the court finds that a case has been made out by the petitioners. Although the permission has been given with prospective effect but the petitioners case was already covered by the court's order. As per the court's order passed in W.P. No. 527 of 2012 (Sitaram Singh and two others) dated 30.1.2012. The said order has already been quoted in the body of the order. Since the retirement of the petitioner was subject to the decision of the State Government and State Government has taken a positive decision on extending the age of retirement from 58 to 60 years, hence, the case of the petitioner should be included in the benefit given to others vide order dated 24.7.2012.

29. The writ petition is, thus, allowed.

30. The petitioners will be treated to have retired after attaining the age of 60. If they have already completed the age of 60 years they will be entitled to the salary and other benefits including allowances till they have attained the age of 60 years. They will be treated to be in service during this period. The benefit will only be available to the persons who are included in this bunch of writ petitions.

31. The order dated 24.7.2012 (contained as Annexure no. 1 to the writ petition) the order dated 26.7.2012 (contained in Annexure no. 2 to the writ petition) shall be quashed to the effect which denies the benefit to the petitioners by being prospective in nature. This prospectiveness shall remain intact for others who are governed by that government order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.05. 2014

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

Civil Misc. Writ Petition No. 8730 of 2014.

Committee of Management, Islamia Inter College, Firozabad & Anr.

.Petitioners

Versus

State of U.P. & Ors. .....Respondents

Counsel for the Petitioners:
Sri Ashok Khare, Sri Anil Bhushan

Counsel for the Respondents:
C.S.C., Sri R.K. Ojha, Sri Namit Srivastava
Sri Parul Srivastava

U.P. High School & Intermediates Colleges(Payment of salaries of teachers and other employees) Act 1971-Section 5(2)-Single operation order-DIOS-failed to consider the clause-VII of scheme of Administration-affirmed by in special Appeal-providing the old management shall to look after the affairs till validity elected new successor-takeover in absence of those contingencies justifying action of passing Single operation-quashed.

Held:Para-19

From the perusal of the impugned order it is manifest that the only reason in the order is that since the election has not been held within time and the Committee of Management has outlived its period, therefore, it was necessary to invoke sub-section (2) of Section 5 of the Act No. 24 of 1971. In the order no finding has been recorded by the DIOS that there was any difficulty in disbursement of salary or Management has failed to comply the provisions of Section 5(1) of the Act, 1971, which provides that the Management shall deposit certain percentage of fee realized from the students. The reason mentioned by the DIOS for invoking Section 5(2) of the Act, 1974 is unsustainable. The said reason was considered by the Division Bench while considering the order of the single operation of the same Institution. The Division Bench held that in view of clause-VII of the Scheme of Administration the office bearers shall continue till his successor is elected.

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

1. The petitioners have filed this writ petition aggrieved by the order of the District Inspector of Schools dated 30 December 2013, whereby he has passed an order of single operation under Section 5(2) of the Uttar Pradesh High Schools and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act, 1971 (U.P. Act No. 24 of 1971). This writ petition is in respect of the educational Institution namely Islamiya Inter College, which has been founded by the petitioner no.2.

2. Briefly stated facts of this case are; last election of Committee of Management of Islamia Inter College, Firozabad (for short, "the Institution") was held on 27.01.2008 wherein Gulab Navi-petitioner no. 2 in the instant writ petition was elected as Manager and one Mohd. Ubedulla was elected as President. The signatures of the petitioner no. 2 was attested by the District Inspector of Schools (for short, "the DIOS") vide order dated 19 January 2009. The term of the office bearers of the Committee of Management is three years. The fresh election was held on 19 December 2010. The petitioner no. 2 was again elected as a Manager and Mohd. Ubedulla was elected as President. After the election the papers were forwarded to the DIOS for the recognition of Committee of Management. The DIOS sent the matter to the Regional Level Committee for consideration of recognition but in the meantime on 04 March 2011 he passed an order of single operation.

3. Aggrieved by the said order the Committee of Management preferred a Writ Petition No. 14663 of 2011. The said writ petition was dismissed by this Court on the ground that the term was admittedly expired and the DIOS has made arrangement for single operation keeping in view the interest of the teachers and employees of the Institution since the managerial dispute was pending before the Regional Level Committee.

4. Dissatisfied with the order of the learned Single Judge dated 10 March 2011 the petitioners preferred a Special Appeal No. 420 of 2011. The said special appeal was allowed on 17 March 2011 and the order of learned Single Judge was modified setting aside the order of single operation. The Division Bench was of the view that the Scheme of Administration specifically provides that the erstwhile office bearers and members of the Committee of Management were entitled to continue till their successors are chosen, therefore, the office bearers of the Committee of Management were held to be entitled to continue and manage the affairs of the College. The Division Bench maintained the direction of the learned Single Judge, whereby He had directed the Regional Level Committee to decide the managerial dispute within certain time.

5. The Regional Level Committee after hearing the concerned parties held that the election dated 19 December 2010 wherein the petitioner no. 2 Gulab Navi was elected as Manager and Mohd. Ubedulla as President, was a valid election and it rejected the claim of the rival faction who had held their election on 19 December 2010. In compliance thereof the DIOS recognized the petitioner no. 2 as Manager and his signatures were attested. A copy of the order of the Regional Level Committee and the DIOS are on the record as annexure-7 & 8 to the writ petition.

6. It is averred that the previous election was held on 19.12.2010. The process for the fresh election was initiated on 22 December 2013. It is stated that due to some unavoidable reason the meeting could not be held on 12 December 2013, therefore, a fresh agenda was issued on 22 December 2013 for holding the election on 12 January 2014. The DIOS was requested to send an Observer and the notice was published in the local newspaper. A copy of the said notice is on the record as annexure-11 to the writ petition.

7. It is stated that the election was held on 12 January 2014 and the copy of the election proceeding and other papers were forwarded to the office of the DIOS for the approval of the Regional Level Committee. The DIOS instead of taking the recognition of the Committee of Management, has passed the impugned order of single operation.

8. I have heard Sri Ashok Khare, learned Senior Advocate assisted by Sri Anil Bhushan, learned Counsel for the petitioners, Sri R.K. Ojha, learned Senior Advocate assisted by Sri Namit Srivastava, learned Counsel for the complainant, and learned Standing Counsel appearing for the State respondents.

9. Sri Ashok Khare, learned Senior Advocate, submits that the Regional Level Committee had approved the election of the petitioners and earlier

order passed by the DIOS was set aside by this Court and in the Special Appeal it was held that as per the Scheme of Administration the office bearers shall continue till their successors are elected. He further submits that the fresh election has also been held on 12 January 2014 and papers have been sent to the office of the DIOS. Before the decision has been taken, the DIOS on the basis of complaint has passed the order of single operation.

10. Lastly he urged that the DIOS has illegally invoked his power under Section 5(2) of the U.P. Act No. 24 of 1971 as none of the conditions for invoking said power is specified in the facts of this case as there was no fault of Management in depositing the Management fund or there was no difficulty in disbursement of the salary of teachers and employees.

11. Learned Senior Advocate Sri R.K. Ojha submits that the term of the Committee of Management is over and the fresh election has not been recognized by the authorities, therefore, the DIOS has rightly invoked his power under Section 5(2) of the U.P. Act No. 24 of 1971.

12. I have heard learned Counsel for the parties and considered their submissions.

13. The petitioner's Institution is a minority Institution. The undisputed election was held on 27.01.2008. In the said election the DIOS has recognized the petitioner no. 2 as Manager and attested the signatures on 19 January 2009. The fresh elections were held on 19 December 2010, wherein the petitioner no. 2 was again elected as Manager of the College. The dispute arose with regard to the said election and the matter was decided by the Regional Level Committee on 30 July 2011, wherein it was found that the petitioner no. 2 was validly elected Manager of the Committee of Management. The DIOS had passed a consequential order on 19 August 2011 attesting the signatures of petitioner no. 2.

14. Pertinently, while the matter was pending before the Regional Level Committee previously also the single operation order was challenged by the petitioner by a Writ Petition No. 14663 of 2011, which was disposed of by this Court on 10.03.2011 with a direction to the Regional Level Committee to decide the matter expeditiously but the learned Single Judge refused to interfere with the order of single operation.

15. Feeling aggrieved by the order of learned Single Judge the petitioners had filed a Special Appeal No. 420 of 2011. In the said Special Appeal, vide order dated 17.03.2011, the order of learned Single Judge was modified and it was found that clause-7 of the Scheme of Administration provides that every office bearer shall continue till his successor is elected. Clause-7 of the Scheme of Administration reads as under;

VII. Term of Members :-.

The term of office bearers and members V(a) & (c) other than ex-officio members shall be three years from the date they are chosen, provided that the term of every office bearer shall be deemed to have continued till his successor is chosen. The term of the ex-officio members shall be governed by the regulations of the Act.

16. The Division Bench has considered the said clause in its judgment

dated 17 March 2011 and set aside the order of the DIOS for single operation. The relevant part of the order is extracted hereunder;

"Sri Khare invited the attention of the Court to Clause 7 of the Scheme of Administration, which finds place at page 50 of the paper book wherein terms of the office bearers and members has been provided to be three years from the date they are chosen but they shall continue till their successor is chosen. He, therefore, submitted that the appellant is validly elected committee of management and till such time the rival claims are decided the appellants are entitled to continue to function as the committee of management and, therefore, the order of single operation could not have been passed.

Sri J.J. Munir, learned counsel could not successfully challenge the aforesaid submission.

In this view of the matter, even otherwise, we find that Clause 7 of the Scheme of Administration specifically takes care of such contingency and the erstwhile office bearers and members of the committee of management are entitled to continue till their successor is chosen and, therefore, the appellants are entitled to continue and manage the affairs of the College including that of operating the accounts. The order dated 4th March, 2011 passed by the District Inspector of Schools, Firozabad directing for single operation is, therefore, set aside."

17. In the instant case the petitioner no. 2 was recognized in two consecutive elections of 2008 and 2010 and the fresh election has also been held, papers of which have been submitted in the office of the DIOS but no order has been passed by the DIOS or the Joint Director of Education. Therefore, there was no difficulty in disbursement of the salary in the Institution.

18. The Section 3 of the U.P. Act No. 24 of 1971 enjoins that the salary of teachers and employees shall be paid within a time frame mentioned in the said Section without deduction of any kind except those authorized by the regulations or by any rules made under the Act. Section 5 of the U.P. Act No. 24 of 1971 provides the procedure for payment of salaries.

19. From the perusal of the impugned order it is manifest that the only reason in the order is that since the election has not been held within time and the Committee of Management has outlived its period, therefore, it was necessary to invoke sub-section (2) of Section 5 of the Act No. 24 of 1971. In the order no finding has been recorded by the DIOS that there was any difficulty in disbursement of salary or Management has failed to comply the provisions of Section 5(1) of the Act, 1971, which provides that the Management shall deposit certain percentage of fee realized from the students. The reason mentioned by the DIOS for invoking Section 5(2) of the Act, 1974 is unsustainable. The said reason was considered by the Division Bench while considering the order of the single operation of the same Institution. The Division Bench held that in view of clause-VII of the Scheme of Administration the office bearers shall continue till his successor is elected.

20. Having regard to the facts and circumstances of the case, I am of the

view that the order of the DIOS is contrary and in teeth of the judgment of the Division Bench in Special Appeal No. 420 of 2011 dated 17.03.2011. For the said reason the order of single operation passed by the DIOS needs to be set aside. Accordingly, it is set aside. It is provided that the papers relating to the election dated 12.01.2014, which have been submitted to the office of the DIOS, is pending consideration. The DIOS is directed to take appropriate decision on the papers submitted by the Committee of Management in terms of the Government Order dated 19 December 2000 and 21 October 2008 as early as possible preferably within eight weeks from the date of communication of this order, but in any case, not later than three months.

21. Thus writ petition is, accordingly, allowed.

22. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.03.2014

BEFORE
THE HON'BLE ARUN TANDON, J.
THE HON'BLE ARVIND KUMAR MISHRA-I, J.

Civil Misc. Writ Petition No. 17066 of 2014

Prof. Ram Chandra. .....Petitioner
Versus
State of U.P. & Ors. .....Respondents

Counsel for the Petitioner:
Sri J.P. Kushwaha, Sri Virendra Kumar, Sri R.K. Ojha

Counsel for the Respondents:
C.S.C., Sri U.N. Sharma, Sri Neeraj Tiwari, Sri Neeraj Tripathi

(A)State Universities Act-1973-Section 68-Suo moto action by chancellor-petitioner was appointed on post of lecturer in Geology-while vacancy advertised for post of Professor-in which petitioner not found suitable-held-appointment against vacancy without advertisement-illegal.

Held:Para-18
We, therefore, see no reason to interfere with the order of the Chancellor wherein he has held the appointment of the petitioner as Lecturer in the year 2002 and Reader in the year 2003 in the subject of Geology was illegal being in the teeth of the statutory provision of Section 31 of the U.P. State Universities Act, 1973.

(B)State Universities Act-1973-Section 31(1) and (4)-Appointment on post of reader-selection committee not constituted as per statutory requirement-V. C.-due to the reason best to him-constituted same selection committee-who had earlier recommended for appointment on post of lecturer without advertisement-held-illegal-however salary already drawn by petitioner shall not be returned.

Held:Para-25
Even otherwise if substantial justice against technical objection are pitted against each other interest of substantial justice must prevail. Universities are institutions of learning and if illegal appointments are permitted to be perpetuate in such institutions, only God can save the education in the State. If the Vice Chancellor who is the Chief Executive of the University himself acts unfairly as has been noticed by the Chancellor in the order impugned, this Court will not interfere with the order of the Chancellor which has the effect of curing the said illegality.

Case Law Discussed:
Civil Appeal No. 979 of 2014; AIR 1936 PC 253.

(Delivered by Hon'ble Arun Tandon, J.)

1. Heard Sri R.K. Ojha, Senior Advocate on behalf of the petitioner, Standing Counsel on behalf of respondent no.1, Sri Neeraj Tripathi, advocate on behalf of respondent no.2, Sri U.N. Sharma, Senior Counsel assisted by Sri Neeraj Tiwari, advocate on behalf of respondents no.3 and 4.

2. The petitioner before this Court seek quashing of the order dated 03.03.2014 passed by the Chancellor, Bundelkhand University, Jhansi i.e. the Governor of the State of Uttar Pradesh as well as the consequential order dated 07.03.2014 issued by Registrar, Bundelkhand University, Jhansi in compliance thereof (annexure nos.10 & 11 to the writ petition respectively).

3. The facts in short giving rise to the present writ petition are as follows:

4. The Bundelkhand University, Jhansi is a University established under the provisions of the U.P. State Universities Act, 1973 (hereinafter referred to as the Act 1973). The University is said to have published advertisement for making appointment on the post of Professor in the year 2002 being Advertisement No.3/2001. This advertisement did not include any post of Lecturer in the department of Geology.

5. The petitioner applied in response to the advertisement. A Selection Committee in accordance with Section 31 sub-section 4 of the Act 1973 was constituted which included two experts nominated by the Chancellor of the University. The Selection Committee did not find the petitioner suitable for the post of Professor but surprisingly, it is alleged that the Selection Committee recommended that the petitioner may be appointed on the post of Lecturer. The post thereof was not subject matter of the advertisement. This recommendation was acted upon by the University and the petitioner is said to have been appointed as Lecturer vide order dated 28.02.2002.

6. It appears that there was another advertisement published by the University for the post of Reader in the subject of Geology being Advertisements No.2 of 2002 and 3 of 2002. The vacancy for the post of Reader in the subject of Geology was reserved for the other backward class category to which the petitioner belongs. The Selection Committee is said to have held selection and to have recommended the name of the petitioner for appointment as Reader vide its recommendation dated 30.01.2003. This recommendation of the Selection Committee for appointment of the petitioner as Reader was accepted by the Executive Council of the University in its meeting held on 01.02.2003. This resulted in the issuance of appointment letter in favour of the petitioner. The petitioner joined and continued to function as Reader in terms of the said appointment letter. He was also granted benefit of career advancement scheme and promoted as Professor.

7. It appears that certain complaints were received by the Chancellor of the University in respect of the appointment of the petitioner. The Chancellor under Section 68 (a) of the Act 1973 decided to exercise suo motu power having regard to seriousness of the allegations made. The Chancellor issued notice to the University as well as to the petitioner to show cause in the matter of his appointment as Reader and Lecturer both being illegal. The University in response to the notice

produced the original records. The petitioner also submitted his reply which has been examined in detailed by the Chancellor under the order impugned dated 03.03.2014.

8. It has been recorded that appointment of the petitioner as Lecturer in terms of Advertisement No.5 of 2001 was patently illegal, as no post of Lecturer in the subject of Geology was included under the advertisement. Therefore, appointment against the non-advertised vacancy was illegal.

9. The appointment on the post of the Reader in the subject of Geology in terms of Advertisements No. 2 of 2002 and 3 of 2002 was also illegal for the following reasons; (a) the Selection Committee for appointment of Reader in the University has to be constituted in accordance with the provisions of Section 31 sub-clause 4 i.e. it has to be comprise of two experts to be appointed by the Chancellor amongst others; (b) neither any request was received from University for appointment of two experts for constituting the Committee in response to the aforesaid Advertisements No.2 of 2002 and 3 of 2002 nor any expert in accordance with Section 31 (4) of the Act was appointed by the Chancellor. Therefore, the constitution of the Selection Committee which selected the petitioner itself was patently illegal; (c) the Vice Chancellor for the reasons best known to him had constituted the same Selection Committee which had earlier recommended the petitioner for the post of Lecturer when the post advertised was that of Professor. Therefore, the Chancellor has recorded his satisfaction that the Vice Chancellor had not acted fairly in the matter of the constitution of the Selection Committee which selected the petitioner.

10. So far as the findings recorded on the issue of the appointment of the petitioner as Lecturer in terms of Advertisement No.5 of 2001 is concerned, nothing much could be added by the counsel for the petitioner. He fairly conceded that in absence of the post of Lecturer in the subject of Geology being included in the Advertisement No.5 of 2001, there could have been no recommendation by the Selection Committee for appointment of the petitioner as Lecturer. If the petitioner was not found suitable for the post of Professor, the Selection Committee should have closed the selection after recording its satisfaction to that effect.

11. We find that the reasons assigned by the Chancellor in the order impugned for coming to the conclusion that the appointment of petitioner as Lecturer against non-advertised post was illegal does not warrant any interference from this Court under Article 226 of the Constitution of India.

12. We may record that repeatedly the Apex Court has held that there can be no appointment against non-advertised vacancy and any attempt to the contrary would be in violation of Article 14 of the Constitution of India. Reference Renu and others Vs. District & Sessions Judge, Tees Hazari & others in Civil Appeal No.979 of 2014 decided on 12.02.2014.

13. Now turning to the issue of appointment of the petitioner as Reader. At the very outset we may record that Section 31 (1) of the Act 1973 as applicable on the relevant date provides

that the teachers of the University and the teacher of an affiliated or associated college shall be appointed by the Executive Council on the recommendation of the Selection Committee in the matter hereinafter specified. Meaning thereby that all other modes of appointment except on the recommendation of the Selection Committee constituted under the Sub-clause of Section 31 of the Act 1973 is barred. Any infraction in the matter of the constitution of the Selection Committee as provided under Section 31 (4) would render the appointment contrary Section 31 to the U.P. State Universities Act, 1973, therefore, patently illegal.

14. would be worthwhile to reproduce Section 31 (1) and Section 31 (4) of the Act 1973 which read as follows:

31. Appointment of Teachers.-(1) Subject to the provisions of this Act, the teachers of the University and the teacher of an affiliated or associated college (other than a college maintained exclusively by the State Government [* * *] shall be appointed by the Executive Council or the management of the affiliated or associated college, as the case may be, on the recommendation of a Selection Committee in the manner hereinafter provided [The Selection Committee shall meet as often as necessary]

31 (4) (a) the Selection Committee for the appointment of a teacher of the University (other than the Director of an Institute and the Principal of a constituent college), shall consist of-

(i) the Vice-Chancellor who shall be the Chairman thereof,

(ii) the Head of the Department concerned:

Provided that the Head of the Department shall not sit in the Selection Committee, when he is himself a candidate for appointment or when the post concerned is of a higher rank than his substantive post and in that event his office shall be filled by the Professor in the Department and if there is no Professor by the Dean of the Faculty:

[Provided further that where the Chancellor is satisfied that in the special circumstances of the case, a Selection Committee cannot be constituted in accordance with the preceding proviso, he may direct the constitution of the Selection Committee in such manner as he thinks fit.]

(iii) in the case of a Professor or Reader, three experts, and in any other case, two experts be nominated by the Chancellor;"

15. It is apparently clear that the Selection Committee for the selection on the post of teachers in the University, which would include the post of Reader, has to comprise of three experts to be nominated by the Chancellor.

16. It is admitted on record that so far as the Selection Committee constituted with reference to Advertisements No.2 of 2002 and 3 of 2002 for the post of Reader in the department of the Geology is concerned, neither the University asked for names of the three experts to be nominated for the Selection Committee nor in fact any experts were nominated by the Chancellor for the Selection Committee to be constituted. In absence of Selection Committee having been constituted in terms of Section 31 (4) of the Act, 1973, any recommendation by the unauthorized Selection Committee would be of no legal consequence.

Therefore, appointment of the petitioner even if accepted by the Executive Council would be contrary to Section 31 of the Act 1973, therefore, per se void.

17. From the order of Chancellor, we further find that he is correct in recording that the Vice Chancellor, Bundelkhand University, Jhansi could not have constitute the Selection with reference to Advertisements No.2 of 2002 and 3 of 2003 as was done in the facts of the case. He is also right in recording that the Vice Chancellor deliberately constituted the same Selection Committee which had recommended the petitioner for appointment as Lecturer when no such post had been so advertised under Advertisement No.5 of 2001. The inference drawn by the Chancellor is more than justified.

18. We, therefore, see no reason to interfere with the order of the Chancellor wherein he has held the appointment of the petitioner as Lecturer in the year 2002 and Reader in the year 2003 in the subject of Geology was illegal being in the teeth of the statutory provision of Section 31 of the U.P. State Universities Act, 1973.

19. We will now examine the issues which has been canvassed by Sri R.K. Ojha, Senior Advocate on behalf of the petitioner; (a) that the power of the Chancellor to act suo motu under Section 68 of the Act is hedged with the condition that he cannot entertain any such grievance after expiry of three months from the date when the question could have been raised for the first time; (b) that absolutely no special satisfaction was recorded in the order by the Chancellor for exercise of his suo motu power.

20. For consideration of the aforesaid two contentions raised on behalf of the petitioner, it is worthwhile to reproduce Section 68 of the Act 1973 which reads as follows:-

68. Reference to the Chancellor.- If any question arises whether any person has been duly elected or appointed as, or is entitled to be, member of any authority or other body of the University, or whether any decision of any authority or officer of the University [including any question as to the validity of a Statute, Ordinance or Regulation, not being a Statute or Ordinance made or approved by the State Government or by the Chancellor)] is in conformity with this Act or the Statutes or the ordinance made thereunder, the matter shall be referred to the Chancellor and the decision of the Chancellor thereon shall be final :

Provided that no reference under this section shall be made-

(a) more that three months after the date when the question could have been raised for the first time;

(b) by any person other than an authority or office of the University or a person aggrieved :

Provided further that the Chancellor may in exceptional circumstances-

(a) act suo motu or entertain a reference after the expiry of the period mentioned in the preceding proviso;

(b) where the matter referred relates to a dispute about the election and the eligibility of the person so elected is in doubt, pass such orders of stay as he thinks just and expedient;"

21. From simple reading of Section 68 of the Act, it is apparently clear that limitation of three months' period from the date the question could be raised as well as person raising the objection answering with description of the aggrieved person are both relateable to a

reference to be made by a third person. These conditions relateable to the exercise of suo motu power of the Chancellor. Therefore, we are inclined to hold that so far as the exercise of suo motu power by the Chancellor is concerned, neither any limitation is prescribed under Section 68 of the Act nor first proviso has any applicability in that respect.

22. So far as the issue of recording of reasons disclosing the exceptional circumstances for exercise of suo motu power is concerned, we may record that it is not necessary that the Chancellor should specifically so mention in the order itself, as to what exceptional circumstances require him to act if exceptional circumstances can be easily ascertained from the order itself.

23. From the order, we find that certain complaints were received in the matter of illegal appointment of the petitioner and the Chancellor had written a letter as early as on 24.01.2011 to the Vice Chancellor to submit his comments and records in the matter of appointment of the petitioner. It took three years for the University to respond and the records were made available to the Chancellor only on 09.01.2014.

24. We may record that the Chancellor is the Head of the Universities established under the provisions of the U.P. State Universities Act 1973. It is his primarily responsibility to see that the provisions of the Act are carried out in letter and spirit. If a Vice Chancellor of such a University decides to act contrary to the Act 1973 to make an appointment dehors the same, the Chancellor must act and if the Chancellor acts, this Court will not interfere.

25. Even otherwise if substantial justice against technical objection are pitted against each other interest of substantial justice must prevail. Universities are institutions of learning and if illegal appointments are permitted to be perpetuate in such institutions, only God can save the education in the State. If the Vice Chancellor who is the Chief Executive of the University himself acts unfairly as has been noticed by the Chancellor in the order impugned, this Court will not interfere with the order of the Chancellor which has the effect of curing the said illegality.

26. Now turning to the other issue which has been raised by Sri R.K. Ojha, Senior Advocate on behalf of the petitioner, namely that the petitioner as on date has worked for nearly 12 years as Lecturer and, therefore, this Court may interfere with the order of the Chancellor which has set aside his appointment as Reader only because of the illegality in the constitution of the Selection Committee specifically in the circumstances when the petitioner had no role to play in the constitution of the Selection Committee by the Vice Chancellor. He submits that the experts did participate in the selection.

27. It is the settled principle of law that if law requires something to be done in a particular manner it has to be done in that manner or not at all. Privy Council in Nazir Ahmad v. King Emperor; AIR 1936 PC 253 laid down the dictum that when a statute requires a thing to be done in a particular manner, it must be done in that manner or not at all. The Hon'ble Apex Court has reiterated and followed the aforesaid dictum in a catena of cases and one of the recent judgment in

Commissioner, Income Tax, Chandigarh v. Pearl Mechanical Engineering and Foundry Works Pvt. Ltd. A Constitution Bench of the Hon'ble Apex Court in Commissioner of Income Tax, Mumbai v. Anjum M.H. Ghaswala and Ors. reaffirmed the general rule that when a statute vests certain power in an authority to be exercised in a particular manner then the said authority has to exercise it only in the manner provided in the same itself.

28. If Section 31 (4) of the Act requires the Selection Committee for the post of Reader of the University to comprise of three experts to be nominated by the Chancellor then no other Selection Committee can be constituted which does not include such nominees from the Chancellor.

29. We, therefore, find no substance in the contention raised on behalf of the petitioner.

30. Although we are of the opinion that it is hard to remove the petitioner because of the fault committed by the University in the matter of the constitution of the Selection Committee after more than 12 years of the alleged selection but hardship to the petitioner cannot be a ground to permit illegal appointments. We may not direct recovery of the salary paid to the petitioner because of his illegal appointment but his continuance will not be perpetuated by this Court any further.

31. So far as the plea that other appointments of like nature are being permitted by the University to continue and no action has been taken against them is concerned, we clarify that having received the order of the Chancellor now which has clarified the position with regard to the constitution of the Selection Committee and effect on selection made with reference to illegally constituted Selection Committee, the University must revisit all such appointment which has been made contrary to Section 31 of Act and shall deal with him uniformly without any favoritism.

32. Learned counsel for the petitioner has placed reliance upon Section 66 of the Act for submitting that even if certain unauthorized person has taken part in the Selection Committee, proceedings may not be invalid. The contention has only been raised on behalf of the petitioner to be rejected. The constitution of the Selection Committee with experts to be nominated by the Chancellor is statutory requirement and if no expert were asked for or appointed by the Vice Chancellor, it cannot be said that there was a defect covered by Section 66 (b) of the Act.

33. For the reasons recorded above, the writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.04.2014

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.
THE HON'BLE VIVEK KUMAR BIRLA, J.

Civil Misc. Writ Petition No. 18330 of 2014

Gitti Balu Truck Operator Association Varanasi ..... Petitioner
Versus
State of U.P. & Ors. .....Respondents

Counsel for the Petitioner:
Sri N.L. Pandey, Sri Suyash Pandey

Counsel for the Respondent:
C.S.C., Sri V.K. Singh, Sri R.P. Srivastava

Sri Indresh Kr. Singh, Sri Syed Nadeem Ahmad, Sri V.K. Chandel, Sri K.D. Rai, Sri Dev Dayal

U.P. Kshetra Panchayat & Zila Panchayat Adhiniyam 1961-Section 239- Validity of clause 4 of bye-laws-empowering zila parishad to realize transportation fee-challenged on ground in absence of any mining activity within territorial limit-transportation fee from those vehicle passing through territorial limit concern parishad-provision of clause 4 ultra virus-held in view of full Bench decision-petition dismissed.

Held: Para-8
The ratio of the said Full Bench judgment clearly states that over and above the powers conferred under Section 239, the Zila Panchayat can frame a bye-law and impose a fee as has been done in the present case as well in exercise of the powers under Section 142 of the Act. The answer of the full bench is therefore complete and squarely repels the submissions raised by the counsel for the petitioner. Thus, there is no ground to strike down the impugned bye-laws merely because Section 142 has not been mentioned in the notification.

Case Law Discussed:
2007(68) ALR 688

(Delivered by Hon'ble Amreshwar Pratap Sahi, J.)

1. Heard Sri N.L. Pandey, learned counsel for the petitioner, Sri V.K. Singh, learned senior counsel assisted by Sri Ravi Prakash Srivastava, Sri V.K. Chandel, Sri Indresh Kumar Singh and Sri Dev Dayal for the respective Zila Panchayats who have been arrayed as respondents no.6 to 9. We have also heard the learned standing counsel for the respondents no.1 to 5.

2. The issue raised in this petition is the power and authority of the respondents-Zila Panchayats to realize transportation fee from vehicles loaded with mining material which are being transported from other districts and are passing and repassing through the territorial limits of the respective Zila Panchayats.

3. The grievance of the petitioner is, therefore, confined to clause 4 of the bye-laws that have been appended as Annexure 1 to the writ petition to urge that if any mining material is being excavated from within the district and is being transported outside the district, then the Zila Panchayat of that district can realize such transportation fee, but the clause which authorizes the charging of such transportation fee from vehicles coming from outside the district is ultra vires the bye-laws itself as well as Section 239 of the U.P. Kshetra Panchayat and Zila Panchayat Adhiniyam, 1961.

4. Learned counsel submits that since the bye-laws are confined in its operation for the movement of vehicles within the Zila Panchayat limits, the same cannot be applied to vehicles that are just passing through the limits of the Zila Panchayat without involved in any activity of mining within the said district.

5. The argument is, therefore, pure and simple. If the mining activity is being carried out within the same Zila Panchayat where the vehicle is passing or repassing then only the transport fee can be charged and not otherwise.

6. The matter had been heard earlier and Sri V.K. Singh, learned senior counsel, had cited the decision in the case of B. Agarwal Stone Product Ltd. Vs. State of U.P., 2007 (68) ALR 688, to urge that this issue has already been answered

by the Full Bench decision categorically laying down that even if the bye-laws cannot be located to the exercise of powers of framing bye-laws under Section 239 of the 1961 Act, yet the provisions of Section 142(1) of the same Act authorizes the Zila Panchayat to charge the transportation fee from any vehicle passing or repassing through the district even if the excavation or mining operations are not within the same district.

7. Having considered the submissions raised and having perused the Full Bench judgment, the ratio of the said Full Bench as answered can be gathered from a bare perusal of paragraphs 4, 48, 49 and 51 of the judgment that are extracted hereinunder:-

"4. The notification dated 5.12.1994 containing the bye-laws that had been framed by the Zila Panchayat, Sonebhadra was published in the U.P. Gazette on 10.12.1994. Clause 1 of the bye-laws states that the bye-laws shall be called the bye-laws empowering the Zila Panchayat, Sonebhadra to levy fee on trucks and tractors engaged for transporting 'gitti', stones, boulders, 'surkhi', lime, coal and coal dust collected from the mining places situated within the rural areas of Zila Panchayat, Sonebhadra to places within or outside the district. Clause 3 provides that every person who on his own or through labourers collects gitti, stone, boulders, lime, coal and coal dust from the mining places of rural areas falling within district Sonebhadra and transports them by land from the rural areas by tractor or truck shall pay the prescribed fee to the Zila Panchayat, Sonebhadra and that such fee shall be paid at the place fixed by the Zila Panchayat, Sonebhadra to such officers or contractors authorised by the Zila Panchayat. Clause 4 stipulates that the fee per trip per tractor shall be Rs.10/- while fee per trip per truck shall be Rs.20/-. These fees were subsequently enhanced to Rs.15/- and Rs.30/- respectively by the notification dated 23.8.1999. Clause 11 of the bye-laws provides that if there is any default of payment of fee while taking the aforesaid minerals for the personal use or sale the mineral shall be confiscated and Clause 12 provides that in case the fee is not paid within a period of 15 days, then the mineral shall be sold for realisation of the fees.

48. Dr. L.M. Singhvi, learned Senior Counsel for the petitioner submitted that the impugned bye-laws are beyond the powers of the Zila Panchayat as the transportation of mineral is not contemplated by sections 142, 144 and 239 of the Zila Panchayat Act. Elaborating his submission, he contended that section 142(1) of the Act is not attracted inasmuch under this section the Zila Panchayat can charge fee to be fixed by the bye-laws for use and occupation of any immovable property vested in, or entrusted to the management of the Zila Panchayat including any public road or place by which it allows the use or occupation whether by allowing a projection thereon or otherwise but the use or occupation which fall under the expression "or otherwise" are specifically provided for under the provision of section 239 and do not provide for framing bye-laws for imposing fees for passing of vehicles on public roads. His contention, therefore, is that the scope of "or otherwise" mentioned in section 142 of the Act is defined in section 239 and for the purposes of the present case is under section 239 (2) C namely Streets but this does not contemplate the

imposition of fee by Zila Panchayat merely on passing of vehicles on public road and, therefore, the levy of fees is without jurisdiction.

49. Learned Advocate General Sri S.M.A. Kazmi and Sri Ravi Kiran Jain, learned Senior Counsel for the Zila Panchayat on other hand, submitted that section 142 (1) of the Zila Panchayat Act is an independent provision which authorises the Zila Panchayat to levy fee for use or occupation of immovable property of Zila Panchayat including public roads or places and section 239 (2) has no application since bye-laws under this sub-section are framed without prejudice to the generality of the power conferred on the Zila Panchayat by sub-section (1) or section 239. They further contended that under section 239 (1) the Zila Panchayat could make bye-laws applicable to the whole or any part of the rural area of the district in respect of matters required by the Act to be governed by bye-laws and since under section 142, the Zila Panchayat could charge fees to be fixed by the bye-laws for use or occupation of any immovable property vested in or entrusted to the management of the Zila Panchayat including any public road, the Zila Panchayat had validly framed the bye-laws. It was also contended by the learned Senior Counsel for the respondents that in view of the definition of public road in section 2 (37) of the Zila Panchayat Act, the Zila Panchayat was competent to levy fees every if a person had an enforceable right to use the road.

51. The contention of Dr. Singhvi, learned Senior Counsel for the petitioner is that the Zila Panchayat can impose fee under section 142 of the Act only on such use of occupation as are prescribed under section 239 (2) of the Act. In this connection he pointed out that the limitations are prescribed under 'C-Streets' contained in section 239(2) of the Act and mere passing or repassing of the vehicles on public road is not covered under this. In our opinion, section 142(1) is an independent section which empowers the Zila Panchayat to charge fee to be fixed by the bye-laws for use and occupation of the public road. Section 239 (1) of the Zila Panchayat Act clearly empowers the Zila Panchayat to make bye-laws for its own purposes in respect of matters required by this Act to be governed by bye-laws. Thus, in view of section 142 (1) of the Zila Panchayat Act read with section 239 (1) of the Zila Panchayat Act, the Zila Panchayat can frame bye-laws for charging fees for use or occupation of any public road. Section 239 (2) of the Zila Panchayat Act empowers the Zila Panchayat to make bye-laws without prejudice to the generality of the power conferred by section 239 (1) of the Zila Panchayat Act. In such circumstances the contention of the learned Senior Counsel for the petitioner that the power to frame bye-laws under section 142 (1) of the Zila Panchayat Act is circumscribed by the conditions contained in section 239 (2) of the Act and in particular to 'C-Streets' cannot be accepted."

8. The ratio of the said Full Bench judgment clearly states that over and above the powers conferred under Section 239, the Zila Panchayat can frame a bye-law and impose a fee as has been done in the present case as well in exercise of the powers under Section 142 of the Act. The answer of the full bench is therefore complete and squarely repels the submissions raised by the counsel for the petitioner. Thus, there is no ground to

strike down the impugned bye-laws merely because Section 142 has not been mentioned in the notification.

9. Consequently, there is no merit in this writ petition. Rejected

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.03.2014

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 18717 of 2004

Sri Bechu Rai Gram Sewak .....Petitioner
Versus
State of U.P. & Ors. .....Respondents

Counsel for the Petitioner:
Sri Chandra Shekhar Srivastava, Sri Pradeep Kumar Rai

Counsel for the Respondent:
C.S.C.

Constitution of India, Art. 21- Right to pension-petitioner retired on 31.07.97 working as Gram Sewak-prior to retirement all formalities completed-but can not be finalized-only reason that service record not traceable- held-petitioner can not be blamed-being instrumentality of state authorities are duty bound to discharge duties in more responsible and caution manner-petition allowed with direction to pay entire amount of pension @ 10% per annum w.e.f. date of retirement to the date of actual payment is made-with cost of Rs. 10,000/-.

Held: Para-23&24
23. In view of the above, I have no hesitation in holding that non payment of retiral benefits and others to petitioner is arbitrary and unreasonable. There was no justification at all for respondents to delay payment thereof.

24. In the circumstances, the petition is allowed. The respondents are directed to pay entire retiral dues of petitioner alongwith interest @ 10% per annum, which shall be computed from the date of his retirement till actual payment is made. This payment shall be made within two months from the date of service of this order.

Case Law Discussed:
AIR 1983 SC 130; 1972 AC 1027; 1964 AC 1129; JT 1993(6) SC 307; JT 2004(5)SC 17; (1996) 6 SCC 530; (1996) 6 SCC 558; AIR 1996 SC 175; W.P. No. 34804 OF 2004.

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

1. The only grievance of petitioner is that he has not been paid retiral dues though he has retired on 31.7.1997.

2. In the counter affidavit the respondents have given the reason that service record of petitioner could not be verified by them and "no objection certificate" has not been produced by petitioner.

3. Learned counsel for the respondents submitted that the petitioner absconded from duty frequently and, therefore, there was break in his service. It is further submitted that the petitioner could not make available photograph and other necessary documents for the purposes of pension despite several reminders and as such, in absence of requisite documents for sanction of pension, the retiral dues could not be paid in time for which petitioner was solely responsible.

4. The brief facts relevant for the purpose of writ petition are that the petitioner was appointed on 17.1.1964 as Gram Sewak and continued to work as

such till 31.7.1997 when he retired from service. On 31.7.1997, for the first time, the respondents' Department served an order upon petitioner that on attaining the age of superannuation, he would retire on 31.7.1997 and he is expected to furnish papers relating to pension in the office so that pension papers may be sent to the concerned department for sanction. The aforesaid order was complied by the petitioner but due to non-availability of petitioner's Service Book, which is maintained by the Department itself, pension could not be sanctioned. Despite several representations of petitioner time and again, he failed to get anything. In the meantime correspondence between the authorities with respect to grant of pension was going on but all in vain. It is also asserted by petitioner that due to inaction of respondent authorities and non-availability of Service Book, petitioner's retiral benefits could not have been sanctioned and he is at the verge of starvation.

5. A counter affidavit has been filed on behalf of respondents no. 1 to 4. On material aspect for not sanctioning pension within time, there is no satisfactory reply in the counter affidavit, it is skatchy and no proper and specific reply of the assertions made in the writ petition has been given.

6. From a perusal of record, it is evident that respondents have failed in their duty to give the pensionary/retiral benefits to petitioner within time or a reasonable time, which they were bound to do, under law. No suitable explanation has been given in the counter affidavit for denying retiral benefits to the petitioner for such a long time.

7. Today, one cannot dispute that pension has attained the status of fundamental right, a facet of right to earn livelihood enshrined under Article 21 of the Constitution. Pension and retiral benefits have been held deferred wages which an employee earn by rendering service for a particular length of time. This is what was held by Apex Court in D.S.Nakara Vs. Union of India AIR 1983 SC 130. This proposition is almost settled. To defer this right of an employee for an unreasonably long period, one must have an authority in law which more or the less must be specific and clear. On the mere pretext of caution, such right cannot be made to suffer in any manner. Whenever such an occasion is brought to notice, this Court has risen to protect the poor and helpless retired employee.

8. Besides above, it is also evident from record that petitioner retired from service on 31.7.1997 but due to non availability of service record he could not be paid retiral benefit within time. Maintenance of service record is the responsibility of respondent authorities. If it is not traceable, the petitioner cannot be blamed and made to suffer. According to paragraph 10 of the counter affidavit, certain payments were mae in June and July, 2005 i.e. after about 8 years of the retirement.

9. A system controlled by bureaucrats can create wrangles to device something which is formulated by policy makers for the benefit of the citizen is writ large from this case. A beneficial scheme made for social welfare of old and retired employees, can be twisted by the system creating a nightmare to retired employees, as is quite evident. The constitutional obligation though pen down to reach the people but Executive, habitual of remaining static or move slow

or no movement at all, can render such scheme quite ineffective and inoperative. Something due today may not be available to a person right in time. It is like a person starving today is assured food to be provide after a month or two by which time he may die of hunger or the foodstuff itself may rot. If this is not unconstitutional then what else can be.

10. Learned counsel appearing for respondents simply tried to shift responsibility of delayed payment of retiral benefits to petitioner but the fact remain undenied that more than eight years delay is wholly unreasonable. The petitioner, a retired employee, had no role whatsoever except of suffering the cause.

11. As already said, pension is not a bounty but a right of employee who has served the employer for long and is entitled for retiral benefits being his deferred wages. The Apex Court in D.S. Nakara (supra) has observed:-

"pension is a right and the payment of it does not depend upon the discretion of the Government but is governed by the rules and a government servant coming within those rules is entitled to claim pension. It was further held that the grant of pension does not depend upon anyone's discretion." (Para 20).

"In the course of transformation of society from feudal to welfare and as socialistic thinking acquired respectability, State obligation to provide security in old age, an escape from underserved want was recognized and as a first steps pension was treated not only as a reward for past service but with a view to helping the employee to avoid destitution in old age. The quid pro quo was that when the employee was physically and mentally alert, he rendered not master the best, expecting him to look after him in the fall of life. A retirement system therefore exists solely for the purpose of providing benefits. In most of the plans of retirement benefits, everyone who qualifies for normal retirement receives the same amount." (Para 22).

"Pensions to civil employees of the Government and the defence personnel as administered in India appear to be a compensation for service rendered in the past." (Para 28).

"Summing up it can be said with confidence that pension is not only compensation for loyal service rendered in the past, but pension also has a broader significance, in that it is a measure of socio-economic justice which inheres economic security in the fall of life when physical and mental prowess is ebbing corresponding to aging process and, therefore, one is required to fall back on savings. One such saving in kind18717 is when you give your best in the hey-day of life to your employer, in days of invalidity, economic security by way of periodical payment is assured. The term has been judicially defined as a stated allowance or stipend made in consideration of past service or a surrender of rights or emoluments to one retired from service. Thus the pension payable to a government employee is earned by rendering long and efficient service and therefore can be said to be a deferred portion of the compensation or for service rendered." (Para 29)

12. Withholding of pension and other retiral benefits of retired employees for years together is not only illegal and

arbitrary but a sin if not an offence since no law has declared so. The officials, who are still in service and are instrumental in such delay causing harassment to the retired employee must however feel afraid of committing such a sin. It is morally and socially obnoxious. It is also against the concept of social and economic justice which is one of the founding pillar of our constitution.

13. In our system, the Constitution is supreme, but the real power vest in the people of India. The Constitution has been enacted "for the people, by the people an18717d of the people". A public functionary cannot be permitted to act like a dictator causing harassment to a common man and in particular when the person subject to harassment is his own employee.

14. Regarding harassment of a common referring to observations of Lord Hailsham in Cassell & Co. Ltd. Vs. Broome, 1972 AC 1027 and Lord Devlin in Rooks Vs. Barnard and others 1964 AC 1129, the Apex Court in Lucknow Development Authority Vs. M.K. Gupta JT 1993 (6) SC 307 held as under:

"An Ordinary citizen or a common man is hardly equipped to match the might of the State or its instrumentalities. That is provided by the rule of law..... A public functionary if he acts maliciously or oppressively and the exercise of power results in harassment and agony then it is not an exercise of power but its abuse. No law provides protection against it. He who is responsible for it must suffer it.....Harassment of a common man by public authorities is socially abhorring and legally impermissible. It may harm him personally but the injury to society is far more grievous." (para 10)

15. The above observations as such have been reiterated in Ghaziabad Development Authorities Vs. Balbir Singh JT 2004 (5) SC 17.

16. The respondents bei18717ng "State" under Article 12 of the Constitution of India, its officers are public functionaries. As observed above, under our Constitution, sovereignty vest in the people. Every limb of constitutional machinery therefore is obliged to be people oriented. Public authorities acting in violation of constitutional or statutory provisions oppressively are accountable for their behaviour. It is high time that this Court should remind respondents that they are expected to perform in a more responsible and reasonable manner so as not to cause undue and avoidable harassment to the public at large and in particular their ex-employees like the petitioner. The respondents have the support of entire machinery and various powers of statute. An ordinary citizen or a common man is hardly equipped to match such might of State or its instrumentalities. Harassment of a common man by public authorities is socially abhorring and legally impressible. This may harm the common man personally but the injury to society is far more grievous. Crime and corruption, thrive and prosper in society due to lack of public resistance. An ordinary citizen instead of complaining and fighting mostly succumbs to the pressure of undesirable functioning in offices instead of standing against it. It is on account of, sometimes, lack of resources or unmatched status which give the feeling of helplessness. Nothing is more damaging than the feeling of helplessness. Even in ordinary matters a common man who has neither the political backing nor

the financial strength to match inaction in public oriented departments gets frustrated and it erodes the credibility in the system. This is unfortunate that matters which require immediate attention are being allowed to linger on and remain unattended. No authority can allow itself to act in a manner which is arbitrary. Public administration no doubt involves a vast amount of administrative discretion which shields action of administrative authority but where it is found that the exercise of power is capricious or other than bona fide, it is the duty of the Court to take effective steps and rise to occasion otherwise the confidence of the common man would shake. It is the responsibility of Court in such matters to immediately rescue such common man so that he may have the confidence that he is not helpless but a bigger authority is there to take care of him and to restrain arbitrary and arrogant, unlawful inaction or illegal exercise of power on the part of the public functionaries.

17. In a democratic system governed by rule of law, the Government does not mean a lax Government. The public servants hold their offices in trust and are expected to perform with due diligence particularly so that their action or inaction may not cause any undue hardship and harassment to a common man. Whenever it comes to the notice of this Court that the Government or its officials have acted with gross negligence and unmindful action causing harassment of a common and helpless man, this Court has never been a silent spectator but always reacted to bring the authorities to law.

18. In Registered Society Vs. Union of India and Others (1996) 6 SCC 530 the Apex court said:

"No public servant can say "you may set aside an order on the ground of mala fide but you can not hold me personally liable" No public servant can arrogate in himself the power to act in a manner which is arbitrary".

19. In Shivsagar Tiwari Vs. Union of India (1996) 6 SCC 558 the Apex Court has held:

"An arbitrary system indeed must always be a corrupt one. There never was a man who thought he had no law but his own will who did not soon find that he had no end but his own profit."

20. In Delhi Development Authority Vs. Skipper Construction and Another AIR 1996 SC 715 has held as follows:

"A democratic Government does not mean a lax Government. The rules of procedure and/or principles of natural justice are not mean to enable the guilty to delay and defeat the just retribution. The wheel of justice may appear to grind slowly but it is duty of all of us to ensure that they do grind steadily and grind well and truly. The justice system cannot be allowed to become soft, supine and spineless."

21. Now, coming to another aspect of the matter, if retiral benefits are paid with extra ordinary delay, the Court should award suitable interest which is compensatory in nature so as to cause some solace to the harassed employee. No Government official should have the liberty of harassing a hopeless employee by withholding his/her lawful dues for a long time and thereafter to escape from any liability so as to boast that nobody can touch him even if he commits an ex

facie illegal, unjust or arbitrary act. Every authority howsoever high must always keep in mind that nobody is above law. The hands of justice are meant not only to catch out such person but it is also the constitutional duty of Court of law to pass suitable orders in such matters so that such illegal acts may not be repeated, not only by him/her but others also. This should be a lesson to everyone committing such unjust act.

22. Interest on delayed payment on retiral dues has been upheld time and against in a catena of decision. This Court in Shamal Chand Tiwari Vs. State of U.P. & Ors. (Writ Petition No.34804 of 2004) decided on 6.12.2005 held:

"Now the question comes about entitlement of the petitioner for interest on delayed payment of retiral benefits. Since the date of retirement is known to the respondents well in advance, there is no reason for them not to make arrangement for payment of retiral benefits to the petitioner well in advance so that as soon as the employee retires, his retiral benefits are paid on the date of retirement or within reasonable time thereafter. Inaction and inordinate delay in payment of retiral benefits is nothing but culpable delay warranting liability of interest on such dues. In the case of State of Kerala and others Vs. M. Padmnanaban Nair, 1985 (1) SLR-750, the Hon'ble Supreme Court has held as follows:

"Since the date of retirement of every Government servant is very much known in advance we fail to appreciate why the process of collecting the requisite information and issuance of these two documents should not be completed at least a week before the date of retirement so that the payment of gratuity amount could be made to the Government servant on the date he retires or on the following day and pension at the expiry of the following months. The necessity for prompt payment of the retirement dues to a Government servant immediately after his retirement cannot be over-emphasized and it would not be unreasonable to direct that the liability to pay panel interest on these dues at the current market rate should commence at the expiry of two months from the date of retirement."

In this view of the matter, this Court is of the view that the claim of the petitioner for interest on the delayed payment of retiral benefits has to be sustained."

23. In view of the above, I have no hesitation in holding that non payment of retiral benefits and others to petitioner is arbitrary and unreasonable. There was no justification at all for respondents to delay payment thereof.

24. In the circumstances, the petition is allowed. The respondents are directed to pay entire retiral dues of petitioner alongwith interest @ 10% per annum, which shall be computed from the date of his retirement till actual payment is made. This payment shall be made within two months from the date of service of this order.

25. The respondent no.1 shall also have liberty to take appropriate action against the officials found responsible for such lapses and delay for payment of retiral dues. A copy of such order may also be kept on record of such officials, found responsible.

26. The petitioner shall be entitled for payment of Rs. 10,000/- as costs from the respondents.

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 17.01.2014

BEFORE

THE HON'BLE RAKESH TIWARI, J.

THE HON'BLE BHARAT BHUSHAN, J.

Civil Misc. Writ Petition No. 18934 of 2002

Pancham Lal..... .Petitioner

Versus

State of U.P. & Ors. .....Respondents

Counsel for the Petitioner:

Sri Krishna Ji Khare

Counsel for the Respondent:

C.S.C.

Constitution of India, Art.-226- Service Law-Notional Promotion-petitioner along with 13 other junior person promoted on post of manager marketing and economic investigation-all were treated to be approved except petitioner-who in view of interim order-working of promotional post retired-and got salary-but pension given treating on post of senior investigator-held once junior to petitioner treated confirmed and given post retrial benefits of promotional post-petitioner can not be discriminated-no question of recovery in absence of allegation of excess payment of salary as to given to manager(M & E-1)-entitled for same treatment.

Held: Para-11

Learned counsel for the petitioner further contents that recommendation letter order dated 7.7.1997 for promotion to the post of Manager (M & E-1) shows that it was against the vacancies of year 1995-96 and had the petitioner been promoted within time, the ad hoc appointment of petitioner would have come to an end in view of law laid down by the Apex Court in 1989 (1) SCC 392 (State of Maharashtra versus Jagannath Achyut Kartandikar) can not be made to suffer adversely for the fault or lapse on the part of the Government itself as it would be unjust, unreasonable and arbitrary. Since he was working on regular basis on the post of Manager Marketing & Economic Investigator and he must have paid his post-retirement benefits of the said post and can not be discriminated from others in this regard particularly in the facts and circumstances of the case. He has also relied upon judgment dated 11.11.2010 passed in Special Appeal No. 1007 (Defective) of 2010 (Firangi Prasad versus State of U.P.) referred to in the judgment dated 14.2.2010 passed in Writ Petition No. 55050 of 2009 (Shashikala versus State) and JT 1996 Vol. 4 731 in this regard.

Case Law Discussed:

1989(1)SCC 392; JT 1996 Vol. 6 SC Page 75; JT 1992 Vol-3 SC 98; (2012) 8 SCC 117; (2006)7 SCC 684; 1989(1) SCC 392; 1996 Vol. 6 SC Page 75.

(Delivered by Hon'ble Rakesh Tiwari, J.)

1. This petition has been preferred for issuance of a writ of certiorari quashing the impugned order dated 14.2.2002 passed by the respondents. Petitioner also seeks a writ of mandamus directing the respondents to pay the post retirement benefits to him for the post of Manager (M and E-I) in pursuance of the orders dated 3.1.2001 and 8.8.2001 passed in Civil Misc. Writ Petition No. 3138 of 1982 and any other writ, order or direction which may be deemed fit and proper in the circumstances of the case. It

appears from record that writ petition was amended vide order of this Court dated 7.8.2008 whereby another prayer in the nature of mandamus has been added in the petition for directing the respondents to give effect the recommendation dated 7.7.1997 of the U.P. Public Service Commission (hereinafter referred to as the Commission) by providing notional promotion to the petitioner to the post of Marketing Manager and Economic Investigator forthwith and also to pay him post retirement benefits accordingly.

Background of the case

2. The backdrop of the case in capsule is that the petitioner was directly appointed initially on the post of Junior Investigator w.e.f. 24.5.1962 thereafter he was directly appointed as Senior Investigator w.e.f. 1.10.1975 and confirmed on the said post. Thereafter under a scheme in the Department of Industries of District Industry Centre certain posts of Manager Marketing and Economic Investigator (hereinafter referred to as Manager (M & E-1) were created. Pursuant to advertisement for appointment on the said posts, petitioner applied for selection and he along with 13 other candidates was selected and appointed vide letter of appointment dated 16.1.1981. After about one and a half year i.e. on 3.5.1982, the appointments of all the candidates including petitioner and one Sri P.C. Jain were cancelled reverting them to the post of Senior Investigator.

3. The aforesaid order dated 3.5.1982 was challenged in Civil Misc. Writ Petition No. 3138 of 1982 (Pancham Lal versus State of U.P. and others) by the petitioner. The other writ petition being Civil Misc. Writ Petition No. 3013 of 1982 (P.C. Jain versus State of U.P. and others) was preferred by Sri P.C.Jain. In the writ petition filed by the petitioner an interim order was passed. Since the Petitioner was holding the post in question having been directly appointed, pursuant to the advertisement, he was continued on the post of Manager Marketing and Economic Investigator and paid his salary in terms of the interim order. The writ petition was later on admitted and after exchange of counter and rejoinder affidavits, the stay order was confirmed.

4. In the meantime, in view of Govt. Order dated 25.6.1984 and Rule 3(b) of the Uttar Pradesh Industries Service Rules, 1993 read with its Appendix B, 50% posts of Manager (M & E-1) were required to be filled up by promotion. Accordingly, the petitioner was considered for promotion to the aforesaid post along with 13 other candidates against the vacancies determined for financial year 1995-96, i.e. 1.4.1995 to 31.3.1996 and was placed at serial no. 1. Other 13 persons were placed below him. However, except the petitioner, 13 candidates place below the petitioner were given promotion as Manager Marketing and Economic Investigator vide order dated 30.7.1997 pursuant to the recommendation dated 7.7.1997 made by the U.P. Public Service Commission.

5. During pendency of the writ petition, the petitioner and Sri P.C. Jain who had filed the aforesaid two writ petitions, retired from service on attaining the age of superannuation on 31.12.1996 and 31.5.1992 respectively from the post of Manager (M & E-1). The retirement order of Sri P.C.Jain from the said post was treated to be approved by the State

Government and he was accordingly paid post-retirement benefits for the post of Manager Marketing and Economic Investigator. While the retirement order of the petitioner from the same post was not taken into consideration on the same terms for payment of his post retirement benefits of the post of Manager (M & E-1).

6. Two similarly situated candidates of recommendation order dated 7.7.1997, namely, Mohd. Shafiuddin, who retired on 31.3.1996 and N.B.Srivastava, who retired on 30.6.1996 were paid post-retirement benefits of the post of Manager (M & E-1) accordingly vide order dated 30.3.2012 as informed by Under Secretary under Right to Information Act, which has been filed by way of supplementary affidavit on 7.11.2012. No reason is said to have been provided in the information dated 30.3.2012 as to why the petitioner has not been promoted on the post of Manager Marketing and Economic Investigator and other candidates below him have been granted notional promotion though he was at serial no. 1 in the list for promotion.

7. The aforesaid writ petition being Civil Misc. Writ Petition No. 3138 of 1982 (Pancham Lal versus State) filed by the petitioner was dismissed on 28.7.1998 as having become infructuous on the assumption that the aforesaid writ petition was filed against the order dated 25.6.1982 whereby the Tribunal has refused to grant interim order and the lis is pending before it.

8. A recall application for recalling the order dated 28.7.1998 mentioning therein that no case is pending before the Tribunal and the cancellation order dated 3.5.1982 was challenged by way of aforesaid writ petition No. 3138 of 1982 as such, the same may be decided on merit but the Court treating the aforesaid application as a review application disposed it with the direction dated 3.1.2001 to the respondents to pay the post retirement benefits such as pension to the petitioner of the post of Manager (M & E-1) which was not paid him, compelling him to move a clarification application, which was disposed of in the following terms:-

" What he actually wants, this Court is to modify the order to the extent that the appellant should be paid post retirement benefits from the post, he was holding at the time of retirement.

We are of the view that that aspect of the matter may be considered by the appointing authority in accordance with rules for which no direction is necessary.

9. It is in the aforesaid backdrop that learned counsel for the petitioner submits that by order dated 14.2.2002 the petitioner has been paid post retiral benefits treating him to have retired from the post of Senior Investigator and denied him post retirement benefits for the post of Manager (Marketing & Economics Investigator).

10. It is submitted by the learned counsel for the petitioner that 50% posts of Manager (M & E-I) were to be filled up by way of promotion and remaining 50% posts by direct recruitment. The selection for the appointment and promotion on the said post of Manager (M & E-I) was and is within the purview of the U.P. Public Service Commission (in short 'the Commission'). After retirement of the petitioner, the

Commission in view of the Government orders dated 25.6.1984 as well as 25.3.1985, vide its letter dated 7.7.1997 recommended the name of the petitioner for notional promotion to the post of Manager (M & E-I) against the vacancy of 1993-94 but he has been discriminated with Sri P.C. Jain who was similarly situated to the petitioner and 13 persons below him in the same recommendation list dated 7.7.1987 in payment of retirement dues including Mohd. Shafiuddin and N.B.Srivastava, who also retired in 1996.

11. Learned counsel for the petitioner further contents that recommendation letter order dated 7.7.1997 for promotion to the post of Manager (M & E-1) shows that it was against the vacancies of year 1995-96 and had the petitioner been promoted within time, the ad hoc appointment of petitioner would have come to an end in view of law laid down by the Apex Court in 1989 (1) SCC 392 (State of Maharashtra versus Jagannath Achyut Kartandikar) can not be made to suffer adversely for the fault or lapse on the part of the Government itself as it would be unjust, unreasonable and arbitrary. Since he was working on regular basis on the post of Manager Marketing & Economic Investigator and he must have paid his post-retirement benefits of the said post and can not be discriminated from others in this regard particularly in the facts and circumstances of the case. He has also relied upon judgment dated 11.11.2010 passed in Special Appeal No. 1007 (Defective) of 2010 (Firangi Prasad versus State of U.P.) referred to in the judgment dated 14.2.2010 passed in Writ Petition No. 55050 of 2009 (Shashikala versus State) and JT 1996 Vol. 4 731 in this regard.

12. It is argued that even otherwise if pursuant to the recommendation of promotion order dated 7.7.1997, two candidates who are similarly retired in the year 1996 as the petitioner, have been given promotion vide order dated 30.7.1997 to the post of Manager (M & E-1), therefore, petitioner can not be discriminated also on this ground.

13. It is further submitted that promotion to the post of Manager Marketing and Economic Investigator is required to be made under Rules of 1993 consequently continuation of ad hoc appointment pursuant to the interim order would be only a temporary appointment dehors the rules and as such, petitioner is entitled to be granted notional promotion to the post of Manager Marketing and Economic Investigator pursuant to the promotion/recommendation order dated 7.7.1997 against the vacancies of the year 1995-96 and is entitled to receive the post-retirement benefits accordingly. In this regard, he has relied upon JT 1996 Vol. 6 SC Page 75 (Dr. Surendra Singh versus State of Jammu & Kashmir.

14. In the alternate counsel for the petitioner next contended that even if the orders /judgment of this Court (Annexures 8, 10 and 11) are treated to be dismissal of writ petition no. 3138 of 1982 (Pancham Lal versus State) even then in view of JT 1992 Vol-3 SC 98 (M/s. Shree Chamundi Mopeds Ltd. Versus Church of South India Trust Association CSI Cinod Secretariat, Madras), if it is presumed in law that no interim order was passed and as such, petitioner will be taken to be on the post of Senior Investigator but pursuant to the recommendation of promotion order dated 7.7.1997 to the post of Manager Marketing and Economic Investigator by which persons junior to him have been

granted benefits of promotion and post retiral benefits of the promotional post of Manager (M & E-1) he also is entitled to receive the post retirement benefits of the same post, as such, the action of the respondents is not providing the post-retirement benefits for the post of Manager (M & E-1) to him is illegal, arbitrary and discriminatory.

15. Per contra, learned Standing Counsel submits that only a short point is involved in this petition as to whether the relief nos. 1 & 4 now claimed by petitioner can be granted to him or not ? According to him, it is apparent from the impugned order dated 14.2.2002 that the appointment of the petitioner on the post of Manager (M & E-I) was not legal. The respondents, pursuant to the order passed in Civil Misc. Writ Petition No. 3138 of 1982, had categorically stated that the petitioner has wrongly been given promotion in anticipation of the vacancy and as such, his appointment on the post of Manager (M& E-I) not being against a vacant and substantive post was neither legal nor justified for the said post at the relevant time did not exist at all, as such the writ petition is also not maintainable on this ground.

16. Though no counter affidavit has been filed, learned Standing Counsel has vehemently argued that no interim order has been granted in this writ petition and as the petitioner has already retired from service and in the circumstance, he is not entitled to the reliefs claimed by him.

17. Learned counsel for the State submits that as a result of dismissal of the writ petition aforesaid, the petitioner would retire as Senior Investigator as he had never been legally promoted on the post of Manager Marketing hence is not entitled to get any financial benefit of the post of Manager Marketing and that since he has received excess payment of salary it can be recovered in view of the judgment of Apex Court rendered in Chandi Prasad Uniyal and others versus State of Uttrakhand and others (2012) 8 SCC 117 as fruits of stay order in writ petition which was subsequently dismissed would not be available to him. Therefore, the writ petition is liable to be dismissed with liberty to the respondents to recover the excess amount paid to the petitioner. In this regard, he has also relief upon on a decision in the case of Surinder Prasad Tiwari vesus U.P. Rajya Krishi Utpadan Mandi Parishad and others (2006) 7 SCC 684. It has been held in paragraphs 24 of the aforesaid judgment :-

"24. In the instant case, the applicant has continued in service for 14 years because of the interim order granted by the High Court on 15.9.1992. In the aforesaid case, the Constitution Bench has observed that merely because an employee had continued under cover of an order of the court, which the court described as "litigious employment: he would not be entitled to any right to be absorbed or made permanent in the service."

18. This judgment of Surinder Prasad Tiwari (Supra) was specifically considered by this Court in Special Appeal No. 926 of 2002 in Sunil Kumar versus The Regional Assistant Director of Education (Basic) 12 Circle, Mordabad, wherein the Court after noticing paragraph 24 of the judgment quoted above, the Court held:

7."Having appreciated the rival submission, we do not find any substance

in the submission of Mr. Saxena and the decision relied on shall have no bearing in the facts of the present case. As stated earlier, the petitioner was appointed by order dated 22.4.1987 on temporary basis and the order of appointment clearly indicated that his service can be terminated without any notice or prior information. His service was terminated in exercise of power under Rule 3 of the Rules 1975 by order dated 5.9.1988. Petitioner has, nowhere, averred as to the process of appointment, which was followed while giving him temporary appointment. True it is that by virtue of interim orders passed by this court, he continued in service but such continuance is nothing but a "litigious employment". Once it is held so held, mere continuance in service for a long period would not clothe him with any right. The view, which we have taken, finds support from the judgement of the Supreme Court in the case of Umadevi (supra) as also Surindra Prasad Tiwari (supra)."

In the judgment relied upon in Chandi Prasad(Supra), the Apex Court in paragraph 12 to 15 has held thus :-

"12. Later, a three-Judge Bench in Syed Abdul Qadir case (supra) after referring to Shyam Babu Verma, Col. B.J. Akkara (retd.) etc. restrained the department from recovery of excess amount paid, but held as follows: (Syed Abdul Qadir case. SCC pp. 491-92, para 59)

"59. Undoubtedly, the excess amount that has been paid to the appellants - teachers was not because of any misrepresentation or fraud on their part and the appellants also had no knowledge that the amount that was being paid to them was more than what they were entitled to. It would not be out of place to mention here that the Finance Department had, in its counter affidavit, admitted that it was a bona fide mistake on their part. The excess payment made was the result of wrong interpretation of the rule that was applicable to them, for which the appellants cannot be held responsible. Rather, the whole confusion was because of inaction, negligence and carelessness of the officials concerned of the Government of Bihar. Learned Counsel appearing on behalf of the appellants-teachers submitted that majority of the beneficiaries have either retired or are on the verge of it. Keeping in view the peculiar facts and circumstances of the case at hand and to avoid any hardship to the appellants-teachers, we are of the view that no recovery of the amount that has been paid in excess to the appellants-teachers should be made.

(emphasis added)"

We may point out that in Syed Abdul Qadir case such a direction was given keeping in view of the peculiar facts and circumstances of that case since the beneficiaries had either retired or were on the verge of retirement and so as to avoid any hardship to them.

13. We are not convinced that this Court in various judgments referred to herein before has laid down any proposition of law that only if the State or its officials establish that there was misrepresentation or fraud on the part of the recipients of the excess pay, then only the amount paid could be recovered. On the other hand, most of the cases referred to hereinbefore turned on the peculiar facts and circumstances of those cases either because the recipients had retired or

on the verge of retirement or were occupying lower posts in the administrative hierarchy.

14. We are concerned with the excess payment of public money which is often described as "tax payers money" which belongs neither to the officers who have effected over-payment nor that of the recipients. We fail to see why the concept of fraud or misrepresentation is being brought in such situations. Question to be asked is whether excess money has been paid or not may be due to a bona fide mistake. Possibly, effecting excess payment of public money by Government officers, may be due to various reasons like negligence, carelessness, collusion, favouritism etc. because money in such situation does not belong to the payer or the payee. Situations may also arise where both the payer and the payee are at fault, then the mistake is mutual. Payments are being effected in many situations without any authority of law and payments have been received by the recipients also without any authority of law. Any amount paid/received without authority of law can always be recovered barring few exceptions of extreme hardships but not as a matter of right, in such situations law implies an obligation on the payee to repay the money, otherwise it would amount to unjust enrichment.

15. We are, therefore, of the considered view that except few instances pointed out in Syed Abdul Qadir case (supra) and in Col. B.J. Akkara (retd.) case (supra), the excess payment made due to wrong/irregular pay fixation can always be recovered."

19. After hearing the learned counsel for the parties and perusal of record, it appears that the Court in Civil Misc. Writ Petition No. 3138 (S/B) of 1982 directed for payment of his salary of the post of Manager (M&E-1) which he was holding prior to passing of the order dated 3.5.1985 and that vide order dated 3.1.2001 on his clarification application for payment of pension for the post of Manager Marketing and Economic Investigator was of the view that this aspect of the matter may be considered by the appointing authority in accordance with law, was not paid to the petitioner.

20. Questions for consideration by this Court now are that (i) whether the salary of the post of Manager Marketing and Economic Investigator which was allowed to the petitioner pursuant to the interim orders dated 9.7.1982 and 3.1.2001 of the Court is liable to be recovered or not in the facts and circumstances of the case, and (ii) Whether petitioner is entitled to receive post retirement benefits of the post of Manager Marketing and Economic Investigator in the aforesaid circumstances.

21. Before appreciating the facts, the judgment relied upon by the petitioner may also be discussed:-

22. In 1989 (1) SCC 392 (State of Maharashtra versus Jagannath Achyut Kartandikar) the Apex Court was considering the question of seniority and promotion where lowering of seniority in promotional post because of late passing of departmental examination for promotion. It was held that incumbent should not be penalised for Government lapses and that making employees to suffer adversely for lapses on part of the Government itself would be unjust,

unreasonable, arbitrary and such an action would violate Articles 14 and 16 of the Constitution of India. The Court further observed that in such cases relaxation in rules granted in favour of the employee to avoid undue hardship to a class of employees would be justified.

23. In the instant case, those employees along with petitioner who were recommended for notional promotion by the U.P. Public Service Commission constituted a class apart from others. All of them have been granted post retiral benefits of the promotional post except the petitioner, therefore, his case is on a better footing than the case of State of Maharashtra relied upon by the petitioner and applies with full force to this case.

24. In the case of Firangi Prasad (Supra) referred to in the case of Shashikala versus State(Supra), it has been held that if the District Inspector of School has issued a letter directing committee of management to appoint a person as teacher and the management delayed the matter at its end, then for such an inaction of management the teacher cannot be made to suffer and in such a case, appointment shall be treated within the cut off date.. The observations of the Court made in para 15 reads thus:-

"15. The second contention needs to be examined in the light of the facts that have emerged from the record, namely that the appellant for no fault on his part was kept out of the Institution by the inaction of the Management in spite of the District Inspector of Schools having dispatched the selection order on 18.01.1993. From the facts on record, it is evident that the Manager of the Institution had to perform the ministerial act of issuing a letter of appointment to the appellant in terms of the selection order dated 18.01.1993. The Management admittedly complied with it after much persuasion on 25.08.1993, for which the appellant is nowhere at fault. On the contrary, the appellant had been continuously approaching the Management time and again expressing his willingness to join the Institution. "

25. It was in the aforesaid facts and circumstances that teachers like the appellants in that case were found to fall within an altogether different class of candidates, who had been wrongfully prevented by the inaction of the management in joining the institution. The direction contained in order dated 18.1.1993 in that case was categorically to allow the appellant to join within ten days which admittedly was scuttled by the Manager for reasons best known to him. The Manager was obliged to issue a letter of appointment under the direction of the District Inspector of Schools.

26. In the instant case, Sri P.C. Jain appointed along with the petitioner on the post of Manager Marketing and Economic Investigator 13 persons including the petitioner recommended for promotion after the reversion of the petitioner on 3.5.1982. All of them except the petitioner were paid salary but their respective retiral dues of the post of Manager Marketing and Economic Investigator discriminating from the petitioner who has been deprived of his retiral dues of the post of Senior Investigator only due to inaction on the part of the respondents. As stated earlier, the petitioner has been discriminated by the authorities in complying with the

orders dated 25.6.1983 and 25.3.1985 the State Government in granting him post retirement benefits of the post of Manager Marketing and Economic Investigator. Though he was on a better footing than them in view of orders dated 9.7.1982 in Civil Misc. Writ Petition No. 3138 (S/B) of 1982 which was pending at the relevant time and order dated 3.1.2001 of the Court. As regard the case of Dr. Surendra Singh versus State of Jammu & Kashmir T 1996 Vol. 6 SC Page 75 relied up on by the petitioner is concerned, it was a case of claiming regularisation also as the appellant had put in 13 years service as an ad hoc employee. The Apex Court following the direction in JT 1993 (6) SC 593 wherein State Government was directed to notify the vacancies to Public Service Commission making it open to the appellants to apply for the same. Under the rules the regular recruitment to the posts was to be made by the Public Service Commission. It was held in that case that consequently, the ad hoc appointments would be only temporary appointments dehors the rules pending regular recruitment without conferring any right to regularisation of service.

27. These questions may be appreciated in the light of facts that (i) the petitioner had been appointed under direct recruitment as Manager (M & E-1) on 16.1.1981 and worked on the said post up to 3.5.1982 when he was reverted back from the said post to the post of Senior Investigator, and (ii) petitioner was again promoted to the post of Manager (M & E-1) in pursuance of the recommendation dated 7.7.1997, therefore, facts of these two situations have to be seen by the Court in the facts and circumstances of the case.

28. Admittedly the petitioner was confirmed as Senior Investigator on 1.10.1975. He was given temporary appointment/posting on the post of Manager Marketing (Prabandhak Vipran) by the Director vide order dated 18.1.1981 in anticipation of approval by the State, as such, the petitioner along with ten other persons was reverted to their original post of Senior Investigator. Aggrieved the petitioner preferred Claim Petition No. 195/F/111/1982 challenging the order of reversion dated 3.5.1982 before the U.P. Public Services Tribunal, Lucknow. The Claim Petition was decided vide judgment dated 9.7.1982 against him against which the petitioner preferred Civil Misc. Writ Petition No. 3138 (S/B) of 1982 in which interim order was granted in the following terms:-

"List for admission on 22.7.1982. "In the meantime in case the petitioner is still holding the charge of the post, he will not be relieved and if he has been relieved the same salary which he was getting before the order in question was passed, will be paid to him. State may file counter affidavit during this period."

In compliance of the aforesaid order, the petitioner had been working as Marketing Manager till his retirement from service he was given his retiral benefits of the post of Senior Investigator pending decision of the writ petition. Subsequently, Civil Misc. Writ Petition No. 3138 of 1982 was also dismissed. In the instant case, petitioner had applied by way of direct recruitment and given appointment on the post Manager Marketing and Economic Investigator pursuant to the vacancies advertised. He was also recommended with 13 other persons by U.P. Public Service Commission for promotion on the aforesaid post after his said appointment

was cancelled and the petitioner was continued in terms of the direction issued by High Court. He retired from the promotional post of Manager (M & E-1) on attaining age of superannuation, hence he would be deemed to be regularised in service on the post of Marketing Manager and Economic Investigator in terms of recommendation dated 7.7.1997 and Government orders dated 25.6.1983 and 25.3.1985 acted upon by it in respect of granting notional promotion to all the promotees except the petitioner who had been illegally and arbitrarily denied notional promotion in violation of Articles 14 and 16 of the Constitution, therefore he would be entitled to post retirement benefits of the post of Manager (M & E-1) as were paid to Sri P.C. Jain and 13 other persons junior to him in service, who were paid their salary and retiral benefits of the post of Manager Marketing and Economic Investigator.

29. From a perusal of Annexures 8 to 12 to the writ petition, it appears that the recommendations of promotion order dated 7.7.1997 of Commission only in the case of the petitioner has not been considered though it was communicated to the Commission and respondents were having knowledge of the same, it was also not brought to the notice of the Court or to the petitioner by the respondents, who were not aware of the recommendation order dated 7.7.1997 as such, the petition was disposed of with the direction to pay the post retirement benefits in accordance with law. As soon as the aforesaid recommendation order dated 7.7.1997 came to his knowledge he has claimed his relief on the basis of the aforesaid recommendation order dated 7.7.1997 by way of present writ petition, which in the facts and circumstances based on subsequent events is maintainable particularly when the petition has been allowed to be amended by the court vide its order dated 7.8.2008 by which the following prayer no. 4 has been added: -

"to issue a writ, order or direction in the nature of mandamus directing the respondents to give effect the recommendation order dated 7.7.97 of the Commission by providing notional promotion to the petitioner to the post of Manager M and E.I forthwith and to pay post retirement benefit accordingly."

30. It is not in dispute that the petitioner had been appointed on the post of Manager Marketing and Economic Investigator on 16.1.1981 but was reverted back on 3.5.1982 after about one and a half year working on the said post. It is also not disputed that in view of circular dated 25.6.1983 and 25.3.1985, Sri P.C.Jain and 13 other junior to the petitioner were paid post retirement benefits considering them to have retired from the post of Manager Marketing and Economic Investigator. Therefore, the contention of the learned counsel for the petitioner that no post of Manager Marketing and Economic Investigator existed on which the petitioner was promoted as he had been treated only on anticipation of the vacancy can not be said to be correct. The petitioner had been appointed on the said post after making advisement and thereafter he was regularised and confirmed in service. Even otherwise all other 13 employees juniors to him have been promoted and were retired were given notional promotion except the petitioner for which no reason is provided by the respondents. The petitioner has been clearly discriminated by the action of the

respondents in not paying his post retirement dues considering him not retired from the post of Manager Marketing and Economic Investigator can not be sustained merely because vide order dated 3.1.2001 the Court directed that aspect of the matter may be considered by the appointing authority in accordance with rules, which does not give handle to the respondents to discriminate the petitioner and decide the matter which can not be approved in law.

31. It has come on record that the promotion of P.C. Jain and 13 other juniors to the petitioner was treated to be an approval from the State Government on the post of Manager Marketing and Economic Investigator and they were paid their post-retirement benefits for the said post. Therefore, even on this ground also the petition is liable to be allowed.

32. We do not find any force in the arguments of the learned counsel for the State that as a result of dismissal of the writ petition, the petitioner would be treated to have retired from the post of Senior Investigator as he was not legally promoted on the post of Manager Marketing and Economic Investigator. We also find that the petitioner had not received any excess payment during his "litigious employment" for the reason he had worked on the post of Manager Marketing and Economic Investigator and continued on the basis of the Court's order. It was not the case where he had received any excess payment by working on the post of Manager Marketing and Economic Investigator. Since the petitioner had been appointed after advertisement and following the procedure for recruitment, his case is clearly distinguishable from the case of Chandi Prasad Uniyal and Surinder Prasad Tiwari (Supra) wherein the bonafide mistake had been committed by the State Government in calculating their pay-scale resulting in excess payment.

33. For all these aforesaid reasons, the writ petition is allowed. Since the petitioner has actually worked on the post of Manager(M & E-I) till his superannuation, no recovery from him shall be made from him for working on the said post and he shall be paid his dues of the post of Manager(M & E-I) on this basis.

34. No orders as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.04.2014

BEFORE
THE HON'BLE DR. DHANANJAYA YESHWANT CHANDRACHUD, C.J.
THE HON'BLE DILIP GUPTA, J.

Civil Misc. Writ Petition No. 19028 of 2014

Hurr Mehdi Baqri... Petitioner
Versus
Chief Election Commission of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Prakash Chandra Srivastava

Counsel for the Respondents:
Bhupendra Nath Singh

Constitution of India, Art.-329(b)- Rejection of nomination-Lok Sabha election-rejected on ground in electoral roll-name of petitioner found no place-review rejected in absence of statutory provision-petition against rejection-held-not maintainable-once election notified except election Tribunal- Court ceased with every jurisdiction-petition dismissed.

Held: Para-9
On the other hand, where a nomination paper has been rejected, we are of the

view that the interference of the Court under Article 226 of the Constitution would not be warranted since the bar under Article 329 (b) would clearly apply. The only manner in which the election can be challenged is by means of presenting an election petition after the declaration of the results where, as we have already noted, one of the grounds can be that a nomination paper has been improperly rejected.

(Delivered by Hon'ble Dr. Dhananjaya Yeshwant Chandrachud, C.J.)

1. The petitioner has sought a direction in the nature of mandamus commanding the respondents to consider his nomination paper for the forthcoming elections to the 16th Lok Sabha in relation to the 08, Sambhal Lok Sabha Election Constituency as valid.

2. On 25 March 2014, the Returning Officer notified that the scrutiny of the nominations would take place on 27 March 2014 between 11:00 a.m. and 3:00 p.m. The nomination paper of the petitioner was rejected on 27 March 2014 on the ground that the name of the petitioner was not found at Serial No. 800 in the electoral rolls of the constituency. The Returning Officer has observed that the petitioner was absent though he was informed that the scrutiny will commence at 11:00 a.m. on 27 March 2014. The petitioner filed an application for making a correction in the nomination paper. This application has been rejected by the Returning Officer for the reason that once the nomination paper had been rejected, a review of the order was not permissible in law.

3. According to the petitioner, the scrutiny was to take place between 11:00 a.m. and 3:00 p.m. on 27 March 2014 and at 2:40 p.m. on 27 March 2014, he submitted the application to the Returning Officer for correcting an error in the nomination paper. The petitioner stated that in his nomination paper, he had incorrectly stated that his name appears at Serial No. 800 of the electoral rolls whereas, in fact, his name appears at Serial No. 802.

4. Learned counsel appearing on behalf of the petitioner submits that the Returning Officer having stated that the scrutiny would take place between 11:00 a.m. and 3:00 p.m., he would not be justified in rejecting the nomination paper despite the receipt of the application at 2:40 p.m. Moreover, it has been submitted, relying upon the provisions of Section 33 (4) and Section 36 (4) of The Representation of People Act, 1951, that the nomination paper ought not to have been rejected on the ground of a defect which is not of a substantial character. Finally, it has been urged that the jurisdiction of the Court under Article 226 of the Constitution is not entirely barred though the election process has commenced in view of the decision of the Supreme Court in Election Commission of India through Secretary vs. Ashok Kumar & others1

5. Article 329 (b) of the Constitution provides as follows:

"(b) No election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature."

6. It is well settled that the entire process from the issuance of a notification under Section 14 of The Representation of People Act, 1951 to the declaration of the

results under Section 66 is comprehended within the expression 'election' in Article 329 of the Constitution.

7. Once the election process has begun, the interference of this Court is clearly not warranted. Moreover, under Section 100 (1) (c), an improper rejection of a nomination is a ground on which the election of a returned candidate can be assailed.

8. The decision of the Supreme Court in Election Commission of India vs. Ashok Kumar (supra) arose from a judgement of the Karala High Court which by an interim order had stayed a notification issued by the Election Commission of India containing directions in regard to the counting of votes and had made directions on its own on the subject. The Supreme Court set aside the order of the High Court and allowed the appeal by the Election Commission of India holding that the Election Commission will have the power to supervise and direct the manner of counting of votes. It was in that context that the Supreme Court while formulating the governing principles of law held that anything which is done towards completing or in furtherance of the election proceedings, cannot be described as questioning the election. The Supreme Court held that judicial intervention would be available if assistance of the Court has been sought merely to correct or smoothen the progress of the election proceedings, to remove obstacles or to preserve a vital piece of evidence which may otherwise be lost or destroyed.

9. On the other hand, where a nomination paper has been rejected, we are of the view that the interference of the Court under Article 226 of the Constitution would not be warranted since the bar under Article 329 (b) would clearly apply. The only manner in which the election can be challenged is by means of presenting an election petition after the declaration of the results where, as we have already noted, one of the grounds can be that a nomination paper has been improperly rejected.

10. A Constitution Bench of the Supreme Court in N.P. Ponnuswami vs. Returning Officer and others2 held that the jurisdiction of the High Court under Article 226 of the Constitution should not be invoked to question the election to either House of Parliament and the observations are as follows:

"The law of elections in India does not contemplate that there should be two attacks on matters connected with election proceedings, one while they are going on by invoking the extraordinary jurisdiction of the High Court under Art. 226 of the Constitution (the ordinary jurisdiction of the Courts having been expressly excluded), and another after they have been completed by means of an election petition."

11. This decision was followed by the Supreme Court in Manda Jaganath vs. K.S. Rathnam and others3 and the observations of the Supreme Court are thus:

"12. In our opinion, whether the Returning Officer is justified in rejecting this Form B submitted by the first respondent herein or not, is not a matter for the High Court to decide in the exercise of its writ jurisdiction. This issue should be agitated by an aggrieved party in an election petition only.

13. It is to be seen that under Article 329(b) of the Constitution of India there is a specific prohibition against any challenge to an election either to the Houses of Parliament or to the Houses of Legislature of the State except by an election petition presented to such authority and in such manner as may be provided for in a law made by the appropriate legislature. Parliament has by enacting the Representation of the People Act, 1951 provided for such a forum for questioning such elections hence, under Article 329(b) no forum other than such forum constituted under the RP Act can entertain a complaint against any election.

14. The word "election" has been judicially defined by various authorities of this Court to mean any and every act taken by the competent authority after the publication of the election notification.

..... 23. The next argument of learned counsel for the respondent is that as per the provisions of section 36 of the Representation of the People Act, Rule 4 of the Conduct of Elections Rules, 1961 and clause 13 of the Election Symbols (Reservation and Allotment) Order, 1968, the omissions found by the Returning Officer in Form B filed by the respondent herein are all curable irregularities and are not defects of substantial nature, calling for rejection of the nomination paper. We think these arguments based on the provisions of the statutes, rules and orders are all arguments which can be addressed in a properly constituted election petition, if need be, and cannot be a ground for setting aside the order of the Returning Officer which is prima facie just and proper, in our opinion."

12. For these reasons, we are not inclined to entertain the petition. The petition is, accordingly, dismissed. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.04.2014

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

Civil Misc. Writ Petition No.19288 of 2014

Shambhoo Narain Yadav & Anr. Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri S.M. Misra

Counsel for the Respondents:
C.S.C., Sri B.P. Singh, Sri Shiv Nath Singh,Sri Rajesh Kumar

Societies Registration Act, 1860-Section 25(i)- Power of prescribed authority-to decide controversy-through summary proceeding and take final decision-no authority to pass interim order-in absence of statutory provision-order granting stay-held-without jurisdiction-quashed.

Held: Para-16
In the present case reference was made under section 25(1) of the 'Act 1860' by a member. The Prescribed Authority on the reference itself has passed an exparte and cryptic order staying the operation of the order passed by the Assistant Registrar dated 23.1.2014 and 6.3.2014. In absence of power to grant an interim order, the order of the Prescribed Authority is without jurisdiction. It is liable to be set aside. Accordingly, it is set aside.

Case Law discussed:
1982 UPLBEC 82; (1994) 4 SCC 225.

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

1. The petitioners are two in number. They claim to be the member of the Society namely Chak Chaubey Palya Development Block Higher Education Expansion Association, Pakardiha , district Azamgarh, which is registered under the Societies Registrar Act, 1860 (Act No. 21 of 1860) (for short 'Act,1860').

2. Petitioners are aggrieved by the order of the prescribed Authority whereby he has granted an interim order. The grievance of the petitioners is that under section 25 (1) of the 'Act 1860'. the Prescribed Authority does not have power to pass an interim order.

3. Brief reference to the factual aspects would suffice.

4. A Society namely Chak Chaubey Palya Development Block Higher Education Expansion Association, Pakardiha , district Azamgarh (hereinafter referred for the sake of brevity as Society) was registered in the year 1975. It has established an educational institution namely Junior High School, Chak Chaubey (Palya) Pakardeeha, district Azamgarh. It is recognized by the U.P.Basic Education Act, 1962. The institution does not receive any aid out of State Fund.

5. It is stated that the last renewal of the Society was made on 8.12.2010 for five years on the papers submitted by one Sri Ram Dayal Yadav. Earlier one Lalji Yadav had also moved application for renewal claiming himself as the Manager of the Society. In view of the conflicting claim by two rival factions the Assistant Registrar, Firms, Societies and Chits referred the matter to the Prescribed Authority under section 25 (1) of the 'Act 1860'. The Prescribed Authority vide his order dated 26.4.2010, recognized the election of the faction headed by Ram Dayal Yadav. It is avered in the writ petition that the last election of the Managing Committee was held on 10th August, 2008. The next election was due in the year 2011. Due to the rival claims the election could not be held, therefore, the Assistant Registrar exercising his power under section 25(2) of the 'Act 1860' published a tentative list of members of the general body and he invited objection by 28.2.2014.

6. It is stated that after receiving the objection he determined the list of the office bearers and 32 members were found to be valid members. The Assistant Registrar vide order dated 6.3.2014 also deputed the District Basic Education Officer, Azamgarh as the Election Officer to hold the fresh election. It is stated that one of the alleged member with a view to delay the election proceedings moved an application before the Prescribed Authority under section 25(1) of the 'Act 1860' challenging the order of the Assistant Registrar dated 23.1.2014. On the same reference the Prescribed Authority has stayed the order of the Assistant Registrar dated 23.1.2014 inviting application of the tentative list and 6.3.2014 whereby he had determined 32 members as valid members of the general body.

7. I have heard Sri S.M.Mishra, learned counsel for the petitioner, Sri B.P. Singh learned counsel for the respondent no.4 and Sri S.N.Singh, learned counsel appearing for respondent no.5. Learned Standing Counsel has accepted notice on behalf of the State authorities.

8. In view of the fact that no factual controversy is involved in the writ petition. Only question of law has been raised by learned counsel for the petitioner. No counter affidavit is needed in the matter. The writ petition is accordingly being finally disposed of in terms of the Rules of the Court.

9. Sri S.M.Mishra, learned counsel for the petitioner submits that under section 25 (1) of the Societies Registration Act, 1860 (Act No. 21 of 1860) (for short 'Act,1860'), the Prescribed Authority has no power to grant any interim order. He submits that under section 25 (1) the Prescribed Authority has been empowered only to decide the dispute in regard to election of the office bearers which is referred to him by the Registrar or by atleast ¼ members of the Society.

10. Learned counsel for the respondents submits that it shall be deemed that Prescribed Authority has ancillary power to pass an interim order also.

11. I find it helpful to extract section 25(1) of the 'Act 1860' hereunder below:-

"25.Dispute regarding election of office bearers.-(1) The prescribed authority may, on a reference made to it by the Registrar or by at least one-fourth of the members of a society registered in Uttar Pradesh, hear and decide in a summary manner any doubt or dispute in respect of the election or continuance in office of an office bearers of such society, and may pass such orders in respect thereof as it deems fit :"

12. From a careful reading of the said section it is evident that Section 25(1) of the 'Act 1860' confers power to the Prescribed Authority to decide the dispute of the office bearers of the Society. He is required to decide the matter summarily. The State Government has not framed any rule to lay down the procedure for hearing and decide the dispute. He is required to decide any doubt or dispute in respect of the election of an office bearers. The proviso and explanation provides the ground on which the election can be set aside.

13. It is true that Section 19-A of the General Clauses Act , 1904 provides an ancillary power to a person/ Officer or Functionaries to enforce doing all such acts, or thing. All such powers shall be deemed to be given as necessary to enable the person to do or enforce the doing of act or thing. From perusal of Section 25(1) of the 'Act 1860' it is not discernable any such power conferred on the Prescribed Authority. This issue fell for consideration of a Division Bench of this Court in Meerut Collegiate Association, Meerut and others v. Sri Arvind Nath Seth and others, reported (1982 UPLBEC 82). The Division Bench has considered the effect of Section 19-A of the U.P. General Clauses Act, 1904 and has also considered the similar provision under section 95 of the U.P. Panchayat Raj Act, 1947 and section 17 of the Arms Act, 1959. The Division Bench has also considered Section 7-F of the U.P. (Temporary) Control of Rent and Eviction Act, 1947 and Section 254 of the Income Tax Act, 1961. After considering the said provisions of the Act and the power of Section 25(1) of the 'Act 1860', the Court came to hold that Prescribed Authority while deciding the dispute under section 25(1) of the 'Act 1860' has no power to pass an interim order. The Court has held as under :-

"Applying the principles enunciated in the decision referred to above, it is not possible to say that for hearing and deciding any doubt or dispute in regard to the election of the office bearer of the petitioner committee it was absolutely necessary for the Prescribed Authority to stay the functioning of the committee pending decision of the reference and further more so when the proceeding are summary in nature. The impugned order, therefore, is liable to be quashed."

14. The Supreme Court in the case of Morgan Stanley Mutual Fund v. Kartick Das reported (1994) 4 SCC 225, has considered the issue whether the Consumer Dispute Redressal Forum has power to pass an interim order. The Court analyzing the provisions of Section 14 of the Consumer Protection Act, 1986 found that the said section does not empower the Tribunal to pass any interim relief. Paragraph 44 of the judgment reads as under :-

" A careful reading of the above discloses that there is no power under the Act to grant any interim relief of (sic or) even an ad interim relief. Only a final relief could be granted. If the jurisdiction of the Forum to grant relief is confined to the four clauses mentioned under section 14, it passes our comprehension as to how an interim injunction could ever be granted disregarding even the balance of convenience."

15. In view of the aforestated legal position, I am of the view, that Prescribed Authority does not have any power to pass an interim order.

16. In the present case reference was made under section 25(1) of the 'Act 1860' by a member. The Prescribed Authority on the reference itself has passed an exparte and cryptic order staying the operation of the order passed by the Assistant Registrar dated 23.1.2014 and 6.3.2014. In absence of power to grant an interim order, the order of the Prescribed Authority is without jurisdiction. It is liable to be set aside. Accordingly, it is set aside.

17. Writ petition is allowed.

18. The Prescribed Authority is directed to decide the Reference in accordance with law. The order is also without prejudice to the rights and contention of the parties.

19. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.02.2014

BEFORE
THE HON'BLE ARUN TANDON, J.
THE HON'BLE ARVIND KUMAR MISHRA-I, J.

Civil Misc. Writ Petition No.19485 of 2012

Z.U. Ansari ...Petitioner
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sawan Kumar Srivastava, Sri Anil Kumar Srivastava,Sri Chandrajeet Tiwari, V.S. Tiwari.

Counsel for the Respondents:
C.S.C., Sri Pankaj Saxena.

Civil Services Regulation-351-A-Petitioner working as Assistant Engineer-retired on 30.09.2008-after three years of retirement charge sheet on 27.06.2011-without prior sanction from Governer-defence taken by

state that since the Minister given approval-hence as per U.P. Secretariat Instruction 1972-shall be deemed to sanction by Governer-held-not amount to sanction as contemplated by Regulation 351-A-charge sheet quashed.

Held: Para-16
We have, therefore, no hesitation to hold that the sanction of the minister referable to the Business Regulations in the facts of the case will not amount to the sanction of the Governor as contemplated by Regulation 351-A of the Civil Services Regulations, 1975.

Case Law discussed:
(2014)1 SCC 156; 2007(2) UPLBEC 1329; AIR 2004 SC 2523.

(Delivered by Hon'ble Arun Tandon, J.)

1. Petitioner before Court seeks quashing of the charge-sheet dated 27.06.2011 issued by the Enquiry Officer under letter dated 28.07.2011 with the approval of the Principal Secretary, Rural Engineering Services. Petitioner has prayed for payment of his entire retiral dues along with interest.

2. Facts in short leading to the petition are as follows :

3. Petitioner before this Court was employed as Assistant Engineering in the Rural Engineering Department of the State of U.P. He attained the age of superannuation on 30.09.2008. After more than three years of his retirement, a charge-sheet dated 27.06.2011 has been served upon the petitioner along with covering letter dated 28.07.2011. The charge-sheet has been signed by the Junior Engineer (Western Region) Rural Engineering Department in his capacity as Enquiry Officer. It is his case that in view of Regulation 351-A read with 370 of Civil Services Regulations, departmental enquiry against the petitioner cannot be instituted/continued without the sanction of the Governor. In the facts of the case, no sanction from the Governor has been obtained, the charge-sheet after more than three years subsequent to his retirement is bad.

4. On behalf of the respondent authorities a counter affidavit has been filed and it has been stated in paragraph 9 that before initiating the departmental proceedings against the petitioner with the service of charge-sheet dated 27.06.2011, approval of the minister of the department had been obtained on 07.01.2011 and this according to the respondents would be deemed to be the sanction referred to under Article 351-A of the Governor having regard to the provisions of the U.P. Secretariat Instructions 1982 framed under the Rules of Business, 1975.

5. Counsel for the respondents has placed reliance upon the judgment of the Apex Court in the case of State of Orissa vs. Kanhu Charan Majhi reported in (2014) 1 SCC, 156, specifically paragraph 12.

6. On behalf of the petitioner in rejoinder affidavit it is submitted that the judgment is clearly distinguishable in the facts of the case having regard to the specific language of Civil Services Regulations which have been framed under Article 309 of the Constitution of India, therefore, statutory in nature. The Rules of Business, 1975 have been framed under Article 156 of the Constitution of India and they deals with the executive decisions of the State Government which are completely foreign to the service rules framed under Article 309 of the Constitution of India.

7. We have heard learned counsel for the parties and have examined the records of the present petition.

8. It is not in dispute that the petitioner had retired in the year 2008 and that departmental proceedings have been initiated against him in the year 2011 i.e. after expiry of three years subsequent to his retirement. It is also not in dispute that under Regulations 351-A of the Civil Services Regulations framed under Article 309 of the Constitution of India for any departmental enquiry being initiated against a retired employee, prior sanction of the Governor is but necessary. The issue in that regard has been settled by the High Court in the case of State of U.P. vs. R.C.Mishra reported in 2007(2) UPLBEC, 1329 wherein Regulation 351-A had been taken note of. It has been laid down that once the government servant has retired and no proceedings have been earlier initiated then the limitations imposed by sub clause (i) or sub-clause (ii) of clause (a) of proviso to Regulation 351-A will apply.

9. We may also record that under Explanation A to Article 351-A, it has been explained that the departmental proceedings against a retired employee shall be deemed to have been instituted when a charge framed against the person concerned is issued to him.

10. It is therefore, clear that as per Regulations 351-A of Civil Services Regulations, the departmental enquiry would be deemed to have been instituted on the date charge-sheet is served upon the petitioner i.e. in the year 2001. The petitioner had neither been placed under suspension nor any charge-sheet has been served upon him while he was in service. Therefore, in the facts of the case, it has to be determined as to whether any sanction from the Governor has been obtained or not.

11. It is admitted on record that there is no order of the Governor sanctioning the departmental proceedings. The stand taken by the State before us is that since the minister of the department had granted approval to the initiation of the departmental proceedings vide order dated 07.01.2011, this order of the minister read with Chapter 7 of U.P. Secretariat Instructions, 1972 framed under the Rules of Business, 1975 has to be deemed to be the sanction of the Governor. In support of this contention the State has placed reliance upon paragraph 12 of the judgment in the case of State of Orissa vs. Kanhu Charan Majhi (supra). Paragraph 12 reads as follows :

"We have considered the provisions of Rule 31 of the Rules, whereby power has been given to the Governor to review the order dated 16.10.1995. Now the question is whether the order was passed by the Governor. It is true that when any statute empowers the Governor to pass an order, the Governor himself need not sign and need not pass the order. The rules of business of any particular State deal with the procedure as to how an order is to be passed by the Governor or in the name of the Governor. In the instant case, the order dated 04.09.2000 was passed by the Under-Secretary, Food Supplies and Consumer Welfare Department of the Government of Orissa. According to Rules 11 and 12 of the Orissa Government Rules of Business, an Under-Secretary is empowered to sign in the name of the Governor. Thus, in view of said legal position, the order dated 04.09.2000 can be said to have been passed by the Governor, exercising power under Rule 31 of the Rules."

12. We may record that the provisions of the Regulations 351-A of the Civil Services Regulations have been framed under Article 309 of the Constitution of India and are statutory in nature. The legal position in that regard is well settled. Reference in that regard may be had to the judgment of the Apex Court in the case of Inder Parkash Gupta vs. State of Jammu & Kashmir and others reported in AIR 2004 SC, 2523 paragraph n28 wherein it has been laid down as follows :

28. The Jammu & Kashmir Medical Education (Gazetted) Services Recruitment Rules, 1979 admittedly were issued under Section 124 of the Jammu and Kashmir Constitution which is in pari material with Article 309 of the Constitution of India. The said Rules are statutory in nature. The Public Service Commission is a body created under the Constitution. Each State constitutes its own Public Service Commission to meet the constitutional requirement for the purpose of discharging its duties under the Constitution. Appointment to service in a State must be in consonance with the constitutional provisions and in conformity with the autonomy and freedom of executive action. Section 133 of the Constitution imposes duty upon the State to conduct examination for appointment to the services of the State. The Public Service Commission is also required to be consulted on the matters enumerated under Section 133. While going through the selection process the Commission, however, must scrupulously follow the statutory rules operating in the field. It may be that for certain purposes, for example, for the purpose of shortlisting, it can lay down its own procedure. The Commission, however, must lay down the procedure strictly in consonance with the statutory rules. It cannot take any action which per se would be violative of the statutory rules or makes the same inoperative for all intent and purport. Even for the purpose of shortlisting, the Commission cannot fix any kind of cut-ff marks.?

13. So far as the Rules of Business, 1975 are concerned, it is admitted to the State that these rules have been framed under Article 166 of the Constitution of India. Article 166 of the Constitution of India deals with the conduct of government business and provides that all executive actions of the Government/State shall be expressed to be taken in the name of the Governor and it is with reference to these actions of the State Government that a power has been conferred upon the Governor to frame the business rules. Article 166 of the Constitution of India reads as follows :

"Article 166-- (1) All executive action of the Government of a State shall be expressed to be taken in the name of the Governor.

(2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor.

(3) The Governor shall make rules for the more convenient transaction of the business of the Government of the State and for the allocation among Ministers of the said business insofar as it is not business with respect to which the /governor is by or under this Constitution required to act in his discretion.?

14. We are of the considered opinion that the provisions of Article 309 of the Constitution of India operate in a separate field vis-a-vis the conduct of government business under Article 166 of the Constitution of India. They are not overlapping. Therefore, if under the service rules framed under Article 309 of the Constitution of India namely the Civil Services Regulations, 1975, it has been provided that sanction of the Governor would be necessary before initiation of the departmental proceedings with the service of the charge sheet upon the retired employee then such sanction has to be that of the Governor and not of the minister with reference to the U.P. Secretariat Instructions 1982 framed under the Rules of Business, 1975. We may also record that the U.P. Secretariat Instructions 1982, Chapter VII only provide that all business allocated to a department under the Rules of Business, 1975 is to be disposed of by or under the General or special directions of the minister in charge (Reference Business Regulations 3). It is, therefore, clear that only such business as allocated to the department under the Rules of Business, 1975 can be disposed of under the general or special directions of the minister in charge.

15. Nothing has been demonstrated before us to lead us to accept that the power to sanction the departmental proceedings in respect of a retired government servant has been allocated as a business to be disposed of under the general or special directions of the minister concerned under the Business Regulations.

16. We have, therefore, no hesitation to hold that the sanction of the minister referable to the Business Regulations in the facts of the case will not amount to the sanction of the Governor as contemplated by Regulation 351-A of the Civil Services Regulations, 1975.

17. So far as the judgment relied upon by the counsel for the respondent in the case of State of Orissa (Supra), we may record that the same is clearly distinguishable in the facts of the case specifically with reference to the Rules of Business, 1975 of the State of U.P. referred to by us.

18. In absence of sanction of the Governor, no departmental proceedings can be initiated against a government servant after his retirement, the impugned charge-sheet cannot be legally sustained. Accordingly, the charge-sheet dated 27.06.2011 is hereby quashed as also the departmental proceedings initiated thereto against the petitioner. The petitioner shall be entitled to all the consequential benefits with the result of the quashing of the charge-sheet and the departmental proceedings. The State is directed to take appropriate action in that regard within two months from the date a certified copy of the order is served upon the State Government.

19. Writ petition is allowed subject to the observations/direction made herein above.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.04.2014

BEFORE
THE HON'BLE DR. DHANANJAYA YESHWANT CHANDRACHUD, C J.
THE HON'BLE DILIP GUPTA, J.

Civil Misc. Writ Petition No.20434 of 2014

Hazrat Ali & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Bijendra Kumar Mishra, Sri Shravan Kumar Dubey

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226- Representation regarding cancellation of sale deed-rejected by District Magistrate-with finding sale executed by Civil Court-in execution of Decree-if any share of petitioner affected-remedy to take recourse of order 21 rule 90 of C.P.C.-writ court can not interfere-held-dismissed with liberty to approach under order 21 rule 90 C.P.C.

Held: Para-9
In this view of the matter, no recourse can be had for exercise of writ jurisdiction under Article 226 of the Constitution. The District Magistrate, Siddharth Nagar was absolutely justified in declining to entertain the representation filed by the petitioners. The District Magistrate can exercise powers which are specifically conferred upon him by law and he had no jurisdiction to entertain a representation in respect of a sale which had taken place in pursuance of an execution of a decree passed by the Civil Court in pursuance of which a registered sale deed had been executed and possession had been handed over to the auction purchaser. Even otherwise, the District Magistrate was not competent to entertain such a request. The remedies of the petitioner must, therefore, lie under the provisions of Order XXI Rule 90 as observed earlier. We leave it open to the petitioners to do so.

(Delivered by Hon'ble Dr. Dhananjaya Yeshwant Chandrachud, C.J.)

1. The relief which the petitioners seek is for setting aside the sale deed dated 29 August 2012 by which Gata No.884 ad measuring 0.9140 hectares of village Pakarihava, Tappa-Dhebarua, pargana Naugarh, tehsil Shohratgarh, district Siddharth Nagar has been sold in execution of a decree. The petitioners seek to question the legality of an order passed by the District Collector, Siddharth Nagar declining to entertain the representation submitted by the petitioners on the ground that the sale having taken place in execution of a decree of a competent Civil Court, the grievance of the petitioners cannot be entertained.

2. Suit 152 of 1999 was filed against one Chinka son of Surya by his wife, son and daughter before the Civil Judge (Senior Division), Siddharth Nagar for maintenance. A decree was passed in the suit on 17 November 2000. In execution proceedings, the movable property in question was put to auction on 30 May 2009 at which the fourth respondent was declared to be a purchaser. The sale was confirmed by the Executing Court on 26 August 2009 and in pursuance of the directions of the Court, possession was handed over to the fourth respondent on 24 May 2011 and a registered deed of sale was executed on 29 August 2012.

3. The petitioners challenged the sale on the ground that they had acquired share in the land in pursuance of a registered sale deed dated 19 October 2004 and 12 December 2006. In an earlier writ petition filed by the petitioners, a Division Bench of this Court, noting that the petitioners had submitted a representation to the District Magistrate, Siddharth Nagar, directed that a decision shall be taken in accordance with law. In pursuance of the order of the Division Bench, the District Magistrate, Siddharth Nagar has rejected the representation of the petitioners on the ground that the land was sold in execution of a decree of the Civil Court in pursuance of which a registered sale

deed was executed and possession has been handed over to the auction purchaser. Hence, the District Magistrate, Siddharth Nagar has stated that he had no jurisdiction to entertain the representation.

4. In a matter as in the present, where an immovable property has been sold in execution of a decree passed by the Civil Court, it would be most inappropriate for the Court in exercise of its writ jurisdiction under Article 226 of the Constitution to interfere when sufficient remedies are provided under Order XXI Rule 90 of the Code of Civil Procedure, 1908.

5. Order XXI Rule 90(1) stipulates that where any immovable property has been sold in execution of a decree, the decree holder, or the purchaser, or "any other person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale", may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it.

6. Sub-rule (2) of Order XXI Rule 90 stipulates that no sale shall be set aside on the ground of irregularity or fraud in publishing or conducting it unless, upon the facts proved, the Court is satisfied that the applicant has sustained substantial injury.

7. Order XXI Rule 92(4) stipulates that where a third party challenges the judgment-debtor's title by filing a suit against the auction-purchaser, the decree-holder and the judgment-debtor shall be necessary parties to the suit.

8. Sufficient remedies are available under the Code of Civil Procedure, 1908 for applying to set aside an auction sale, which has been conducted in execution of a decree including at the behest of a third party which claims an interest or share in the property which is affected by the sale.

9. In this view of the matter, no recourse can be had for exercise of writ jurisdiction under Article 226 of the Constitution. The District Magistrate, Siddharth Nagar was absolutely justified in declining to entertain the representation filed by the petitioners. The District Magistrate can exercise powers which are specifically conferred upon him by law and he had no jurisdiction to entertain a representation in respect of a sale which had taken place in pursuance of an execution of a decree passed by the Civil Court in pursuance of which a registered sale deed had been executed and possession had been handed over to the auction purchaser. Even otherwise, the District Magistrate was not competent to entertain such a request. The remedies of the petitioner must, therefore, lie under the provisions of Order XXI Rule 90 as observed earlier. We leave it open to the petitioners to do so.

10. The writ petition is, accordingly, dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.04.2014

BEFORE
THE HON'BLE DR. DHANANJAYA YESHWANT CHANDRACHUD, C.J.
THE HON'BLE DILIP GUPTA, J.

Civil Misc. Writ Petition No. 21415 of 2014

Irshad ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Akhilanand Pandey, Sri Suresh Chandra Varma

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226- Role of police-where Civil suit pending before Civil Court-private respondent failed to get-exparte injunction order-with collusion of private respondent police using extra judicial method of coercion-highly depreciated-police can not discharge the duty of Civil Court.

Held: Para-3
We have no manner of doubt that it is not open to the police authorities to arrogate to themselves powers which are not conferred upon them by law. Any such coercive methods would be violative of the rule of law. The fourth respondent is entitled, in the pending suit, to seek all possible reliefs which are legitimately open. However, a police officer would have no justification whatsoever to exercise those powers which are to be exercised by the civil court on an adjudication of facts between litigating parties.

(Delivered by Hon'ble Dr. Dhananjaya Yeshwant Chandrachud, C.J.)

1. The petitioner has moved this proceeding stating that he is a co-sharer in plots no. 177 and 178, situated in Mauja Katauli Buzurg, Pargana Devgaon, Tehsil- Lalganj, District Azamgarh.

2. The fourth respondent filed a suit before the Civil Judge (Junior Division), Haveli, Azamgarh (Original Suit No. 381 of 2014) in which the petitioner and the fifth respondents who are brothers have been impleaded as the first and second defendants, whereas respondents 6, 7 and 8 who are sons of the fourth respondent-plaintiff were also impleaded as defendants. The Civil Judge (Junior Division) did not grant any interim injunction but by an order dated 3 March 2014 issued notice and directed a spot inspection by a Commissioner. The petitioner has stated that on 9 March 2014, while he was carrying out construction on the portion of the land which has fallen to his share, the third respondent sought to raise an obstruction.

3. The grievance in these proceedings is that the third respondent, who is the officer Incharge of the Police Station, is now coercing the petitioner not to carry out any construction though the fourth respondent has failed to obtain an injunction before the Trial Court. At the outset, we make it clear that the issue as to whether the construction which is carried out by the petitioner is or is not within his holding, as claimed, cannot be determined by this Court under Article 226 of the Constitution in the present proceeding. We are, however, entertaining the petition only on the basis of the grievance that the third respondent, who is the officer Incharge of the Police Station, has taken the law in his own hands and despite the fact that the fourth respondent has failed to obtain an interim injunction, is using extra judicial methods to coerce the petitioner. We have no manner of doubt that it is not open to the police authorities to arrogate to themselves powers which are not conferred upon them by law. Any such coercive methods would be violative of the rule of law. The fourth respondent is entitled, in the pending suit, to seek all possible reliefs which are legitimately open. However, a police officer would have no justification whatsoever to exercise those powers which are to be exercised by the civil court on an adjudication of facts between litigating parties.

4. We, however, clarify that these observations are only confined to deal with the allegation against the third respondent and shall not amount to any

expression of opinion by the Court on the rights inter se as claimed by the petitioner and the private respondents, which are left to be decided in appropriate proceedings, including those which are pending before the Civil Court.

5. The petition is, accordingly, disposed of. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.04.2014

BEFORE
THE HON'BLE ANJANI KUMAR MISHRA, J.

Civil Misc. Writ Petition No.21572 of 2014

Dr. Anil Kumar ...Petitioner
Versus
D.D.C. District G.B. Nagar & Ors. ...Respondents

Counsel for the Petitioner:
Sri Saurabh Sachan,Sri A.K. Sachan
Counsel for the Respondents:
C.S.C.

U.P. Consolidation of Holdings Act-Section 48-Sale deed by one co-shareholder to other-prior to consolidation scheme-not taken into consideration while determining share-the C.O. Taken view as in pursuance of sale deed name not mutated-and the sale transaction hit by provision of section 168-A of U.P. Z.A. & L.R. Act-SOC as well as D.D.C.-rightly set-a-side the order passed by C.O. In view of fact when sale deed executed-village was not under consolidation-more over sale transaction between one coshare holder to other-neither mutation nor provisions of 168-A of Z.A. Act attracted-petition dismissed.

Held: Para-11
Under the circumstances, there was no question of the sale deed requiring mutation in the revenue record. Mutation could have been required only if the sale deed was in favour of persons whose name did not already exist in the record. Moreover, sale deed is of a share in a joint Khata and the same, therefore, is not hit by provision 168-A of the Act as it existed in the statute book on the date of sale deed. This provision has been deleted from statute book w.e.f. 23.8.2004 vide Act No. 27 of 2004. Sale of share by one co-tenure holder in favour of another co-tenure holder in a joint khata does not result in any fragmentation.

Case Law discussed:
1971 RD 518.

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

1. Heard Sri AK Sachan, learned counsel for the petitioner.

2. This writ petition arises out of an objection under section 9-A(2) filed by Mushe and others,

3. The dispute in the writ petition pertains to land of Khata No. 104 which was recorded in the name of Smt. Saremwati, w/o Sri Kashi Ram, Mushe, son of Solu, and Horam, son of Kale in the basic year. Three sets of objections were filed under section 9-A (2). Of the three objections, the writ petition pertains to the objection filed by Mushe claiming on the basis of the sale deed dated 11.12.1964 wherein Chandru had sold his 1/4th share in favour of Horam, son of Kale and Mushe, son of Solu.

4. A counter objection was filed by the petitioner's mother claiming the share of Chandru on the basis of sale deed dated 17.4.1973 alleged to have been executed in her favour by the said Chandru.

5. The Consolidation Officer by his order dated 3.4.1989 determined the share of the parties on the basis of the pedigree on record. The claim based on the sale deed dated 11.12.1964 was not accepted on the ground that no mutation on the basis of the sale deed has been made and that the sale itself was void in view of section 168-A of the UP Zamindari Abolution and Land Reforms Act (the Act).

6. Aggrieved, an appeal was preferred which was allowed by order dated 7.7.2006 whereby relying upon the sale deed dated 11.12.1964, an area of 1.160 was ordered to be recorded in the name of successor in interest of Horam and Mushe.

7. Against the order passed by the appellate authority, the mother of the petitioner preferred Revision No. 29. The Deputy Director of Consolidation (the DDC) by his order dated 1.8.2013 dismissed the revision. Hence the present writ petition.

8. Learned counsel for the petitioner Sri AK Sachan has submitted that the sale deed dated 11.12.1964 was never mutated in the revenue records and in any case the said sale deed was void in view of Section 168-A of the Act. He submits that the orders of the appellate court and revisional court which ignore the aforesaid two aspects of case are patently illegal and therefore deserve to be set aside.

9. I have considered the submission made by the petitioner and have perused the record.

10. The record reveals that the sale deed dated 11.12.1964 was executed in favour of persons who were co-tenure holders of the Khata in question and were recorded as such thereon from prior to the sale deed.

11. Under the circumstances, there was no question of the sale deed requiring mutation in the revenue record. Mutation could have been required only if the sale deed was in favour of persons whose name did not already exist in the record. Moreover, sale deed is of a share in a joint Khata and the same, therefore, is not hit by provision 168-A of the Act as it existed in the statute book on the date of sale deed. This provision has been deleted from statute book w.e.f. 23.8.2004 vide Act No. 27 of 2004. Sale of share by one co-tenure holder in favour of another co-tenure holder in a joint khata does not result in any fragmentation.

12. This view is fully supported by the judgment in the case of Santokhi Vs. Board of Revenue UP reported in 1971 RD 518, wherein it was held as under:

"Where undivided interest of one of the co-tenure holders is transferred, it cannot be said that the transfer involves transfer of a 'fragment', ..."What is transferred is undivided interest in the land and not any specific land. The prohibition contained in Section 168-A is in respect of land which is a fragment i.e. which is lesser in extent than the prescribed area and not of undivided interest in the land..."

13. By the sale deed in question the share of one co tenure holder increased

and that of the vendor decreased in an undivided holding. Hence no fragmentation resulted and the holding remained the same.

14. The plea of fragmentation cannot be accepted for another reason. For this plea to succeed it is also required to be proved that the sale was of a fragment in a consolidated area. There is nothing on record that consolidation operations had taken place prior to the execution of the sale deed on 11.2.1964.

15. In view of aforesaid discussion the submissions made by the learned counsel for the petitioner have no force. The writ petition is devoid of merits and is accordingly dismissed at the admission stage.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.04.2014

BEFORE
THE HON'BLE VINEET SARAN, J.
THE HON'BLE NAHEED ARA MOONIS, J.

Civil Misc. Writ Petition No.22113 of 2014

Rameshwar Das Gupta & Anr..Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Pankaj Dubey

Counsel for the Respondents:
C.S.C., Sri Ramendra Pratap Singh

Right to fair compensation and transparency in land Acquisition Rehabilitation and Resettlement Act, 2013-Section 24-claim of fair compensation-land acquired by notification u/s 4-on 17.09.96-notification under section 6 issued on 28.10.96-compensation received as per Rule 1997 on 05.02.01-claim based upon ground-no physical possession taken-and petitioners are still in actual possession-except certain photographs no documents produced-held-after receiving amount of award based upon agreement possession of state government itself presumed-if possession retain petitioner-deemed dishonest can not invoke writ jurisdiction-petition dismissed.

Held: Para-9
We are further of the view that in case the petitioners had not handed over the possession after the Award had been passed even after receiving compensation and also did not challenge the said proceedings before any competent court or authority by not handing over possession of the land, the petitioners had clearly not conducted themselves properly and had proceeded with a dishonest intention. Such being the position, the petitioners would not be entitled to any relief under the extra ordinary discretionary jurisdiction of this Court under Article 226 of the Constitution of India.

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

1. Heard learned counsel for the petitioners as well as learned Standing Counsel appearing for the State-respondents no. 1 to 3 and Sri Ramendra Pratap Singh, learned counsel appearing for respondent no.4-Greater Noida Industrial Development Authority and have perused the record.

2. The admitted case of the petitioners is that by notification dated 17.9.1996 issued under section 4 of the Land Acquisition Act, 1894 (hereinafter referred to as "the Act") and the subsequent notification dated 28.10.1996 issued under section 6 of the Act, the land of the petitioners was acquired by the

State Government for respondent no.4. Then as per the Award dated 5.2.2001 passed on the basis of agreement entered into under Land Acquisition (Determination of Compensation and Declaration of Award by Agreement) Rules, 1997 (hereinafter referred to as "the Rules of 1997"), the petitioners had been paid compensation as per the agreement. In the said Award itself, which has become final, it has been categorically stated that the possession of the land has been taken from the petitioners on 20.1.1998. It is admitted to the petitioners that the compensation has been duly paid to them.

3. Now after a gap of about 18 years of the notifications, 16 years after the possession of the land has been taken and 13 years after the Award which was passed on the basis of a compromise/agreement under the Rules of 1997, which compensation has been accepted by the petitioners, this writ petition has been filed claiming benefit of Section 24 of Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (in short, "Act of 2013").

4. For ready reference, section 24 of the Act of 2013 is reproduced below:-

"24. Land acquisition process under Act No. 1 of 1894 shall be deemed to have lapsed in certain cases.-(1) Notwithstanding anything contained in this Act, in any case of land acquisition proceedings initiated under the Land Acquisition Act, 1894 (1 of 1894),-

(a) where no award under section 11 of the said Land Acquisition Act has been made, then, all provisions of this Act relating to the determination of compensation shall apply; or

(b) where an award under said section 11 has been made, then such proceedings shall continue under the provisions of the said Land Acquisition Act, as if the said Act has not been repealed.

(2) Notwithstanding anything contained in sub-section(1), in case of land acquisition proceedings initiated under the Land Acquisition Act, 1894 (1 of 1894), where an award under the said section 11 has been made five years or more prior to the commencement of this Act but the physical possession of the land has not been taken or the compensation has not been paid the said proceedings shall be deemed to have lapsed and the appropriate Government, if it so chooses, shall initiate the proceedings of such land acquisition afresh in accordance with the provisions of this Act:

Provided that where an award has been made and compensation in respect of a majority of land holdings has not been deposited in the account of the beneficiaries, then, all beneficiaries specified in the notification for acquisition under section 4 of the said Land Acquisition Act, shall be entitled to compensation in accordance with the provisions of this Act."

5. Learned counsel for the petitioners submits that actual physical possession of the land has not been taken from the petitioners and as such since the Award in the case was made on 5.2.2001, which was more than five years prior to the commencement of Act of 2013 (which came into force on 1.1.2014) and the actual physical possession of the land has not been taken, the petitioners would be

entitled to the benefit of sub-section (2) of Section 24 of the Act of 2013.

6. Except for merely stating in paragraph 7 of the writ petition that the petitioners are still in actual physical possession of the entire land which is still lying vacant and filing of some photographs said to be relating to the land in question, there is no proper evidence in the form of any document like Khasra etc. to show that the petitioners still continue in possession of the land.

7. Even otherwise, once the compensation has been awarded and paid to the petitioners on the basis of an agreement executed under the Rules of 1997, it would be presumed that the possession of the land has been taken over from the petitioners. It is not a case where a normal Award has been passed and thereafter the petitioners had been litigating with regard to the possession being taken from them. Here is a case where after the Award was passed, wherein it was mentioned that the possession of the land has been taken on 20.1.1998, the petitioners kept silent and had accepted the amount awarded and did not dispute the fact at any stage that the possession of the land had not been taken from them, although specifically mentioned to be so in the Award itself.

8. As such, we are of the firm view that in the circumstances, the petitioners cannot be given the benefit of the provisions of the Act of 2013. Their claim that they continued in possession of the land even after receiving compensation under the Award, which mentions about the taking over of possession of the land from the petitioners, does not deserve to be accepted. Finality has to be given to a proceeding/transaction at some stage. In the present case, the transaction had been completed once a compromise/agreement had been entered into between the parties and award was passed, which was accepted by the petitioner. After accepting compensation under the award, the petitioners cannot turn around after more than a decade and say that possession (as already mentioned in the award) was not given by or taken from them.

9. We are further of the view that in case the petitioners had not handed over the possession after the Award had been passed even after receiving compensation and also did not challenge the said proceedings before any competent court or authority by not handing over possession of the land, the petitioners had clearly not conducted themselves properly and had proceeded with a dishonest intention. Such being the position, the petitioners would not be entitled to any relief under the extra ordinary discretionary jurisdiction of this Court under Article 226 of the Constitution of India.

10. For the foregoing reasons, the petitioners are not entitled to any relief, as we are of the opinion that the provisions of Section 24(2) of the Act of 2013 would not be attracted in the facts of the present case. This writ petition is, accordingly, dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.04.2014

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Civil Misc. Writ Petition No.22619 of 2014

Smt. Kumkum ...Petitioner
Versus
Sri Arvinder Singh Bagga @ Bablu & Ors. ...Respondents

Counsel for the Petitioner:

Sri Siddharth Srivastava

Counsel for the Respondents:
Sri Pavan Kishore, Sri Krishan Ji Khare

Civil Procedure Code-Order 41 Rule-5-Power of Appellate Court-Trail Court-decreed the suit for permanent injunction-appeal against-first appellate Court stayed the operation of judgment during pendancy of appeal-argument that Lower Appellate Court at the best can stay the execution-but can not stay the operation-held-court should not hyper technical-under Section 151 C.P.C.-with inherent power can pass such order-even otherwise being interlocutory order-not liable to interfere under extra-ordinary jurisdiction of Writ Court.

Held: Para-8
It is pertinent to mention that wherever any judgment, order and decree is likely to visit a party with civil consequences and the same is under challenge, normally pending adjudication it is always better to stay the effect and operation of such an order. Thus, the appellate court in exercise of its inherent power has not committed any error in passing the impugned order.

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

1. Heard Sri Siddhartha Srivastava, counsel for the petitioner and Sri Pavan Kisore on behalf of respondents No.5 and 6.

2. Petitioner is aggrieved by the order dated 31.3.2014 passed by the appellate court disposing of application paper No.13-Ga in Civil Appeal No.95 of 2013 (Nav Kalpna Sahkari Avas Samit and another Vs. Smt. Kumkum and others).

3. It appears that the petitioner had instituted a suit for a decree of permanent injunction. The said suit was decreed vide judgment and order dated 20.5.2013 restraining the defendants to the suit from interfering in the possession and ownership of the petitioner over the suit property.

4. Aggrieved by it defendants No.5 and 6 preferred the above appeal.

5. The appellate court by the impugned order, pending appeal, has stayed the operation of the aforesaid judgment, order and decree vide order dated 31.3.2014 till the disposal of the appeal for which 1.5.2014 has been fixed as the next date.

6. In challenging the above order the submission of Sri Srivastava is that in exercise of power under Order 41 Rule 5 C.P.C. the appellate court has no jurisdiction to stay the operation of the judgment, order and decree rather it can only stay execution of the decree.

7. The argument advanced appears to be attractive but on a closure scrutiny I find that the stay of operation of the judgment, order and decree has the same effect as stay of execution of the decree. Moreover, the court below has the jurisdiction to stay the operation and effect of the order which is under challenge in appeal before it in exercise of its inherent power so that justice may be done to parties. Thus, the power of stay of the operation of the judgment, order and decree may not be technically available under Order 41 Rule 5 C.P.C. but is traceable to same provision in law i.e. Section 151 C.P.C.

8. It is pertinent to mention that wherever any judgment, order and decree is likely to visit a party with civil consequences and the same is under challenge, normally pending adjudication it is always better to stay the effect and operation of such an order. Thus, the appellate court in exercise of its inherent power has not committed any error in passing the impugned order.

9. The said impugned order is only an interlocutory order which is operative only till the disposal of the appeal for which a date has been fixed. It does not has the effect of deciding any substantive rights of the parties which may require any interference in exercise of extra ordinary jurisdiction of this Court.

10. In view of the above, I find no merit in the petition and it is accordingly dismissed with no orders as to costs.

11. The writ petition is dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.05.2014

BEFORE
THE HON'BLE A.P. SAHI, J.

Crl. Misc. IInd Bail Application No. 22648 of 2013

Pradeep Shukla ...Applicant
Versus
C.B.I. ...Opp. Party

Counsel for the Petitioner:
Sri Sudeep Harkauli

Counsel for the Respondents:
Sri Anurag Khanna

High Court Rules-Chapter VIII-Rules-18-
Application for extension of bail-on second bail on medical ground interim bail granted for six month-extension of bail application filed-based upon computer information by High Court-once second bail application disposed of-nothing further remains-can not be treated pending application-extension application -held not maintainable-warning given to registry from giving such information.

Held: Para-24 & 25
24. Having recorded so, I find the present application to be not maintainable and, therefore, this Court does not have the jurisdiction to entertain this application as per the ratio of the judicial pronouncement of the Apex Court in the case of Nazma Vs. Javed Alias Anjum, (2013) 1 SCC 376, and the case of Rakesh Kumar Pandey Vs. Udai Bhan Singh, (2008) 17 SCC 764.

25. The application, therefore, being not maintainable, is accordingly rejected without prejudice to the rights of the applicant to move a proper regular fresh bail application if so advised in accordance with law.

Case Law discussed:
(2013) 1 SCC 376; (2008) 17 SCC 764; (1980) 2 SCC 559; Crl. Appeal. 689 of 2014; (2013) 1 SCC 376; (2008) 17 SCC 764.

(Delivered by Hon'ble A.P. Sahi, J.)

1. This application to extend bail has been filed on the assumption that Bail Application No.22648 of 2013 as per the case status report obtained from the computer section of the High Court and even otherwise is still pending. The said information received from the computer section has been placed before the Court.

2. The application, which arises out of the aforesaid bail application, has been

placed before this Bench as matters relating to the NRHM scam have been nominated by Hon'ble the Chief Justice to this bench for hearing.

3. I have heard learned counsel for the applicant and the learned Counsel for the Central Bureau of Investigation at length and have perused the contents of the orders passed from time to time by this Court as well as by the Apex Court. The applicant's First Bail Application No.13938 of 2013 was considered and rejected by a learned single Judge of this Court on 31.5.2013. The applicant challenged the same before the Apex Court in Special Leave to Appeal (Criminal) No.4974 of 2013 which was withdrawn by the applicant and was dismissed accordingly on 5.7.2013 by the following order:-

"Mr. Rakesh Dwivedi, learned Senior Counsel appearing for the petitioner, prays that Crl. M.P. No.13625 of 2013 application for permission to withdraw the Special leave Petition be allowed. Mr. Luthra, learned Additional Solicitor General appearing for the C.B.I., has no objection to that. Accordingly, Crl. M.P. No.13625 of 2013 is allowed and consequently, the Special Leave Petition shall stand dismissed as withdrawn.

It will be open to the respondent to apply to the Trial Court to proceed with the trial at the earliest, preferably on day-to-day basis."

4. The second Bail Application No.22648 of 2013 was filed praying for bail on the grounds of continuing ailment and the medical treatment that was required to be undergone by the applicant apart from other grounds. The Central Bureau of Investigation filed a counter-affidavit and also took a plea that ailment by itself cannot be a ground for grant of bail. The C.B.I. also contested the second bail on the ground that since the first Bail Application had been rejected on merits and the Special Leave Petition filed by the applicant had been withdrawn, the second Bail could not be entertained by this Court.

5. The learned single Judge held that second bail Application was maintainable as the SLP had been withdrawn and had not been decided on merits. This finding recorded by the learned single Judge in the order dated 31.10.2013 has not been put to any further challenge by the C.B.I.

6. On the issue relating to the second Bail being entertained on medical grounds, the learned Judge observed that the C.B.I. has not challenged the deteriorating medical condition of the applicant and on a consideration of the said fact, the applicant was found to be entitled for being enlarged on "Short Term Bail" on medical grounds so that he may receive proper treatment. The order passed by the learned single Judge in the later part of paragraph No.14 of the said order is extracted here under:

"Thus in the interest of justice, the applicant can be enlarged on short term bail on medical ground so as to enable him to get proper treatment and in order to ensure the speedy and fair trial, certain directions can be imposed upon the applicant. Therefore, without touching the merit of the case, the applicant be enlarged on interim/short term bail for a period of six months to enable him to get proper medical treatment."

7. Thereafter, the learned single Judge passed the operative part of the bail order contained in Paragraph No.15 thereof which is extracted here under:-

"15.Let the applicant Pradeep Shukla involved in R.C. 220 2012 E 0002 under

section 120B I.P.C. read with 420, 468, 471 I.P.C. and section 13(2) PC Act read with section 13(1)(d) PC Act, P.S. CBI, EOU -IV, EO II, New Delhi be released on short term bail for six months on his executing a personal bond and two sureties each in the like amount to the satisfaction of the C.B.I. Court on following conditions.

1.That the applicant will not try to influence the witnesses and will cooperate in the speedy and expeditious trial before the C.B.I. Court.

2.That the applicant will produce the progress/status report from the attending physician or surgeon regarding his health after every two months.

3.That the applicant will not leave the country without prior permission of the Court."

8. It is in the aforesaid background that the present application has been filed which is a Misc. Application praying for extending the said period of bail in view of the continuing ailment of the applicant.

9. To substantiate his submissions, Sri R. Basant, learned Senior Counsel, submits that the applicant is the victim of political cross fire as a result whereof he was implicated in this case and has now landed up in troubled waters on account of his poor physical condition and serious ailment. The applicant as per expert Medical diagnosis is suffering from spinal tumour due to growth detected between vertebrae T4 & T5, recurring Transient Ischemic Attacks and Cardiac Artillery Disorder. Sri Basant has invited the attention of the Court to various documents and prescriptions from several hospitals to submit that in spite of the order dated 31.10.2013, the applicant continued to receive treatment and was discharged from hospital only on 3.12.2013. He has continuously been admitted to hospital on several occasions even thereafter and the the aforesaid diseases with which the applicant is suffering would leave no room for doubt and his deteriorating health condition, which fact remains undisputed by the C.B.I., has made him susceptible to conditions that are threatening to life. He has cited an authority of neurology and has also raised his submissions inviting the attention of the Court to the continuing medical unfitness of the applicant that is so serious that the applicant deserves to be continued on further bail.

10. The issue of consideration of merits of the ailment would arise only if the present application is found to be maintainable. The reason is simple, namely the application would be maintainable if the Bail Application itself is treated to be pending as urged by the learned counsel for the applicant. Learned Counsel had been apprised about the two decisions of the Apex Court in the case of Nazma Vs. Javed Alias Anjum, (2013) 1 SCC 376, and the case of Rakesh Kumar Pandey Vs. Udai Bhan Singh, (2008) 17 SCC 764, where the observations indicate clearly to the effect that a misc. application in a disposed of matter in a criminal case would not be maintainable as per the statutory law prescribed. It is this objection that had been raised by the Bench itself on the previous occasion that the learned Counsel had been called upon to answer.

11. Sri Basant, therefore, submits that what was intended by the order dated 31.10.2013, particularly the observations contained in paragraph Nos. 14 and 15 extracted herein above, has to be looked into holistically and not in isolation. He submits that the Court clearly intended to grant a bail as an interim measure on the ground of facilitating proper medical treatment and,

therefore, the application has been rightly understood by the computer section of the High Court to be pending. He contends that, however, he does not intend to canvass that the Court is bound to accept the said indication of the computer section but what can be reasonably inferred is that the word "interim" having been used by the Court, and there being no concept of short-term bail, the application should be treated to be pending particularly in view of the second condition imposed in the order dated 31.10.2013. He submits that submission of medical reports was intended to be placed before this Court and, therefore, the bail application cannot be treated to have been finally disposed of. The only legitimate inference, therefore, that can be drawn is that the matter was yet to be disposed off after a periodical assessment, and even if there is a doubt about pendency, then in the back ground aforesaid, benefit should enure to the applicant by adequately protecting the liberty of the applicant more so when the trial is moving at a snail's pace.

12. The submission is that the applicant was under a bona fide belief of the pendency of the said bail application and the semantic inadequacy of the language, if any, in the order dated 31.10.2013 should enure to the benefit of the applicant. It is urged that the applicant had moved the extension application well within time before the expiry of 6 months on 24.4.2014 with a clear averment that the applicant had neither violated any terms of the bail or has done nothing objectionable. Learned Counsel contends that the powers of this Court even otherwise under Section 482 Cr.P.C. are clearly attracted in such a situation. He further submits that as a matter of protection, the applicant is also moving a third bail application, even assuming though not admitting, that the present application is not maintainable. On an over all view of the matter particularly the ailment of the applicant, if the liberty of the applicant is curtailed, there is every likelihood of the applicant not receiving appropriate medical assistance for the diseases from which he is suffering, and in the event of refusal, there is every likelihood of an irreversible loss being suffered by the applicant.

13. It is contended that apart from this, in such a piquant situation, where the third bail application is not likely to be entertained as per Chapter-VIII Rule 18 immediately, compassion should be shown by this Court to entertain this application for extending the bail further so as to make available the applicant the medical facilities effectively. It is submited that the applicant is cooperating with the trial and has not abused any of the conditions imposed in the order dated 31.10.2013. Consequently, this Court may take a compassionate view in this piquant situation and entertain this application at a juncture when where the applicant would be taken into custody without any opportunity to pursue a fresh bail application.

14. Opposing this application, Sri Anurag Khanna submits that the applicant's bail had already been rejected on merits on 31.5.2013 which stands affirmed by the Apex Court after the withdrawal application was disposed off on 5.7.2013. He further submits that the second bail was filed with all prayers including the ground of medical ailment and the Court vide order dated 31.10.2013 chose only to grant a short term bail for a limited period of 6 months only. He, therefore, contends that the bail application stood disposed of and no relief in the second bail application any further remained to be granted or considered subsequently. He submits that much capital is being made out by the learned Counsel from the second condition imposed in the order dated 31.10.2013 which was clearly meant to be reported to the C.B.I. court

and not this Court. He contends that the learned Counsel for the applicant cannot dispute the legal proposition that there is no concept of a short-term bail and, therefore, even assuming that the word "interim" has been used in the order dated 31.10.2013, it only reflects the intention of the Court to bail out the applicant on medical grounds for a short period of 6 months only. According to him, the application stood finally disposed of by the order dated 31.10.2013 and any information obtained by the applicant from the computer section is absolutely misleading and is not authentic.

15. Sri Khanna submits that he has instructions to state that in case this Extension Application is being treated by this Court to be maintainable, then in that event the C.B.I. proposes to file a detailed counter-affidavit on the merits of such claim of extension. Sri Khanna submits that the learned Counsel for the applicant is not correct in his submission in construing the contents of order dated 31.10.2013 and there is no reason to believe that the applicant was unaware of the correct gist of the bail order dated 31.10.2013. He submits that the applicant cannot take any undue advantage on the plea of ignorance of law as he is well assisted by efficient counsel, who are aware of the legal position. The submission, therefore, is that the extension application is not maintainable.

16. Sri Basant, on the issue of consideration of such matters and on the meaning of the word "custody" has relied on the Apex Court decision in the case of Niranjan Singh and another Vs. Prabhakar Rajaram Kharote and others, (1980) 2 SCC 559, as explained in the latest decision of the Apex Court in the case of Sandeep Kumar Bafna Vs. State of Maharashtra and another, Criminal Appeal No.689 of 2014, decided on 27.3.2014. Sri Basant submits that the High Court should not be influenced by any external media reports magnifying the nature of the alleged scam so as to curtail the liberty of the applicant which otherwise is impermissible in law.

17. Having heard learned counsel for the parties and having considered the aforesaid submissions, it is clear that the first bail application of the applicant before the High Court was considered on merits and rejected on 31.5.2013. The applicant filed a Special Leave to Appeal that was dismissed as withdrawn in terms as contained in the order of the Apex Court dated 5.7.2013 where after the second bail application was filed. The second bail Application was considered by the learned single Judge without touching the merits of the case purely on medical grounds and on the footing that the C.B.I. has not challenged the deteriorating medical condition of the applicant. Not only this, the Court proceeded on a presumption that the applicant can be enlarged for a short-term on bail on medical grounds. As canvassed by Sri Basant and as understood by the law of the land, the Criminal Procedure Code or any law for the time being in force does not acknowledge the existence of a concept of a short-term bail. The issue, therefore, is as to whether the order dated 31.10.2013 is an interim order of bail or not?

18. In my considered opinion, even if it is a bail for an interim period, the entire tenor of the order would leave no room for doubt that the applicant was let off for 6 months only on medical grounds. The tenor of the language employed reflects a unhesitant disposal with conditions without any direction to place the matter again for further reconsideration by the Court. As suggested, the order is not a perpetual

retention of any discretion to be exercised on an interval of six months in the same application like a festive announcement.

19. There is nothing like a renewal in the same application as it would amount to restoring the same application and reanimate the same. This resumption is not permissible after a pause or a rest. On the facts as discussed above, the application cannot be revived by reinforcements of subsequent facts relating to medical grounds after the order dated 30.10.2013 through an extension application. The fresh grounds of continuing ailment can be made a ground for a fresh bail but such facts which were not available before cannot be pressed into service for a reopening and reconsideration in the same application as it would set up a perpetual precedent to file an application in the same bail application that would go contrary to the correct procedure of law.

20. The order dated 31.10.2013 disposing off the second bail application does not offer more than what it recites and this Court is not required to read more than what is written therein. To read between the lines to find out an intention would be adding more than what is transcribed. The order is not benevolent to the extent as suggested by the learned Counsel. The language of the order brooks no mystery for any further interpretation nor can one suspect or doubt the clarity of it which is as clear as a window pane.

21. To my mind, the learned Judge had not left anything to be decided in future and the application stood disposed of on 31.10.2013 finally. There is yet another reason to conclude the above, namely, the prayer made by the applicant was not of either a short-term bail or an interim bail and, therefore, it was not the case of either of the parties before the learned Judge to consider the grant of an interim or a short-term bail. The learned Judge, who disposed of the matter on 31.10.2013, exercised his judicious discretion to grant a bail for 6 months especially on medical grounds. The description of the bail either as interim or short-term, in my opinion, is absolutely immaterial for the purpose of status of the bail application. The application had been considered after the counter-affidavit had been filed by the C.B.I. and after full scale arguments. The learned Judge, therefore, in my opinion, had disposed of the application finally and nothing remained pending to be reconsidered by the High Court in the same.

22. The argument, which has been raised on the strength of the information given by the computer section, is unacceptable inasmuch as the entire order-sheet of the bail application as maintained by the High Court and the endorsements made, do not indicate the status of this application to be pending. Sri Basant submits that the order-sheet even otherwise does not make even an endorsement of a final disposal. I am unable to accept this contention inasmuch as on 2.10.2013, the entire bail application was heard after Affidavits were exchanged and orders were reserved. The learned single Judge has not issued any direction to the office so as to presume that the bail application shall again be listed for orders after 6 months. In the absence of any such indication in the order dated 31.10.2013, the raising of any such presumption would be incorrect and against the records.

23. It is not understood as to how the computer section was showing the status of the case to be pending but it goes without saying that the case status report which is issued by the computer section clearly contains a disclaimer that it is not authentic or certified copy of the order regarding the status

of a case. To remove any doubts it was open to the learned counsel for the applicant to have filed a question-answer, the provisions whereof are available under the Allahabad High Court Rules, 1952, and the applicant would have been informed about the correct legal status of the disposal of the application. Thus, to argue that the applicant could draw a legitimate inference from such information of the computer section of the High Court does not appear to hold water. The clear intention of the learned Judge, while passing the order on 31.10.2013, was to bail out the applicant only for a period of 6 months and nothing further. There is, therefore, no occasion to brook any doubt about the same or extend the benefit thereof to the applicant.

24. Having recorded so, I find the present application to be not maintainable and, therefore, this Court does not have the jurisdiction to entertain this application as per the ratio of the judicial pronouncement of the Apex Court in the case of Nazma Vs. Javed Alias Anjum, (2013) 1 SCC 376, and the case of Rakesh Kumar Pandey Vs. Udai Bhan Singh, (2008) 17 SCC 764.

25. The application, therefore, being not maintainable, is accordingly rejected without prejudice to the rights of the applicant to move a proper regular fresh bail application if so advised in accordance with law.

26. The Registrar General is directed to instruct the office not to furnish any information without verifying the correct status of any proceeding before this Court as the information given by the computer section in the present case has raised a confusion even though the same is legally unfounded as indicated above. The Registrar General may, therefore, take steps for issuing appropriate instructions to the computer section and to the office in this regard.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.01.2014

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 23319 of 2001

Smt. Arti Devi ...Petitioner
Versus
District Judge Siddharthnagar & Ors. ...Respondents

Counsel for the Petitioner:
Sri Chandeshwar Prasad, Sri Kushal Kant

Counsel for the Respondents:
C.S.C., Sri Ghanshyam Dubey, Jitendra Kumar Yadav

C.P.C.-Order XXI- Exclusion of provisions of Section 5 of limitation-Suit barred by time-T/C not justified in entertaining delay condonation application-it can be entertained in appeal on revision by virtue of section 3 of Act-Revisional Court rightly interfered with such order-warrant no interfere by Writ Court.

Held: Para-5
Section 5 applies to the stages subsequent to institution of a valid suit and those proceedings which are construed as continuation of suit and not for seeking condonation of delay in filing a time barred suit. The applicability of Section 5 has been excluded specifically to applications which fall under Order XXI C.P.C. It shows that even when the suit proceedings have come to an end, in execution proceedings also Section 5 shall not be applicable. A suit if otherwise is barred by time and is not saved by other provisions of Sections 4 and 6 to 24 of Act, 1963 then it shall not be entertainable by the Court and has to be dismissed in view of the obligation created

vide Section 3 of Act, 1963. Section 5 specifically says that it is applicable to an appeal or in application but not to a suit. The suit instituted by filing a plaint and a plaint, in my view, would not be covered by the term "application".

Case Law discussed:
1982 AWC 591; AIR 1973 Raj. 29L AIR 1988 Karnataka 83.

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

1. Heard Sri Jitendra Kumar Yadav, Advocate holding brief on behalf of Sri Chandeshwar Prasad, learned counsel for the petitioner and perused the record.

2. The writ petition is directed against the order dated 03.03.2001 passed by District Judge, Siddharth Nagar allowing Revision No. 29 of 2001.

3. It appears that for cancellation of sale deed dated 22.01.1991 Original Suit No. 264 of 1997 was filed alongwith a delay condonation application, whereupon the Trial Court passed order condoning delay in filing suit. Subsequently, when an application was filed for recall of that order, that was also rejected by Trial Court vide order dated 08.02.2001 and thereagainst a revision was preferred by defendant, which has been allowed by District Judge, Siddharth Nagar vide impugned order dated 03.03.2001.

4. The Revisional Court has observed that there is no provision in the Limitation Act for condoning delay in filing suit. Learned counsel for the petitioner could not show that Section 5 of Limitation Act, 1963 (hereinafter referred to as the "Act, 1963") would apply to seek condonation of delay in filing a suit itself. Once the suit itself is barred by time, the Court is retrained to entertain the same by virtue of Section 3.

5. Section 5 applies to the stages subsequent to institution of a valid suit and those proceedings which are construed as continuation of suit and not for seeking condonation of delay in filing a time barred suit. The applicability of Section 5 has been excluded specifically to applications which fall under Order XXI C.P.C. It shows that even when the suit proceedings have come to an end, in execution proceedings also Section 5 shall not be applicable. A suit if otherwise is barred by time and is not saved by other provisions of Sections 4 and 6 to 24 of Act, 1963 then it shall not be entertainable by the Court and has to be dismissed in view of the obligation created vide Section 3 of Act, 1963. Section 5 specifically says that it is applicable to an appeal or in application but not to a suit. The suit instituted by filing a plaint and a plaint, in my view, would not be covered by the term "application".

6. This Court in Smt. Jagwanta Vs. Smt. Nirmala and others, 1982 AWC 591 has specifically said that Section 5 does not apply to suits or to applications under order XXI Rule 2 C.P.C. A similar view has also been taken in Badri Narayan Sharma Vs. Panchayat Samiti, Dhariawad, AIR 1973 Raj. 29. The Karnataka High Court in Mahboob Pasha v. Syed Zaheeruddin and Ors., AIR 1988 Karnataka 83 has said that Section 5 does not apply to original cause of action so as to extend the period of limitation by concession made by parties.

7. Learned counsel for the petitioner also could not place anything before this Court so as to pursue to take an otherwise view in the matter. In my view, the District Judge has rightly set at naught the Trial

Court's order by allowing revision since the Trial Court has committed a serious jurisdictional error by entertaining a time barred suit and making ti within time by allowing application under Section 5 of Act, 1963. The Revisional Court's order, therefore, warrants no interference.

8. Dismissed. Interim order, if any, stands vacated.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.05.2014

BEFORE
THE HON'BLE VINEET SARAN, J.
THE HON'BLE NAHEED ARA MONNIS, J.

Civil Misc. Writ Petition No. 23465 of 2010

Shiva Nand Gupta & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ashok Kumar Dwivedi, Sri N.C. Rajvanshi, Sri Lal Ji Pandey

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226- Compensation-land occupied by PWD-without following procedure of Land Acquisition Act-for last 30 years petitioner running from pillar to post-lastly in the year 2009 with mutual settlement agreed to pay compensation at circle rate of 2001-although not entitled for interest-but entitled 30% solatium-payble within 3 month with interest by 15% per annum in case of default interest rate shall be 24 % apart form cost of Rs. One Lacs-petition allowed.

Held: Para-10 & 11
We, however, hold that the petitioners would be entitled to an amount of 30% solatium on the assessed amount of Rs. 10,91,375/-. We further hold that on the said amount of solatium the petitioners shall also be entitled to interest at rate of 15% per annum from 13.5.2010 till the date of actual payment. The said amount shall be paid to the petitioners within three months from today failing which the respondents shall be liable to pay interest at 24% per annum from 13.5.2010 till the date of actual payment.

11. Considering the fact that the land of the petitioners was taken over 36 years back, and they were paid compensation only after filing of this writ petition, and before that also the petitioners had to file another writ petition earlier and had to wait for more than three decades, because of which their family members must have suffered substantial loss, we direct that the respondents shall be liable to pay cost, which we assess at Rs. One lac. The said amount of Rs. One lac shall also be paid to the petitioners within the aforesaid period of three months from today. The Principal Secretary, Public Works Department, Government of U.P., shall ensure that the order of this Court is complied with within the specified time.

Case Law discussed:
2013(2) AWC 1795.

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

1. This is a case where it is admitted by the respondents that the land of the petitioners was taken over by the State authorities more than three decades back on 1.3.1978 without resorting to the procedure of acquiring the land under the Land Acquisition Act or by adopting any other procedure prescribed in law. It shows complete high-handedness of the State-authorities in depriving the petitioners, who are villagers, of their land without following the procedure of law. It is not expected of the State authorities to illegally take over the land of any citizen

and sit tight over the matter, and it is only after a marathon innings of struggle by the land owners, in chasing their case before the State-authorities and filing writ petition in this Court, that the respondents now come up with the case that during the pendency of this writ petition the consent has been taken from the petitioners in the year 2010 to the effect that they would be agreeable to accept the compensation at the circle rate in terms of the G.O. dated 29.9.2001. Such agreement had been arrived at only after this Court had passed an order on 4.5.2010 to the effect that the respondents shall ensure payment of compensation to the petitioners for the land which had been taken over by them, or to show cause by the next date. Thereafter on 26.5.2010, 8.7.2010, 3.5.2013 and 14.5.2013 this Court had passed the following orders:-

"ORDER DATED: 26.5.2010

On 04.05.2010, this Court had passed the following order:-

"The grievance of the petitioners is that though his land has been acquired in 1978 but till date no compensation has been paid.

Learned Standing Counsel has, on having received instructions, stated that with regard to the said issue, a meeting has been called for by the District Magistrate on 13.05.2010, on which date it is likely that the matter regarding compensation would be taken.

In view of the aforesaid circumstances, it is directed that the respondents shall ensue payment of compensation to the petitioner for the land, which has been acquired by them or they may show cause by the next date.

List on 25.05.2010."

The said order has not been complied with.

Learned Standing Counsel states that the Principal Secretary, Ministry of Public Works Department had already sent the proposal for payment of the compensation and the payment of compensation would be made to the petitioners very shortly.

Accordingly, on request of the learned Standing Counsel, list on 8th July, 2010, by which date the respondent No.1 shall ensure payment of compensation to the petitioners, and also file his personal affidavit explaining the delay in making such payment to the petitioners when the land was acquired in the year 1978.

ORDER DATED: 8.7.2010

In compliance of this Court's order dated 26.5.2010 Sri Ravindra Singh, Principal Secretary, Government of U.P. P.W.D. has filed his affidavit of compliance. In the said affidavit it is not explained as to under what circumstances the payment of Rs. 10 lacs and odd has been made to the petitioners on 23.6.2010 when by communication dated 13.8.2009 (Annexure-10 to the writ petition) the Executive Engineer had requested the Government for a sum of Rs. 62,37,511/- for payment of compensation.

Such affidavit of compliance, which has been filed today, is not satisfactory, inasmuch as it is not explained as to how the figure of Rs. 10 lacs and odd, which has been paid to the petitioner has been arrived at.

Let the Principal Secretary, Government of U.P.. P.W.D file his personal affidavit explaining such difference as to how the compensation has been reduced from Rs. 62 lacs and odd to

Rs. 10 lacs and odd. The said officer shall also file his counter affidavit in reply to the averments made in the writ petition. Such affidavit may be filed within three weeks. The petitioners shall have one week thereafter to file rejoinder affidavit.

List on 11th August, 2010.

ORDER DATED: 3.5.2013

On 8.7.2010, this Court did not accept the compliance of the affidavit filed by Sri Ravindra Singh, Principal Secretary, Government of U.P. P.W.D. in respect of payment of Rs. 10 lacs against the amount of Rs. 62,37,511/- which was to be paid by way of compensation.

In the counter affidavit, still no explanation is there. If the amount to the tune of Rs. 62,37,511/- pursuant to the acquisition of the petitioner's land is payable to him then why for such a long period he has been paid only an amount of Rs. 10 lacs, although the Executive Engineer had requested the Government for a sum of Rs. 62,37,511/-. The matter appears to be very serious.

In respect to non-payment/delay in payment of amount at least after 8.7.2010, the interest payable of that amount will have to be directed to be paid by the concerned Officer from his personal pocket, will also be a question which will be dealt with on the next date.

If satisfactory explanation by the personal affidavit of the Principal Secretary, Government of U.P. P.W.D, who may be holding the post held as on date, is not filed on or before the date fixed, then this Court will have no option but to direct the personal appearance of that Officer, so as to pass appropriate orders.

Let this matter be listed on 14.5.2013.

Certified copy of this order be made available to the learned Standing Counsel without any payment and to the counsel for the petitioner on payment of usual charges by Tuesday i.e. 7.5.2013.

ORDER DATED: 14.5.2013

Personal affidavit of Dr. Rajneesh Dube, Principal Secretary, has been filed to demonstrate that whatever was agreed by the petitioner was paid.

Annexure No. 4 to the affidavit clearly indicates that the amount payable to the tenure holder has been calculated after adding the interest and solatium also.

After preparing the amount which is in all to the tune of Rs. 62,37,511/- the Executive Engineer appears to have written to the District Magistrate for the sanction of the same what can be the reason on the part of the petitioner to decline to accept that amount.

Counsel for the petitioner submits that the petitioner accepted the amount at the circle rate but that never mean that he denied the acceptance of the amount of interest and solatium.

Be as it may, affidavit filed by Sri Dube is taken on record. Counsel for the petitioner is permitted to file affidavit in reply and to improve his own case.

As requested, list this matter in the second week of July, 2013."

2. When this writ petition was filed there was no such compensation offered by the respondent-authorities, and the prayer made in this writ petition was to pay a sum of Rs. 62,35,511/- plus solatium and interest etc. as had been assessed by the Special Land Acquisition Officer vide his calculation chart prepared on 3.8.2009, a copy whereof has been filed as Annexure-9 to the writ petition. It is this compensation which the learned

counsel for the petitioners asserts that the petitioners would be entitled to. In the rejoinder affidavit the specific case of the petitioners is that the consent of the petitioners (which was during the pendency of the writ petition) was taken by force in the circumstances when the son of the petitioner no.2 died due to kidney problem, and during the cremation of his son he was called upon by the District Magistrate to be present in the meeting. It is thus contended that in such circumstances the consent which was taken from the petitioner no.2 cannot be said to be free and fair, but by force and pressure exerted on the petitioners by the respondents.

3. We have heard Sri N.C.Rajvanshi, learned senior counsel assisted by Sri Lal Ji Pandey, learned counsel for the petitioners as well as learned Standing Counsel appearing on behalf of the respondents and have perused the record.

4. On the basis of the alleged compromise the compensation to be paid to the petitioners was in terms of the G.O. dated 29.9.2001. The said G.O. speaks of market value and not the circle rate. The Committee constituted under the said G.O. dated 29.9.2001 assessed the compensation amount for the land taken from the petitioners at the circle rate and not the market value. The same was assessed at Rs. 10,91,375/- which was paid to the petitioners by two separate cheques dated 23.6.2010. Even the said amount has now been paid to the petitioners after they were made to run from pillar to post for over three decades, and had to file writ petition and take recourse to other legal measures. Learned counsel for the petitioners has submitted that the amount determined by the committee constituted under the G.O. dated 29.9.2001 is also not as per the terms of the G.O. The circle rate would be different from market value. The committee has not proceeded to determine the market value but has mis-interpreted the G.O. and determined the compensation payable to the petitioners at the prevailing circle rate.

5. It may be relevant to mention that the compensation of Rs.62,37,511/- plus solatium and interest etc. claimed by the petitioners on the basis of the report dated 3.8.2009 of the Special Land Acquisition Officer does not appear to be very appropriate as after calculating the current market value, solatium at 30% has been assessed, plus interest from the date of acquisition till the date of the report has also been calculated. In the present case, since the value of the land at the circle rate as on the date of the assessment has been calculated, interest of 30 years would not be payable. As such, the claim of the petitioners to be paid compensation at the rate assessed by the report dated 3.8.2009 of the Special Land Acquisition Officer does not deserve to be granted.

6. Now this Court has to consider as to whether the compensation which has been paid on the basis of the assessment and report of the committee submitted after the filing of this writ petition would be adequate and appropriate.

7. Depriving a citizen of his land, especially at the hands of the State authorities, is a very serious matter. However necessary or laudable the purpose for acquisition of land may be, yet the State-authorities would be obliged to comply with the provisions of law before depriving any citizen of his land. The present is a case where all procedures have been done away with by the State-authorities and they have admittedly taken

over the land of the petitioners without any authority of law, by using their might. Such action of the State-authorities appears to be akin to the method normally resorted to by the land mafias in depriving persons of their land. Such action of the State-authorities shocks the conscience of the Court.

8. In the light of the aforesaid facts, this Court has now to consider as to in what manner the petitioners can be compensated for having been deprived of their valuable land by the respondents, without resorting to any procedure of law.

9. In the case of Bhimandas Ambwani Vs. Delhi Power Corporation 2013(2) AWC 1795, the Apex Court, while dealing with a case where the land owner had been dispossessed without resorting to any valid procedure for acquisition of land, and where land had already been utilized and the land owner could not be restored back into possession, it was held that the respondents should make an award treating the notification under section 4 of the Land Acquisition Act as having been issued on the date of judgment, which in that case was 12.2.2013. The present is a similar case where the land of the petitioners has been taken away without following any procedure, and now their consent is said to have been taken on 13.5.2010 (which may be voluntary or under compulsion), and a meeting is held on the same day i.e. 13.5.2010 and the compensation is assessed at the circle rate. Admittedly as per Government Order dated 29.9.2001, the petitioners ought to have been given compensation at the market rate, but the same has been determined at the circle rate, which is not in terms of the Government Order. As per judgment of the Apex Court in the case of Bhimandas Ambwani (supra) and also as per provisions of the Land Acquisition Act, the petitioners would be entitled to solatium at 30% plus interest.

10. To put a quietus to the litigation so that the agony suffered by the petitioners may be put to rest, the petitioners have agreed to the assessed amount of compensation at circle rate provided they are paid 30% solatium and interest thereupon. Keeping in view that the amount was calculated at the circle rate as on the date of the meeting i.e. 13.5.2010, we hold that the same would be the amount of compensation awarded under the provisions of the Land Acquisition Act. Since the assessed amount of Rs. 10,91,375/- was paid to the petitioners on 23.6.2010, which was immediately after 13.5.2010, the question of payment of interest on the said amount would not arise. We, however, hold that the petitioners would be entitled to an amount of 30% solatium on the assessed amount of Rs. 10,91,375/-. We further hold that on the said amount of solatium the petitioners shall also be entitled to interest at rate of 15% per annum from 13.5.2010 till the date of actual payment. The said amount shall be paid to the petitioners within three months from today failing which the respondents shall be liable to pay interest at 24% per annum from 13.5.2010 till the date of actual payment.

11. Considering the fact that the land of the petitioners was taken over 36 years back, and they were paid compensation only after filing of this writ petition, and before that also the petitioners had to file another writ petition earlier and had to wait for more than three decades, because of which their family members must have suffered substantial loss, we direct that the respondents shall be liable to pay cost, which we assess at Rs. One lac. The said

amount of Rs. One lac shall also be paid to the petitioners within the aforesaid period of three months from today. The Principal Secretary, Public Works Department, Government of U.P., shall ensure that the order of this Court is complied with within the specified time.

12. This writ petition stands allowed to the extent as indicated above.

13. The office is directed to supply a copy of this order to the learned Standing Counsel so as to enable him to forward the same to the Principal Secretary, Public Works Department, Government of U.P., Lucknow for necessary compliance.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.01.2014

BEFORE
THE HON'BLE MANOJ MISRA, J.

Criminal Misc. Application No.23662 of 2012

Vijendra Singh ...Applicant
Versus
State of U.P. & An.r ...Opp. Parties

Counsel for the Petitioner:
Sri V.P. Srivastava, Sri Amit Kumar Singh, Sri Umesh Vats, Sri Ranjay Kumar, Sri Sanjay Kumar Dwuvedi

Counsel for the Respondents:
A.G.A, Sri Satya Prakash Srivastava, Sri Kamlesh Kumar Tiwari, Sri K.K. Rao.

Cr.P.C.-482-Quashing of criminal proceeding-offense under section 420 I.P.C.-allegation of making false declaration in affidavit-regarding non practicing lawyer-very allegation stand falsified-from judgment of High Court in which petitioner-found surrendered his registration certificate-stood confirmed from record of Bar Council-continuance of further proceeding amounts to wasted of precious time of Court-in view of Apex Court-decision-entire proceeding quashed.

Held: Para-11
Coming to the instant case, the prosecution case was based only on the allegation that the applicant being an enrolled advocate made a false statement that he was not an advocate so as to obtain registration as a contractor. Whether a person is a practicing advocate or has surrendered his license to practice can no better be ascertained than from the record of the Bar Council. Therefore, once from the record produced by the Bar Council before this Court in Writ C no.45873 of 2012, this Court, by its judgment and order dated 11.10.2012, held that the applicant had surrendered his certificate of enrollment on 28th January, 1979 and that he had not applied for renewal of his certificate of enrollment, the statement made by the applicant in the affidavit of the year 2011 that he is not a practicing Advocate, cannot be said to be false or misleading so as to justify drawing of proceedings against him. Thus, the very foundation of the prosecution case stands demolished, by a document which is none other than a judgment of this Court and the correctness of which has not been doubted by the learned counsel for the parties, further, when there is no dispute of it having attained finality. In such circumstances, there is no shadow of doubt that the prosecution of the applicant would be an exercise in futility and waste of precious time of the court. Holding of trial now, when the fundamental issue has already been decided by this Court in favour of the applicant (accused), would be travesty of justice. Accordingly, this Court considers it to be a fit case where the proceedings deserve to be quashed.

(Delivered by Hon'ble Manoj Misra, J.)

1. Heard Sri Umesh Vats, holding brief of Sri Amit Kumar Singh, learned counsel for the applicant; Sri K.K. Rao, holding brief of Sri Satya Prakash Srivastava, for the opposite party no.2; and the learned AGA for the State.

2. By the present application, under Section 482 Cr.P.C., the applicant has sought for quashing of the proceedings of criminal case no.1595 of 2012, arising out of charge-sheet submitted by the police under Section 420 IPC in case crime no.464 of 2012, police station Kotwali, district Ballia, pending in the Court of Chief Judicial Magistrate, Ballia.

3. A perusal of the record reveals that the opposite party no.2 lodged a first information report alleging therein that the applicant Vijendra Singh is working as a registered thekedar (contractor) in the food and civil supplies department of district Ballia. For attaining eligibility to be registered as a thekedar certain formalities are to be completed. One of them is to have a character certificate. It is alleged that in paragraph no.4 of the affidavit filed by the applicant, for obtaining character certificate, it has been falsely alleged by him that he is not an advocate enrolled with the Bar Council when, in fact, he is enrolled as an advocate with enrollment number 1018 of 1972. It was thus alleged that for the purpose of obtaining registration as a contractor, the applicant made a false representation and, as such was guilty of an offence punishable under section 420 IPC. The poilce conducted investigation and laid charge sheet dated 30.06.2012 on which cognizance was taken on 5.7.2012.

4. The submission of learned counsel for the applicant is that although the applicant was initially enrolled as an Advocate, on 5th October, 1972, with the Bar Council of U.P., having enrollment no.1018 of 1972, but the said enrollment certificate was surrendered on 28th January, 1979 along with an application that the applicant will not be practising law and, therefore, the original certificate of enrollment may be treated as 'surrendered'. It has been submitted that in connection with the matter, the Regional Food Controller, Basti region, Basti had passed an order dated 23rd August, 2012, thereby cancelling the registration of the applicant as a contractor on ground that in the inquiry it was found that on 27th April, 2012, the applicant had deposited Rs.1,290/- for renewal of his enrollment as an Advocate. It has been submitted that the applicant had contested the proceedings with regard to cancellation of his registration as a contractor claiming before the authority concerned that he had not applied for renewal of enrollment by depositing Rs.1,290/- and that it appears that some impostor, in order to cause damage to the applicant, has made such deposit. It has been submitted that the said matter travelled to this Court vide Writ C no.45873 of 2012, wherein the original record was summoned from the Bar Council of U.P. and this Court had found, as a fact, that the enrollment certificate was surrendered by the applicant on 28th January, 1979 and that the deposit of Rs.1,290/- seeking renewal of the enrollment was not made by the applicant and, accordingly by order dated 11th October, 2012, this Court had set aside order passed by the Regional Food Controller, Basti Region, Basti after recording a categorical finding to the above effect. It has been submitted that

since the issue has already been set at rest by an authoritative pronouncement of this Court in Writ C no.45873 of 2012 and the order passed by this Court has become final between the parties, the continuance of proceedings, as against the applicant, on the same issue, which has already been decided in favour of the applicant, would amount to abuse of the process of the Court and, as such, to secure the ends of justice, the proceedings be quashed. The copy of the order dated 11th October, 2012, passed by this Court in Writ C No.45873 of 2012 has been produced in Court, which has been taken on record.

5. Learned counsel for the opposite parties do not dispute the passing of the order dated 11th October 2012 in Writ C No.45873 of 2012. They also do not dispute that the aforesaid order has attained finality.

6. I have perused the order passed by this Court in Writ C No.45873 of 2012. A perusal thereof reveals that this court has rendered a clear finding that the applicant had surrendered the enrollment certificate in the year 1979 with the Bar Council, which is still lying in the file of the Bar Council and that the applicant has not withdrawn the surrender and had neither applied for duplicate identity card nor had deposited Rs.1290/- towards renewal fees. The relevant observation of this Court's order dated 11.10.2012 passed in Writ C No.45873 of 2012, as contained in paragraph 10 of the order, is reproduced herein below:

"The original record of the Bar Council of Uttar Pradesh and the order passed by the Chairman, Bar Council clearly establishes that the enrollment certificate surrendered in the year 1979 is still available in the file of Bar Council. The applicant has not withdrawn the surrender and had not applied for duplicate identity card nor had deposited Rs.1290/-."

7. From the decision of this court it is thus established that the applicant having surrendered his enrollment as an advocate in the year 1979, did not make any false misrepresentation, with a dishonest intention, in the affidavit dated 8.8.2011 (Annexure 2 to the affidavit filed in support of the application), by stating he was not an advocate. Therefore, the very basis of his prosecution stands nullified.

8. Ordinarily, while considering a prayer for quashment of the criminal proceedings, only the prosecution documents are to be considered and the defence documents or the defence version given by the accused in support of his case cannot be considered while exercising the power under section 482 of the Code of Criminal Procedure. However, there is no absolute bar that the Court, in exercise of its power under section 482 of the Code, cannot at all consider the documents--which are beyond suspicion or doubt--placed by the accused, if on the face of those documents, the accusations cannot stand. In Harshendra Kumar D. v. Rebatilata Koley, (2011) 3 SCC 351, the apex court, in paragraphs 25 and 26 of the report, observed as follows:

"25. In our judgment, the above observations cannot be read to mean that in a criminal case where trial is yet to take place and the matter is at the stage of

issuance of summons or taking cognizance, materials relied upon by the accused which are in the nature of public documents or the materials which are beyond suspicion or doubt, in no circumstance, can be looked into by the High Court in exercise of its jurisdiction under Section 482 or for that matter in exercise of revisional jurisdiction under Section 397 of the Code. It is fairly settled now that while exercising inherent jurisdiction under Section 482 or revisional jurisdiction under Section 397 of the Code in a case where complaint is sought to be quashed, it is not proper for the High Court to consider the defence of the accused or embark upon an enquiry in respect of merits of the accusations. However, in an appropriate case, if on the face of the documents -- which are beyond suspicion or doubt -- placed by the accused, the accusations against him cannot stand, it would be travesty of justice if the accused is relegated to trial and he is asked to prove his defence before the trial court. In such a matter, for promotion of justice or to prevent injustice or abuse of process, the High Court may look into the materials which have significant bearing on the matter at prima facie stage.

26. Criminal prosecution is a serious matter; it affects the liberty of a person. No greater damage can be done to the reputation of a person than dragging him in a criminal case. In our opinion, the High Court fell into grave error in not taking into consideration the uncontroverted documents relating to the appellant's resignation from the post of Director of the Company. Had these documents been considered by the High Court, it would have been apparent that the appellant has resigned much before the cheques were issued by the Company."

9. Further, in the case of Rajiv Thapar v. Madan Lal Kapoor, (2013) 3 SCC 330, the apex court, while laying down the various tests as to when a defence document can be considered for quashing the proceedings, in exercise of power under section 482 of the Code, in paragraph 29 onwards of the report, observed as follows:

29.....To invoke its inherent jurisdiction under Section 482 CrPC the High Court has to be fully satisfied that the material produced by the accused is such that would lead to the conclusion that his/their defence is based on sound, reasonable, and indubitable facts; the material produced is such as would rule out and displace the assertions contained in the charges levelled against the accused; and the material produced is such as would clearly reject and overrule the veracity of the allegations contained in the accusations levelled by the prosecution/complainant. It should be sufficient to rule out, reject and discard the accusations levelled by the prosecution/complainant, without the necessity of recording any evidence. For this the material relied upon by the defence should not have been refuted, or alternatively, cannot be justifiably refuted, being material of sterling and impeccable quality. The material relied upon by the accused should be such as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the

High Court would persuade it to exercise its power under Section 482 CrPC to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice.

30. Based on the factors canvassed in the foregoing paragraphs, we would delineate the following steps to determine the veracity of a prayer for quashment raised by an accused by invoking the power vested in the High Court under Section 482 CrPC:

30.1. Step one: whether the material relied upon by the accused is sound, reasonable, and indubitable i.e. the material is of sterling and impeccable quality?

30.2. Step two: whether the material relied upon by the accused would rule out the assertions contained in the charges levelled against the accused i.e. the material is sufficient to reject and overrule the factual assertions contained in the complaint i.e. the material is such as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false?

30.3. Step three: whether the material relied upon by the accused has not been refuted by the prosecution/complainant; and/or the material is such that it cannot be justifiably refuted by the prosecution/complainant?

30.4. Step four: whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice?

30.5.If the answer to all the steps is in the affirmative, the judicial conscience of the High Court should persuade it to quash such criminal proceedings in exercise of power vested in it under Section 482 CrPC. Such exercise of power, besides doing justice to the accused, would save precious court time, which would otherwise be wasted in holding such a trial (as well as proceedings arising therefrom) specially when it is clear that the same would not conclude in the conviction of the accused."

10. The view taken in Rajiv Thapar's case has been followed and reiterated by the Apex Court in the case of Prashant Bharti Vs. State (NCT of Delhi) : (2013) 9 SCC, 293.

11. Coming to the instant case, the prosecution case was based only on the allegation that the applicant being an enrolled advocate made a false statement that he was not an advocate so as to obtain registration as a contractor. Whether a person is a practicing advocate or has surrendered his license to practice can no better be ascertained than from the record of the Bar Council. Therefore, once from the record produced by the Bar Council before this Court in Writ C no.45873 of 2012, this Court, by its judgment and order dated 11.10.2012, held that the applicant had surrendered his certificate of enrollment on 28th January, 1979 and that he had not applied for renewal of his certificate of enrollment, the statement made by the applicant in the affidavit of the year 2011 that he is not a practicing Advocate, cannot be said to be false or misleading so as to justify drawing of proceedings against him. Thus, the very foundation of the prosecution case stands demolished, by a document which is

none other than a judgment of this Court and the correctness of which has not been doubted by the learned counsel for the parties, further, when there is no dispute of it having attained finality. In such circumstances, there is no shadow of doubt that the prosecution of the applicant would be an exercise in futility and waste of precious time of the court. Holding of trial now, when the fundamental issue has already been decided by this Court in favour of the applicant (accused), would be travesty of justice. Accordingly, this Court considers it to be a fit case where the proceedings deserve to be quashed.

12. For the reasons stated here-in-above, the application is allowed. The proceedings of criminal case no.1595 of 2012, arising out of charge-sheet submitted by the police, under Section 420 IPC, in case crime no.464 of 2012, police station Kotwali, district Ballia, pending in the Court of Chief Judicial Magistrate, Ballia, are hereby quashed.

13. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.04.2014

BEFORE
THE HON'BLE DR. DHANANJAYA YESHWANT CHANDRACHUD, C.J.
THE HON'BLE DILIP GUPTA, J.

Civil Misc. Writ (P.I.L) Petition No.24206 of 2014

Raja John Bunch ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Tanveer Ahmad Siddiqui, Sri Bidhan Chandra Rai

Counsel for the Respondents:
A.S.G.I., Sri Bhoopendra Nath Singh, Sri Krishna Agrwal

Constitution of India, Art.-226- Public Interest Litigation-petitioner seeking to quash the provisions of section 33(7) and section 70 of Representation of people Act 1951 contrary to provisions of Art. 101 of constitution-held-if a person elected as M.P. Or MLA has vacate on seat-within prescribed period-otherwise both shall be deemed vacated-considering such clear provision-no interfere on called far-petition can not be entertained-nor mandamus can be issued to the legislative body to enact particular law sole-wisdom of legislature-petition dismissed.

Held: Para-14&15

14. These, in our view, are matters of legislative policy. What the Election Commission of India has observed is undoubtedly a matter which must be attributed the greatest weight and deference but that would not result in an existing provision of law being rendered unconstitutional or arbitrary.

15. In a cases pertaining to the enactment of a particular law or policy, the Court would not be justified in issuing a writ of mandamus directing that the law should be amended. A mandamus to that effect cannot be issued by the High Court under Article 226 of the Constitution. No direction can be issued to a legislative body to enact a law or to amend an existing law. The alternate reliefs which have been sought in the petition are all basically matters of legislative policy. The Election Commission of India, which is vested with the authority under Article 324 of the Constitution of superintendence, direction and control over elections, has formulated its suggestions for electoral reforms. The matter must rest there,

insofar as this Court is concerned. We find no reason to entertain the petition or to accept the submission that Section 33 (7) and Section 70 of the Representation of the People Act, 1951 are contrary to Article 101 of the Constitution. We also decline to entertain the other reliefs which have been pressed in the alternate.

(Delivered by Hon'ble Dr. Dhananjaya Yeshwant Chandrachud, C.J.)

1. This petition has been filed in the public interest. The petitioner is an RTI activist and is a life member of the National Campaign for People's Right to Information. The petitioner challenges the constitutional validity of the provisions of Section 33 (7) of the Representation of the People Act, 1951 on the ground that these provisions are inconsistent with Article 101 of the Constitution. The petitioner also seeks a writ of mandamus to implement the recommendation which was made by the Election Commission of India to restrict a candidate from contesting an election from more than one constituency in a particular election. The petitioner further seeks a mandamus to recover the entire expenses incurred in a constituency in which a seat gets vacated as a consequence of a candidate resigning his seat. Finally, the petitioner seeks that guidelines be framed to debar every member from contesting an election for a stipulated duration upon resigning his or her seat.

2. Section 33 (7) of the Representation of the People Act, 1951 provides as follows:

"(7) Notwithstanding anything contained in sub-section (6) or in any other provisions of this Act, a person shall not be moninated as a candidate for election,--

(a) in the case of a general election to the House of the People (whether or not held simultaneously from all Parliamentary constituencies), from more than two Parliamentary constituencies;

(b) in the case of a general election to the Legislative Assembly of a State (whether or not held simultaneously from all Assembly constituencies), from more than two Assembly constituencies in that State;

(c) in the case of a biennial election to the Legislative Council of a State having such Council, from more than two Council constituencies in the State;

(d)in the case of a biennial election to the Council of States for filling two or more seats allotted to a State, for filling more than two such seats;

(e) in the case of bye-elections to the House of the people from two or more Parliamentary constituencies which are held simultaneously, from more than two such Parliamentary constituencies;

(f) in the case of bye-elections to the Legislative Assembly of a State from two or more Assembly constituencies which are held simultaneously, from more than two such Assembly constituencies;

(g) in the case of bye-elections to the Council of States for filling two or more seats allotted to a State, which are held simultaneously, for filling more than two such seats;

(h) in the case of bye-elections to the Legislative Council of a State having such Council from two or more Council constituencies which are held simultaneously, from more than two such Council constituencies.

Explanation.--For the purposes of this sub-section, two or more bye-elections shall be deemed to be held simultaneously where the notification calling such bye-elections are issued by the Election Commission under sections 147, 149, 150 or, as the case may be, 151 on the same date."

3. Section 70 makes the following provisions:

"70. Election to more than one seat in either House of Parliament or in the House or either House of the Legislature of a State--If a person is elected to more than one seat in either House of Parliament or in the House or either House of the Legislature of a State, then, unless within the prescribed time he resigns all but one of the seats by writing under his hand addressed to the Speaker or Chairman, as the case may be, or to such other authority or officer as may be prescribed, all the seats shall become vacant."

4. Under clauses (a) and (b) of Section 33 (7), it is provided that a person shall not be nominated as a candidate for an election from more than two constituencies at a general election to the House of the People or, as the case may be, to the Legislative Assembly of a State. In the case of bye-elections to the House of the People, a candidate cannot be nominated from more than two Parliamentary constituencies. In the case of bye-elections to the Legislative Assembly of a State, a candidate cannot be nominated from more than two Assembly constituencies in that State.

5. The submission before the Court is that the provisions of Section 33 (7) are contrary to and inconsistent with Article 101 of the Constitution.

6. Article 101 provides as follows:

"101. Vacation of seats.-- (1) No person shall be a member of both Houses of Parliament and provision shall be made by Parliament by law for the vacation by a person who is chosen a member of both Houses of his seat in one House or the other

(2) No person shall be a member both of Parliament and of a House of the Legislature of a State, and if a person is chosen a member both of Parliament and of a House of the Legislature of a State, then, at the expiration of such period as may be specified in rules made by the President, that person's seat in Parliament shall become vacant, unless he has previously resigned his seat in the Legislature of the State.

(3)If a member of either House of Parliament--

(a) becomes subject to any of the disqualifications mentioned in clause (1) or clause (2) of Article 102, or

(b) resigns his seat by writing under his hand addressed to the Chairman or the Speaker, as the as may be, and his resignation is accepted by the Chairman or the Speaker, as the case may be,

his seat shall thereupon become vacant:

Provided that in the case of any resignation referred to in sub- clause (b), if from information received or otherwise and after making such inquiry as he thinks fit, the Chairman or the Speaker, as the case may be, is satisfied that such

resignation is not voluntary or genuine, he shall not accept such resignation.

(4)If for a period of sixty days a member of either House of Parliament is without permission of the House absent from all meetings thereof, the House may declare his seat vacant:

Provided that in computing the said period of sixty days no account shall be taken of any period during which the House is prorogued or is adjourned for more than four consecutive days"

7. Article 101 does not contain any prohibition or restriction on a person contesting an election or filing a nomination from more than one constituency. Clause (1) of Article 101 provides that a person shall not be a member of both the Houses of Parliament. Clause (2) of Article 101 provides that no person shall be a member of Parliament and of a House of the Legislature of a State. If such an eventuality occurs, then, upon the expiry of the period specified in the rules made by the President, the seat held in Parliament would become vacant, unless the person has previously resigned his seat in the Legislature of the State.

8. Sub-clause (b) of Clause (3) of Article 101 allows a member of either House of Parliament to resign his seat by writing under his hand addressed to the Chairman or the Speaker, as the case may be. The seat becomes vacant upon the acceptance of the resignation by the Chairman or the Speaker.

9. Consequently, a plain reading of Article 101 would indicate that it does not place any restriction on the number of constituencies from which a person may file his/her nomination during the course of a general election. Such a restriction is imposed in sub-section (7) of Section 33 of the Representation of the People Act, 1951. There is nothing inconsistent between Article 101 and Section 33 (7). Under Section 70, if a person is elected to more than one seat in either House of Parliament or of the Legislature of a State, he has to resign from all but one of the seats within the prescribed time failing which all the seats shall become vacant.

10. The submission is that the provision by which a candidate may contest or file his nomination from more than one seat (subject to a maximum of two) results in a situation where the constituency would be unrepresented once the candidate resigns from the seat. This circumstance would not, in our view, render a provision unconstitutional. A seat may fall vacant for a variety of reasons including, amongst them, the disqualifications which are contained in Article 102 of the Constitution. The seat which falls vacant has to be filled up in accordance with law.

11. As a matter of fact, Article 101 (3) (b) contemplates that a seat would become vacant when the resignation of a member of either House of Parliament from his seat is accepted by the Chairman or the Speaker, as the case may be.

12. The Election Commission of India had, in its Proposals for Electoral Reforms of 2004, suggested that the law should be amended to provide that a person cannot contest from more than one constituency at a time. In the alternate, it was suggested that if the provision facilitating a candidate to contest from two constituencies is to be retained, an

express provision should be made in law to deposit, with the Government, an appropriate amount of money being the expenditure for holding the bye-election. The observations in the report of the Election Commission of India are of significance and read as follows:

"RESTRICTION ON THE NUMBER OF SEATS FROM WHICH ONE MAY CONTEST

As per the law as it stands at present [Sub-Section (7) of Section 33 of the Representation of the People Act, 1951], a person can contest a general election or a group of bye-elections or biennial elections from a maximum of two constituencies.

There have been several cases where a person contests election from two constituencies, and wins from both. In such a situation he vacates the seat in one of the two constituencies. The consequence is that a bye-election would be required from one constituency involving avoidable labour and expenditure on the conduct of that bye-election.

The Commission is of the view that the law should be amended to provide that a person cannot contest from more than on constituency at a time.

The Commission will also add that in case the legislature is of the view that the provision facilitating contesting from two constituencies as existing at present is to be retained, then there should be an express provision in the law requiring a person who contests and wins election from two seats, resulting in a bye-election from one of the two constituencies, to deposit in the government account an appropriate amount of money being the expenditure for holding the bye-election. The amount could be Rs.5,00,000/- for State Assembly and Council election and Rs.10,00,000/- for election to the House of the People."

13. To the same effect, is a Background Paper on Electoral Reforms published by the Legislative Department of the Ministry of Law and Justice, Government of India. The suggestion in the Background Paper is thus:

"**6.5 Restriction on the number of seats which one may contest.**

Section 33 of the Representation of the People Act, 1951, a person can contest a general election or a group of bye-elections or biennial elections from a maximum of two constituencies. There have been several cases where a person contests election from two constituencies, and wins from both. In such a situation he vacates the seat in one of the two constituencies. The consequence is that a bye-election would be required from one constituency which apart from involving avoidable labour and expenditure on the conduct of that bye-election.

* Recommendations

The Election Commission is of the view that the law should be amended to provide that a person cannot contest from more than one constituency at a time."

14. These, in our view, are matters of legislative policy. What the Election Commission of India has observed is undoubtedly a matter which must be attributed the greatest weight and deference but that would not result in an existing provision of law being rendered unconstitutional or arbitrary.

15. In a cases pertaining to the enactment of a particular law or policy, the Court would not be justified in issuing a writ of mandamus directing that the law should be amended. A mandamus to that effect cannot be issued by the High Court under Article 226 of the Constitution. No direction can be issued to a legislative body to enact a law or to amend an existing law. The alternate reliefs which have been sought in the petition are all basically matters of legislative policy. The Election Commission of India, which is vested with the authority under Article 324 of the Constitution of superintendence, direction and control over elections, has formulated its suggestions for electoral reforms. The matter must rest there, insofar as this Court is concerned. We find no reason to entertain the petition or to accept the submission that Section 33 (7) and Section 70 of the Representation of the People Act, 1951 are contrary to Article 101 of the Constitution. We also decline to entertain the other reliefs which have been pressed in the alternate.

16. The petition is, accordingly, dismissed. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.03.2014

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.
THE HON'BLE VIVEK KUMAR BIRLA, J.

Civil Misc. Writ Petition No. 24469 of 2012

Satish Kumar Sharma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Akhilesh Kumar Sharma, Sri U.N. Sharma

Counsel for the Respondents:
C.S.C., Sri M.C. Chaturvedi, Sri Piyush Shukla

Urban Planning Development Act-1973- Section 13-petitioner representation-rejected on ground-the plot in question ermarked for park-after inviting objection-published under public notice-petitioner did not choose to file any objection-after 6 years representation about alteration duly approved-can not be entertained-petition dismissed.

Held: Para-9
Sri Sharma is correct to this extent and location or relocation cannot be altered without any procedure being followed in this regard, but in the instant case the alteration which is permissible under the provisions of 1973 Act has been carried out after due public notice in the newspapers. The petitioner claims to be ignorant about such notice. A public notice in the newspapers cannot be discarded as such allegations. Admittedly, the petitioner did not file any objection in relation to the proposed alteration in the Master Plan.

Case Law discussed:
AIR 1991 SC 1902; AIR 1993 Allahabad 57.

(Delivered by Hon'ble Amreshwar Pratap Sahi, J.)

1. Heard Dr. Akhilesh Kumar Sharma, learned counsel for the petitioner and perused the counter affidavit filed by the respondent-authority.

2. The petitioner has come up questioning the order passed by the Agra Development Authority, Agra dated 3.4.2012 whereby his representation has been rejected on the ground that the land in dispute over which the petitioner alleges to have raised constructions, has been earmarked as a park and also for other

purposes under the Master Plan which now stands revised after the approval of the Zonal Plan. The same has been approved by the State Government as per the provisions under Section 13 of the U.P. Urban Planning and Development Act, 1973.

3. The finding recorded is that with regard to alteration in the user of the land was proposed under a public notice which was published in hindi dailies "Dainik Jagran" and "Amar Ujjala" in the year 2006, whereafter objections were invited. The petitioner did not choose to file any objections to the said public notice whereafter the Zonal Plan was approved and sent to the State Government, which has been finalised taking the shape of Agra Development Authority Master Plan 2021.

4. In the aforesaid circumstances, the representation of the petitioner has been rejected holding that the land in question has already been reserved for a park and a part of the said land is also shown in the road widening plan of Master Plan 2021.

5. The constructions, which have been raised by the petitioner, do not appear to have been made after any due sanction of a map or a plan by the respondent- Development Authority. In such circumstances, there being no challenge raised to the competence of the State Government in changing the Master Plan or approving the Zonal Plan, no such relief can be granted to the petitioner as prayed for which is only for quashing of the order dated 3.4.2012.

6. Learned counsel for the petitioner submits that certain change land user has been permitted on which the finding recorded is that two wrongs cannot make a right. Learned counsel for the petitioner has been unable to point out any such provision under which such alteration of user can now be permitted by this Court after the Master Plan has already been finalised and published.

7. Sri Sharma then contends that in view of the judgement of the Apex Court in the case of Bangalore Medical Trust vs. S. Muddappa and others AIR 1991 SC 1902 and the Division Bench Judgement of this Court in the case of D.D. Vyas and others vs. Ghaziabad Development Authority AIR 1993 Allahabad 57, the location of the park cannot be altered.

8. Learned counsel submits even otherwise there was land available with the authority to relocate the park for which certain suggestions has been made.

9. Sri Sharma is correct to this extent and location or relocation cannot be altered without any procedure being followed in this regard, but in the instant case the alteration which is permissible under the provisions of 1973 Act has been carried out after due public notice in the newspapers. The petitioner claims to be ignorant about such notice. A public notice in the newspapers cannot be discarded as such allegations. Admittedly, the petitioner did not file any objection in relation to the proposed alteration in the Master Plan.

10. In these circumstances, this petition, which has been filed in 2012 after

six years of the alteration of the Master Plan in the year 2006-2007 cannot be entertained. Even otherwise no other ground has been raised to challenge the Master Plan, which is a Legislative Act.

11. Consequently, we do not find any merit in this petition.

12. The writ petition is, accordingly, rejected.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.05.2014

BEFORE
THE HON'BLE ARUN TANDON, J.
THE HON'BLE SHASHI KANT, J.

Criminal Misc. Writ Petition No. 24999 of 2013

Shila Devi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri P.K. Upadhyay

Counsel for the Respondents:
A.G.A., Sri V.C. Mishra (Advocate General)

Code of Criminal Procedure-Section-197-Sanction for prosecution-offence under Section 306,506,323, ILO-B IPC against police personal-on direction of High Court-C.B.C.I.D. Completed investigation found those police persons involved-applied for sanction accompanied with investigation report-after 6 month by impugned order-rejection on ground no possibility of conviction-held-such opinion-tailor made to suit the police officers involved-ignoring the impact of High Court direction-order quashed with direction to pass fresh order in accordance with law keeping in view of direction of High Court.

Held: Para-15
We have no hesitation to record that such reports, which do not even take into consideration as to what has been found and recorded by the C.B.C.I.D in its report seeking prosecution, is patently unjust. The opinion appears to be tailor-made to suit only the interest of the police officers involved. Even the order of the High Court dated 22.07.2011 and its impact has gone unnoticed in the report of Special Secretary (Law) & Addl. Legal Remembrances, Govt. of U.P., Lucknow.

Case Law discussed:
(2014) 1 Supreme Court Cases (Cri) 515.

(Delivered by Hon'ble Arun Tandon, J.)

1. Heard P. K. Upadhyay, counsel for the petitioner and V. C. Mishra, Advocate General on behalf of the State as well as other respondent authorities.

2. Petitioner seeks quashing of the order dated 23.05.2013 passed by Principal Secretary, Home, Government of U. P., Lucknow whereby he has refused to grant sanction for prosecution of three police personnel in Case Crime No.829 of 2010 under Sections 306, 506, 323, 120 B IPC.

3. Facts in short as on record of the present writ petition are as follows :

FIR being Case Crime No.829 of 2010, under Sections 306, 506, 323, 120 B IPC, P. S.Kerakat, District-Jaunpur was registered on 20.10.2010, by Smt. Shila, mother of the deceased Yogendra Kumar. In the FIR it was mentioned that her son Yogendra Kumar was forced to commit suicide because of the undue pressures brought upon him by his accused wife as well as by constables Prabhu Nath Ram,

Madhusudan Mishra and S.I., Vikas Pandey, In-Charge of the police outpost-Gaddi.

4. The case was investigated by civil police, a charge sheet was filed against the wife of the deceased only. The informant-mother filed Writ Petition No.23269 of 2010 alleging therein that the investigation has not been done in free and fair manner because of the involvement of the police officers as detailed above. The investigation had not been done in the right direction with specific reference to the suicide note recovered near the dead body of the deceased as well as in respect of the deceased being called at the police station and being asked to wait for long periods and being harassed by the police officers without making any mention of the same in the G.D.

5. The High Court after considering the facts pleaded by the mother and after affording opportunity to the prosecution and the State-respondents, it came to a conclusion vide order dated 22.07.2011 that the investigation has not been done by the Investigating Officer in right direction specifically with reference to the suicide note and summoning of the victim to the police outpost on 18.10.2010 and 20.10.2010 where he is alleged to have been tortured. The details of his being called to the police outpost were not mentioned in the G.D. of the respective dates. In the totality of the facts on record the High Court went on to pass following orders :

"The investigation has not been made by the I.O. on the basis of the suicide note but during the pendency of the writ petition the I.O. completed the investigation in which the charge sheet has been proposed only against Smt. Reena Devi, wife of the deceased, but this court has directed not to submit any police report before the court concerned till further order of this court, at this stage it is not proper to discuss all the facts and the allegations but the circumstances are of such nature in which for ensuring the fair investigation, the investigation of the above mentioned case is required to be done by the investigating agency other than the local police because the allegations have been made against three police personnel of the same police station where the alleged occurrence has taken place. Therefore, we direct that the investigation of case crime no.829 of 2010 under sections 306, 506, 323 and 120-B IPC, P.S.Kerakat, District-Jaunpur shall be done by the C.B.C.I.D. The S.P. Jaunpur is directed to ensure that shall be handed over to C.B.C.I.D. Forthwith, who shall submit the police report after completing the investigation before the court concerned.

Accordingly the writ petition is finally disposed of."

6. In terms of the order of the High Court C.B.C.I.D proceeded with the investigation. It prepared a draft police report. Thereafter, C.B.C.I.D made an application to the State Government vide letter dated 3 December 2012 for sanction being granted for the prosecution of the police officers. The said application was accompanied with the details of the investigation done by the C.B.C.I.D. On receipt of the said application it appears that the Principal Secretary, Home, U. P. Government, who was competent person to sanction prosecution, asked for a report from the Law Department of the State of U.P. Special Secretary (Law) & Addl. Legal Remembrances, Govt. of U.P., Lucknow submitted a report on 23.05.2013 i.e. after six months of the receipt of the application for sanction of the prosecution. On the basis of said legal opinion the Principal Secretary,

Home has proceeded to pass the order dated 23.05.2013 impugned in the petition. He has refused to grant sanction for prosecution, the reason assigned in the order for the purpose reads as follows :

"इस समबंध में मुझे कहने का निर्देश हुआ है कि उपरोक्त दोषी पुलिसकर्मियों के विरूद्व अभियोजन स्वीकृति प्रदान किये जाने के उपलब्ध साक्ष्यों / अभिलेखों के आधार पर सफलता की सम्भावना क्षीण होना पाये जाने पर शासन द्वारा सम्यक् विचारोपरान्त उक्त दोषी पुलिसकर्मियों के विरूद्व अभियोजन स्वीकृति प्रदान किये जाने का औचित्य नहीं पाया गया है।"

7. Before we address ourselves to the report of the Special Secretary (Law) & Addl. Legal Remembrances it may be recorded that the order of the Principal Secretary, Home does not even refer to the report of the Special Secretary (Law) & Addl. Legal Remembrances.

8. It is settled law that the orders are to be judged for the reasons recorded therein. From the order of the State Government dated 23.05.2013 it is clear that the only reason disclosed is that on the basis of the evidence available on the records, the chances of offence being brought home against the police officers are minimal. Therefore, sanction for prosecution is being refused.

9. We may record that, from page 9 of the report of the C.B.C.I.D., which has been enclosed as Annexure No.1 along with the counter affidavit filed on behalf of the State, sufficient facts and materials have been disclosed for charge sheet being filed against the police officers and the matter being investigated against them also.

10. In paragraphs 10 (2) and 10(3) of the report of C.B.C.I.D., the explanation of the police officers, the reason for not accepting the same and the evidence relied upon in support of the conclusion drawn by the C.B.C.I.D. has specifically been mentioned along with the recommendation in the matter.

11. The relevant portion of the report of the C.B.C.I.D. is being quoted herein below :

"इसके अतिरिक्त स्थानीय पुलिस के जो प्रथम सूचना रिपोर्ट में नामित उपनिरीक्षक प्रभारी चौकी थाना गद्दी श्री विकास पाण्डेय पुत्र स्व0 राम निरंजन पाण्डेय निवासी सत्यानगंज थाना अहरौरा मिर्जापुर हाल तैनाती संराय पुख्ता पुलिस चौकी थाना सदर कोतवाली जनपद जौनपुर आरक्षी 984 ना0पु0 मधुसूदन मिश्रा पुत्र स्व0 सुधीर मिश्रा नि0 चोखना थाना मेजा जनपद इलाहाबाद हाल पता थाना बडेसर जनपद गाजीपुर व आरक्षी 113 ना0 पु0 प्रभू नाथ राम पुत्र श्री शंकर राम निवासी ग्राम चोचकपुर थाना करण्डा जनपद गाजीपुर हाल पता थाना कुरांव जनपद इलाहाबाद के विरूद्व मृतक योगेन्द्र गुप्ता को अनाधिकृत रूप से पुलिस चौकी थाना गद्दी बुलाकर पत्नी के सामने प्रताडित एवं अपमानित किया गया तथा अभियुक्त विजय कुमार गुप्ता व मृतक योगेन्द्र द्वारा दिए गये प्रार्थना पत्र का न तो जी0 डी0 में आमद किया और न ही बरवक्त वापसी और न ही श्रीमती रीना गुप्ता को घर के अंदर कमरे में बंद पाये जाने का तस्किरा जी0 डी0 में अंकित किया जो विधि विरूद्व है और अनाधिकृत रूप से वादिनी, वादिनी के पति विश्वनाथ गुप्ता, राकेश गुप्ता एवं गांव के सुरेन्द्र केवट, सामू सिंह, शिव कुमार गुप्ता, लल्लन यादन व दिलीप कुमार सिंह आदि के कथनो एवं मृतक के सुसाइट नोट के आधार पर मृतक योगेन्द्र को पुलिस ने चौकी थाना गद्दी पर बैठाये रखा एवं सरेआम अपमानित किया जिसके कारण योगेन्द्र ने ग्लानिवश आत्महत्या कर ली जो धारा 306/342/506 भा0 दं0 वि0 के अंतर्गत प्रथम दृष्टया अपराध को प्रमाणित होना पाया गया है।

10 (2) अभियुक्तों का स्पष्टीकरण व बचाव के तर्कः–

श्रीमती गीता गुप्ता के छोटे भाई विजय गुप्ता द्वारा दिनांक 12–10–10 को पुलिस चौकी थाना गद्दी के प्रभारी उपनिरीक्षक विकास पाण्डेय के नाम दिये गये शिकायती प्रार्थनापत्र के आधार पर मृतक योगेन्द्र को आरक्षी मधुसूदन मिश्रा एवं आरक्षी प्रभू नाथ राम द्वारा पुलिस चौकी चौराहे पर पूछताछ हेतु बुलाकर लाया गया था किन्तु तीनो पुलिसकर्मियों द्वारा चौराहे

पर योगेन्द्र गुप्ता को मारने पीटने, गाली गलौज करने अथवा अपमानित न किये जाने के तर्क दिये गये है।

10 (3) अभियुक्तों के स्पष्टीकरण व बचाव के तर्को को न मानने का कारणः—

अभियुक्तों द्वारा किया गया कथन मात्र अपने बचाव में दिया गया है जो मानने योग्य नहीं है। अभियुक्तों के विरूद्व न्यायालय में आरोप पत्र प्रेषित किये जाने व न्यायालय में अभियोजित किये जाने हेतु पर्याप्त साक्ष्य उपलब्ध है।

10 (4) सबूत पक्ष एवं बचाव पक्ष के तथ्यों का विश्लेषणः—

उपनिरीक्षिक श्री विकास पाण्डेय आरक्षी श्री मधुसूदन मिश्रा एवं आरक्षी श्री प्रभूनाथ राम द्वारा अंकित कराया गया कथन मात्र अपने आप को बचाने की नियत से दिया गया है।

अपराध शाखा की विवेचना से उपरोक्त अभियुक्तगण के विरूद्व प्रथम दृष्टया अपराध अन्तर्गत धारा 306/342/506 भा0 दं0 वि0 प्रमाणित है।

निष्कर्षः—

विवेचना के मध्य संकलित मौखिक अभिलेखीय एवं परिस्थितिजन्य साक्ष्यों के विश्लेषण से शिकायतकर्ता श्री शीला देवी द्वारा दिनांक 23—10—10 को पंजीकृत कराये गये प्रथम सूचना रिपोर्ट में विजय गुप्ता, अजय कुमार गुप्ता, हरी लाल उप निरी0 विकास पाण्डेय आरक्षी मधुसूदन मिश्रा एवं आरक्षी प्रभूनाथ राम को नामित किया है जिसमें से अजय कुमार गुप्ता, हरी लाल गुप्ता के विरूद्व किसी अपराध का प्रमाणित होना नहीं पाया गया है। बल्कि प्रथम सूचना में नामित अभियुक्त श्रीमती रीना गुप्ता पत्नी मृतक योगेन्द्र कुमार गुप्ता एवं अभियुक्त विजय कुमार गुप्ता पुत्र अगनू गुप्ता (मृतक योगेन्द्र का साला) के द्वारा जीवनयापन व दहेज उत्पीडन को लेकर एक पक्षीय अदालती कार्यवाही एवं झूंठा अभियोग पंजीकृत कराया गया था जिसके उत्पीडन एवं आर्थिक तंगी के कारण योगेन्द्र गुप्ता द्वारा अपने ही मकान में लगे सीलिंग फेन में लुंगी से फंदा बनाकर आत्महत्या कर लिया गया। संदर्भित अभियोग के विवेचना तत्तकालीन क्षेत्राधिकारी केराकत श्री नेत्रपाल सिंह द्वारा की गयी तथा विवेचनोपरान्त श्रीमती रीना गुप्ता द्वारा अपने पति मृतक योगेन्द्र कुमार गुप्ता को पूर्णरूपेण उत्पीडित करने का दोषी पाये जाने पर केवल श्रीमती रीना गुप्ता पत्नी मृतक योगेन्द्र कुमारग गुप्ता निवासी खर्गसेनपुर ,थाना केराकत जनपद जौनपुर हाल पता ग्राम टिकरगढ थाना देवगांव आजमगढ के विरूद्व धारा 306 भा0दं0 वि0 का अपराध सृजित होना पाया है , शेष प्रथम सूचना रिपोर्ट में नामित अजय गुप्ता पुत्रगण अगनू, हरी लाल अगनू व नदनलाल के विरूद्व अपराध का सृजि होना नहीं पाया गया है। स्थानीय पुलिस के विवेचक द्वारा श्रीमती रीना गुप्ता के विरूद्व दिनांक 31—3—11 को आरोप पत्र संख्या 08/11 धारा 306 भा0दं0 वि0 प्रेषित किया गया है अपराध शाखा की विवेचना से स्थानीय पुलिस द्वारा प्रेषित आरोप पत्र में किसी परिवर्तन की आवश्यकता नहीं है। विजय कुमार गुप्ता पुत्र अगनू गुप्ता निवासी टिकरगढ थाना देवगांज जनपद आजमगढ के विरूद्व अपराध संख्या की गहन विवेचना से अपनी बहन श्रीमती रीना गुप्ता के साथ साथ मृतक योगेन्द्र को फांसी लगाकर आत्महत्या किये जाने के लिए उत्तेजित करने के कारण धारा 306/120बी0, भा0दं0वि0 के अपराध का दोषी पाया गया है। इसके अतिरिकत स्थानीय पुलिस के जो प्रथम सूचना रिपोर्ट में नामित उपनिरीक्षक प्रभारी चौकी थाना गद्दी श्री विकस कुमार पाण्डेय पुत्र स्व0 राम निरंजन पाण्डेय निवासी सत्यानगंज थाना अहरौरा मिर्जापुर हाल तैनाती संरायपुख्ता पुलिस चौकी थाना सदर कोतवाली जनपद जौनपुर आरक्षी 984 ना0 पु0 मधुसूदन मिश्रा पुत्र स्व0 सुधीर मिश्रा निवासी चोखना थाना मेजा जनपद इलाहाबाद हाल पता थाना बडेसर जनपद गाजीपुर व आरक्षी 113 ना0 पु0 प्रभूनाथ राम पुत्र श्री शंकर राम निवासी ग्राम चोचलपुर थाना करण्डा जनपद गाजीपुर हाल पता थाना कुरांव जनपद इलाहाबाद के विरूद्व मृतक योगेन्द्र गुप्ता को अनाधिकृत रूप से पुलिस चौकी थाना गद्दी बुलाकर पत्नी के सामने प्रताडित एवं अपमानित किया गया तथा अभियुक्त विजय कुमार गुप्ता व मृतक योगेन्द्र द्वारा दिए गये प्रार्थनापत्र का न तो जी0डी0 में आमद किया और न ही बरवक्त वापसी और न ही श्रीमती रीना गुप्ता को घर के अंदर कमरे में बंद पाये जाने का तास्किरा जी0डी0 में अंकित किया। जो विधि विरूद्व है और अनाधिकृत रूप से वादिनी के पति विश्वनाथ गुप्ता, राकेश गुप्ता एवं गांव के सुरेन्द्र केवट, सामू सिंह, शिव कुमार गुप्ता, लल्लन यादव व दिलीप कुमार सिंह आदि के कथनों एवं मृतक के सुसाइट नोट के आधार पर मृतक योगेन्द्र को पुलिस ने चौकी थाना गद्दी पर बैठाये रखा एवं सरेआम अपमानित किया जिसके कारण योगेन्द्र ने गलानिवश आत्महत्या कर ली जो धारा 306/342/506/120 बी, भा0 दं0 वि0 के अन्तर्गत प्रथम दृष्टया अपराध का प्रमाणित होना पाया गया है।

संस्तुतिः—

अपराध शाखा की सम्पूर्ण विवेचना के मध्य उपलब्ध अभिलेखीय/मौखिक एवं परिस्थितिजन्य साक्ष्य के विश्लेषण से अभियुक्त श्रीमती रीना गुप्ता पत्नी स्व0 योगेन्द्र कुमार गुप्ता एवं अभियुक्त विजय कुमार गुप्ता पुत्र अगनू गुप्ता के विरूद्व धारा 306/120बी, भा0 दं0 वि0 का अपराध प्रमाणित होना पाया गया है। श्रीमती रीना गुप्ता के विरूद्व जनपदीय पुलिस के विवेचक द्वारा पूर्व में आरोप पत्र प्रेषित किया जा चुका है जिसमें किसी बदलाव की आवश्यकता नही है। अतः अभियुक्त विजय कुमार गुप्ता के विरूद्व धारा 306/120 बी0, भा0 दं0 वि0 के अन्तर्गत धारा 173 दं0 पं0 सं0 के तहत पूरक आरोप पत्र प्रेषित एवं उप निरीक्षक प्रभारी, चौकी थाना गद्दी श्री विकास पाण्डेय, आरक्षी मधुसूदन मिश्रा व आरक्षी प्रभूनाथ राम के विरूद्व धारा 306/342/506/120बी, भा0दं0 वि0 का अपराध प्रथम दृष्टया प्रमाणित पाया गया है। मा0 न्यायालय में अभियोग चलाये जाने हेतु पर्याप्त साक्ष्य है। अभियुक्त रीना गुप्ता व अभियुक्त विजय कुमार गुप्ता के विरूद्व अभियोजन स्वीकृति की आवश्यकता नहीं है इनके विरूद्व आरोपपत्र प्रेषित किया जा रहा है।

अतः उपनिरीक्षक/तत्का0 प्रभारी चौकी थाना गद्दी श्री विकास पाण्डेय आरक्षी मधुसूदन मिश्रा व आरक्षी प्रभूनाथ राम उपरोक्त को न्यायालय में अभियोजन किये जाने हेतु धारा 197 (2) दं0 प्र0 सं0 के अन्तर्गत अभियोजन स्वीकृति एवं धारा 45 (2) दं0 प्र0 सं0 के अन्तर्गत गिरफतार किये जाने की अनुमति वांछित है। साथ ही साथ यह भी अनुरोध है कि अभियोजन स्वीकृति के लिए तिथि निर्धारित कर अवगत कराने की कृपा करे ताकि समबन्धित विवेचक को समय से विचार विमर्श किये जाने हेतु भेजा जा सके।"

12. From the order of the State Government, it is apparently clear that there has been complete non application of mind to the facts disclosed in the report of the C.B.C.I.D. along with the evidence collected and reasons assigned for investigation being done against the police officers also.

13. Now turning to the Annexure-CA-2 of the counter affidavit i.e. report of the Special Secretary (Law) & Addl. Legal Remembrances, Govt. of U.P., Lucknow, which is alleged to be the basis for passing the order impugned. We may record that the report runs in two and half pages. The first two pages deals with the investigation done by the civil police, which was not accepted by the High Court as per its judgment dated 22.07.2011 referred to above and investigation was directed through C.B.C.I.D. The facts upto that stage are not of much relevance. The later part of the report contains the judgment of Supreme Court, which deals with protection to be provided to the officers. It is the law applicable.

14. The consideration of the report of the C.B.C.I.D is only in the last paragraph of the opinion of Rangnath Pandey, Special Secretary (Law) & Addl. Legal Remembrances, Govt. of U.P., Lucknow, which reads as follows :

"इस प्रकार प्रशासनिक विभाग द्वारा पृष्ठ 18 से 22 पर अंकित टिप्पणी तथा विवेचनाधिकारी द्वारा अवगत कराये गये तथ्यों एवं पुलिस अधीक्षक अपराध शाखा, अपराध अनुसंधान विभाग लखनऊ के पत्र दिनांक 14–2–2012 के साथ संलग्न अभिलेखीय एवं मौखिक साक्ष्यों के प्रकाश में मुकदमा अपराध संख्या 829/1010, अन्तर्गत धारा 306,506, 323, 120बी, भा0 दं0 वि0 थाना केराकत जनपद जौनपुर से समबन्धित उपनिरीक्षक विकास पाण्डेय आरक्षी प्रभूनाथ और आरक्षी मधुसूदन के विरूद्व अभियोजन स्वीकृति प्रदान किये जाने पर सफलता की सम्भावना क्षीण प्रतीत होती है।"

15. We have no hesitation to record that such reports, which do not even take into consideration as to what has been found and recorded by the C.B.C.I.D in its report seeking prosecution, is patently unjust. The opinion appears to be tailor-made to suit only the interest of the police officers involved. Even the order of the High Court dated 22.07.2011 and its impact has gone unnoticed in the report of Special Secretary (Law) & Addl. Legal Remembrances, Govt. of U.P., Lucknow.

16. From the records we find that for six months no action was taken in the matter of passing of the orders in respect of the application to sanction for prosecution made by the C.B.C.I.D. It was only when a contempt petition was filed before the High Court being Contempt Petition No.2689 of 2012 that the State Government got an opinion from the Special Secretary (Law) & Addl. Legal Remembrances noted above. Thereafter, the Special Secretary (Law) & Addl. Legal Remembrances, Govt. of U.P., Lucknow has proceeded to refuse the sanction for prosecution. We may record that the date fixed in the contempt proceedings for decision being taken on the request of the C.B.C.I.D was 27.05.2013.

17. In the aforesaid circumstances we feel it just and proper to quash the order dated 23.05.2013. It is ordered accordingly.

18. Having regard to the report of the C.B.C.I.D we direct the Principal Secretary, Home, Govt. of U. P., Lucknow to revisit the matter and act in accordance with law preferably within a period of two weeks of the receipt of a certified copy of this order. It may only to be noticed that the High Court in its order dated 22.07.2011 quoted above had specifically directed that the report shall be submitted by the C.B.C.I.D. to the Court concerned.

19. So far as Rangnath Pandey, Special Secretary (Law) & Addl. Legal Remembrances, Govt. of U. P., Lucknow is concerned, he is a judicial officer on deputation with the State Government. He is cautioned to be more careful in future.

20. Learned Additional Government Advocate has placed reliance upon the judgment in the case of State of Maharashtra Vs. Mahesh G. Jain reported in (2014) 1 Supreme Court Cases (Cri) 515.

21. We have gone through the judgment and we find that the same is clearly distinguishable in the facts of the case.

22. Writ petition is allowed with aforesaid observations.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.05.2014

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.
THE HON'BLE RAJAN ROY, J.

Civil Misc. Writ Petition No. 61522 of 2012

Smt. Meena Manral & Ors. ...Petitioners
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioners:
Sri L.C. Srivastava, Sri Neeraj Srivastava

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-Protection of status and pay-given by High Court-confirmed by Apex Court-petitioner working as Project officer under Basic Education department-by order 23.03.01 treated ex-cadre holder post-quashed-with finding once government decided to absorbs considering long period of their service-petitioner became surplus employee entitled for pay protection as well as status-by impugned order government again decide to absorbs on post of LT grade-in revise pay scale-held-order nothing but mud wash quashed-direction to reconsider fisibility of pay protection as well as status-if found entitled shall be given every consequential benefit.

Held: Para-14

Consequently, we direct the State Government to reconsider the matter pertaining to the issue of grant of equivalent status to the petitioners as ordered by this court in its judgment dated 05.04.2002 by considering all the relevant aspects of the matter including the recommendation dated 23.06.2010 against existing post or any other equivalent post. It shall be open for the petitioners also to file appropriate representation stating therein their version before the State Government. The State Government shall take a decision in this regard within a period of three months from the date of production of a certified copy of this order before it and in the event, the claim of the petitioners is accepted then all consequential benefits flowing therefrom shall also be granted to them. The pay protection granted under the order dated 27.09.2012 shall be subject to the fresh decision to be taken as aforesaid.

(Delivered by Hon'ble Amreshwar Pratap Sahi, J.)

1. The petitioners were engaged under a non-formal education scheme on temporary basis against newly created post of Project Officer in the pay-scale of Rs.770/- to Rs.1600/-. In the year 2001, the Government of India took a decision to abolish the said scheme of non-formal education and initiated another scheme in the name of E.G.S./ A.I.A. Consequent to the abolition of the scheme, the petitioners were faced with a situation of termination of their services. In these circumstances, a writ petition being Civil Misc. Writ Petition No.42806 of 2000 was filed by Pradeshiya Pariyojna Adhikdari, Anopcharik Shiksha Sangh, U.P., which was disposed of on 09.10.2000 with a direction to the State Government to consider the representations of the petitioners. The said representations came to be dismissed by the State Government on 23.03.2001. However, the State Government taking a lenient view passed an order on 24.03.2001, by which the petitioners, i.e. the project officers, who were not having any lien anywhere, their services were decided to be absorbed as Assistant Teachers in L.T. Grade instead of terminating their services and in pursuance of the said decision, the petitioners were adjusted against the said post in government inter colleges in the pay-scale of Rs.4500-7000/-.

2. Not being satisfied with the aforesaid orders dated 23.03.2001 and 24.03.2001, the petitioners approached this court by filing various writ petitions, which were clubbed together and decided on 05.04.2002. The order dated 23.03.2001 was quashed. This court was of the view that as the government had not addressed itself to factors relevant to the question as to protection of pay and status, the same should be remitted to the State Government for reconsideration. Accordingly, the order dated 23.03.2001 was quashed. The matter was remitted to reconsider the feasibility of protection of pay and status of the petitioners after taking into reckoning of the relevant factors stated in the judgment and, if necessary, to modify its order dated 24.03.2001 accordingly. Thus, essentially the court was of the view that while absorbing the petitioners as assistant teachers in L.T. Grade, the State Government had not considered the pay and status commensurate with the post of Project Officer, which was being held by them earlier and accordingly, the aforesaid directions were given.

3. A perusal of the aforesaid judgment makes it amply clear that the order dated 23.03.2001 was quashed and the matter was remanded to the State Government to reconsider the feasibility of "protection of pay and status of the petitioners after taking into reckoning all the relevant factors stated in the

said judgment and if necessary to modify its order dated 24.03.2001, accordingly."

4. The said judgment was challenged by the State Government before the Supreme Court by means of Civil Appeal No.8658 of 2002 and connected appeals, which were dismissed on 01.12.2011. The order passed by the Supreme Court is being quoted hereinbelow:

"Having heard learned counsel for the parties and perused the impugned judgment, we are of the opinion that the direction by the High Court to the Government to consider the question of protection of pay and status of the writ petitioners in the light of the observations made in the impugned judgment, does not warrant our interference with the impugned judgment. Accordingly, the appeal is dismissed.

However, having regard to the fact that the issue is hanging fire for over 10 years, we would request the authorities concerned to take a final decision in the matter, as expeditiously as practicable and in any case, not later than 6 months from the date of receipt of a copy of this order.

In view of the order passed in the appeal, all applications for impleadment and intervention are rendered infructuous and are disposed of accordingly.

CIVIL APPEAL NO. 631 of 2007

In light of the order passed in Civil Appeal No. 8658 of 2002 arising out of SLP(C) No. 12422 of 2002 [@ C.M.W.P. No. 18619 of 2001], this appeal also merits dismissal. We order accordingly. However, insofar as the enforcement of order dated 5th September, 2002 passed by the High Court of Uttarakhand at Nainital in terms of the subsequent order dated 8th June, 2004 passed in Civil Contempt Petition No. 96 of 2003 is concerned, it will be open to the parties to pursue appropriate remedy as may be available to them in this behalf."

5. After the aforesaid matter attained finality, the opposite parties considered the matter and passed an order on 27.09.2012, whereby the petitioners were granted the revised pay scale corresponding to the pay scale of post of Project Officer/ Assistant Project Officer after seeking approval of the finance department. The relevant extract of the order dated 27.09.2012 is being quoted hereinbelow:

"2 इस संबंध में शासन द्वारा माननीय उच्चतम न्यायालय में योजित की गयी विशेष अनुज्ञा याचिका संख्या- 8658/2002 , दिनांक 01 दिसम्बर, 2011 में दिये गये आदेशों के कम में पुर्नविचार करते हुये वित्त विभाग द्वारा की गयी टिप्पणी के प्रकाश में निम्नवत निर्णय लिया गया है:-

"परियोजना अधिकारी एवं सहायक परियोजना अधिकारी के पदों पर पदधारक कमशः वेतनमान रू0 6500-10500 एवं 5000-8000 में तैनात थे । छठे वेतन आयोग के संदर्भ में इन वेतनमानों का सामान्य पुनरीक्षण कमशः वेतन बैण्ड-2 रू0 9300-34800 एवं ग्रेड वेतन रू0 4600 एवं वेतन बैण्ड-2 रू0 9300-34800 एवं ग्रेड वेतन रू0 4600 एवं वेतन बैण्ड-2 रू0 9300-34800 ग्रेड वेतन रू0 4200 के पदों पर तैनाती दिये जाने से उनके वेतन एवं स्तर का संरक्षण (चतवजमबजपवद वि चंल दक जंजनेद्ध हो जाता है ।

3 इस संबंध में मुझे कहने को निर्देश हुआ है कि ऐसे परियोजना अधिकारी / सहायक परियोजना अधिकारी को शासन के पत्र सं0 454/15-68-प्रौ0-2001-200ह93ह/2000 दिनांक 24 मार्च, 2001 द्वारा एल0टी0ग्रेड के सहायक अध्यापक के संवर्गीय पदों पर

सम्मायोजित किया गया था । तत्समय 281 परियोजना अधिकारी/ सहायक परियोजना अधिकारी द्वारा कार्यभार ग्रहण किया गया था केवल 36 परियोजना अधिकारी/ सहायक परियोजना अधिकारी ने एल0टी0ग्रेड के सहायक अध्यापक के संवर्गीय पदों पर कार्यभार नहीं ग्रहण किया था । उनकी पूर्व की सेवाओं को दृष्टिगत रखते हुये मा0 उच्चतम न्यायलय के आदेश के अनुपालन में उपरोक्त शासनादेश का लाभ प्रदान करते हुये एल0टी0ग्रेड के सहायक अध्यापक के संवर्गीय रिक्त पदों पर सम्मायोजित / तैनाती किये जाने की कार्यवाही सम्पन्न कराया जाय ।

4 उक्त आदेश तत्काल प्रभाव से लागू माना जायेगा ।"

6. Still not being satisfied, the petitioners filed instant writ petition challenging the aforesaid order dated 27.09.2012 on the ground that the State Government has not properly considered their cases in the light of the earlier judgment of this court dated 05.04.2002. It has been contended on behalf of the petitioners that while passing the impugned order, the State Government has failed to apply its mind to the aspect of grant of status equivalent to the post of Project Officer/ Assistant Project Officer and has erroneously granted pay scale of the said post assuming that by doing so, the equivalent status has also been automatically confirmed.

7. While entertaining this writ petition, an interim order was passed on 27.11.2012, by which the operation of the impugned order dated 27.09.2012 was stayed leaving it open for the State Government to pass appropriate orders dealing with the issue. However, no such decision has been taken by the State Government during the pendency of the writ petition.

8. On 09.03.2014, after hearing the matter at length, this court had passed the following order:

"By means of this writ petition the petitioners have challenged the order dated 27.9.2012 passed by the State Government in-purported compliance of the earlier judgment of the Apex Court dated 1.12.2011 passed in Civil Appeal No.8658 of 2002 and connected matters.

By means of the impugned order as per the State Government the claim of pay and status of the post of Project Officer/Assistant Project Officer have been granted to the petitioners who have been absorbed as L.T. Grade Assistant Teachers. However, the grievance of the petitioners is that under the judgment dated 1.12.2011 their case for grant of status equivalent to the post of Project Officer was required to be considered which has not been done by the State Government.

The contention is that in view of the said judgment they are entitled to be considered for being absorbed on the post equivalent to the post of Project Officer, namely, D.I./A.D.I/.D.I.G.S. and to be given salary in the pay scale corresponding to the said post which has not been done in the instant case.

Sri Sashi Nandan, learned senior counsel appearing for the petitioners in one of the matters has invited the attention of the Court to certain recommendations made by Under Secretary, Education Department, Government of U.P. to the State Government by which he has proposed that the post of Deputy Basic Education Officers in the pay-scale of Rs.6000-10500/- which are vacant should be kept vacant and the absorption of the petitioners should be considered against

the said post which are equivalent to the earlier post of Project Officer.

The contention is that this recommendation has not been considered and the impugned order has been passed in a mechanical manner.

Put up this matter on Tuesday next, i.e. 13.5.2014.

Learned counsel for the respective parties shall address the Court on the issue that what would be the modality for absorbing the petitioners on a post equivalent to the post of Project Officer as also the feasibility by such an exercise keeping in view the relevant service rules applicable to the said post and the promotional opportunities etc. of the Feeder Cadres as also the nature of duties to be performed."

9. Today, the matter has been heard again on the issue of according status equivalent to the post of Project Officer/ Assistant Project Officer.

10. After hearing learned counsel for the petitioners as also the learned standing counsel for State and after perusing the material on record including the affidavits filed, we are of the view that the State has not considered the matter strictly in accordance with the observations of this court made in the earlier judgment dated 05.04.2002. Under some misconception, it has arrived at the conclusion that by absorbing the petitioners in L.T. Grade as Assistant Teachers and granting the revised pay-scale in respect of the pay-scale of the erstwhile post of Project Officer, status of Project Officer/ Assistant Project Officer also stood conferred. Learned counsel for the petitioners have contended that under the non-formal education scheme, they were not performing a teaching job but were exercising supervisory functions, whereas their absorption has been made on the post of Assistant Teachers in L.T. Grade, which is a teaching post. Learned counsel for the petitioners have also invited the attention of the court to a recommendation dated 23.06.2010 made by the Under Secretary, Department of Education to the State Government, a copy of which is annexed as Annexure-6 to the writ petition. The relevant extracts of the said recommendation are as under:

"इस संबंध में पूर्व पृष्ठ–7 एवं 8 पर स्थिति स्पष्ट की जा चुकी हैं। प्रकरण में यह उल्लेखनीय है कि कार्मिक अनुभाग–2 के शासनादेश संख्या–20/1/91/का–2–2008 दिनांक 9 जून 2009 में यह नीतिगत निर्णय लिया जा चुका है कि विभागों में उपलब्ध सरप्लस कार्मिकों का समायोजन कर दिया जाये और इनके समायोजन होने तक रिक्त पदों को न भरा जाये। इसलिए सरकार / विभाग का यह दायित्व बनता है कि इनका अतिशीघ्र समायोजन कर दिया जाये। इनके पैतृक विभाग बेसिक शिक्षा अन्तर्गत ही निरीक्षण अनुभव के अनुरूप वेतनमान रू0 6500–10500 में उप बेसिक शिक्षा अधिकारी के 27 आस्थगित पद रिक्त है। इसलिए उक्त रिक्त पदों के सापेक्ष समायोजन किये जाने में कोई

विधिक अथवा अन्य कठिनाई नहीं है। अतः विनम्र अनुरोध है कि प्रहनगत सरप्लस परियोजना अधिकारियों का इन्हीं के पैतृक विभाग बेसिक शिक्षा अन्तर्गत उप बेसिक शिक्षा अधिकारी के रिक्त 27 आस्थगित पदों के सापेक्ष समायोजन आदेश निर्गत किये जाने के संबंध में कृपया उच्चादेश प्राप्त करना चाहें।"

11. On an overall consideration of the facts and circumstances of the case, we find that the impugned order does not show any consideration of the observations made in the report of the Under Secretary as quoted hereinabove.

The relevant aspects noted by us in the order dated 09.05.2014 have also not been adverted to by the State Government while taking the impugned decision.

12. The reasons given in the impugned order for granting of status of Assistant Teacher in L.T. Grade does not appear to be sound. The State has not considered the relevant aspects of the matter, as directed by this court on 05.04.2002 and as has been noticed by us in the order dated 09.05.2014.

13. In the aforesaid circumstances, the impugned order, in so far as it relates to the grant of status of Assistant Teacher in L.T. Grade to the petitioners is concerned, is not sustainable and the same is quashed, and so far as the grant of status equivalent to the post of Project Officer/ Assistant Project Officer was concerned, the same requires no interference at this stage.

14. Consequently, we direct the State Government to reconsider the matter pertaining to the issue of grant of equivalent status to the petitioners as ordered by this court in its judgment dated 05.04.2002 by considering all the relevant aspects of the matter including the recommendation dated 23.06.2010 against existing post or any other equivalent post. It shall be open for the petitioners also to file appropriate representation stating therein their version before the State Government. The State Government shall take a decision in this regard within a period of three months from the date of production of a certified copy of this order before it and in the event, the claim of the petitioners is accepted then all consequential benefits flowing therefrom shall also be granted to them. The pay protection granted under the order dated 27.09.2012 shall be subject to the fresh decision to be taken as aforesaid.

15. The existing status of the petitioner shall continue till the aforesaid decision is taken by the State Government.

16. The writ petition is partly allowed.
