ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 26.09.2014

BEFORE
THE HON'BLE SANJAY MISRA, J.
THE HON'BLE BRIJESH KUMAR SRIVASTAVA-II, J.

Service Bench No. 1163 of 2014

Matadin Maurya ..Petitioner
Versus
State of U.P. & Ors. . ..Respondents

Counsel for the Petitioner:
Sri Kumar Ayush, Sri Dhirendra Singh
Sri K.S. Pawar

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-26- Service Law-transfer from Allahabad to Lalitpur-challenged on ground of Malice in law-Malice in law and malice in fact-explained-Court find that considering representation-the consolidation commissioner already modified the transfer from Lalitpur to Kaushambi-as his wife working as teacher in Arya kanya Inter College-owned by private management-no possibility of transfer in future-moreover Kaushambi being part of Dist. Allahabad-transfer order already modified-no further interference by Writ Court required-petition dismissed.

Held: Para-51, 52 & 59
51. We are of the view that violation of administrative guidelines contained in the transfer policy does not give any right to an employee to assail its validity in court of law nor would the court interfere on such grounds.

52. As far as malice in law is concerned, it has to be shown that it is a deliberate and disregard the right of others and the order in question would attract the principles of malice in law if it was passed on irrelevant grounds.

59. From the above discussions, we are of the view that the order impugned dated 13.08.2014 has been passed by the competent authority after considering the request of petitioner's wife and that too in compliance of the order of Division Bench of this Court passed in Writ Petition No. 941 (SB) of 2014. Accordingly no case for interference is made out and the writ petition is liable to be dismissed. It is accordingly dismissed.

Case Law discussed:
W.P. No. 941(SB) of 2014; 2009 (2) SCC 592; [2003(11) SCC 740]; (1914) AC 808; (1890) 24 QBD 371; AIR 1979, SC 49; JT 2009 (13) SC 643; JT 2007 (3) SC 112; [2006(6) SCC 430];[AIR 2012 SC 1339]; W.P. No. 36211 of 2013; [1974 (2) SCR 348]; [1986 (4) SCC 131]; [AIR 2004 Supreme Court 2165]; [AIR 2005 SC 3341]; [2004 RD-AH 572]; [JT 1994 (5) SC 298].

(Delivered by Hon'ble B.K. Srivastava-II, J.)

1. The brief facts of the case are that initially the petitioner was appointed as Assistant Consolidation Officer in the year 1994 and had worked on the said post since 07.09.1994 to 24.07.1997 at district Banda and thereafter he has been promoted on the post of Consolidation Officer and had worked since 25.07.1997 to 24.07.2004 at district Azamgarh and in District Hamirpur from 05.07.2008 to 20.05.2012 and in district Lucknow from 21.05.2012 to 25.07.2012 and thereafter he has been further promoted on the post of Settlement Officer consolidation and posted at Allahabad since 26.07.2012 till the passing of the transfer order dated 26.06.2014 whereby the petitioner has been transferred from District Allahabad to Lalitpur.

2. Against the transfer order dated 26.06.2014, the wife of the petitioner,

who claims to be an Assistant Teacher in Arya Kanya Intermediate College, Allahabad has made a representation dated 27.06.2014 before the respondent no.1-Principal Secretary, Revenue Department, U.P. Lucknow stating therein that she is also a government servant posted in Allahabad, hence in light of Clause 1-D of the transfer policy, the petitioner is entitled to be transferred at the said place and further that the prescribed period under the policy having not expired, it would be a mid term transfer insofar as it relates to the petitioner. Thereafter the petitioner has filed Writ Petition No. 941 (SB) of 2014 [Matadin Maurya Vs. State of U.P. and others] and the Division Bench of this Court after hearing the learned counsel for the parties on 07.07.2014 has passed the following order:

"We have heard Sri Kumar Ayush, learned counsel for the petitioner and learned Standing Counsel for the respondents no. 1, 2 and 3. Notice need not be issued to the respondent no.4 in view of the order being passed herein.

The petitioner is aggrieved by the order dated 26.06.2014 passed by the Commissioner Consolidation, Uttar Pradesh, Lucknow, respondent no.2 as contained in Annexure-1 to the writ petition.

Learned counsel for the petitioner has submitted that the Transfer Policy dated 04.06.2014 filed as Annexure-5 to the writ petition provides that when the husband and wife both are government servant then as far as possible they should be transferred at the same place. Learned counsel for the petitioner states that the petitioner has been posted as Settlement Officer, Consolidation, Allahabad since past two years and as such in light of the Transfer Policy, the petitioner could not have been transferred prior to expiry of the prescribed period given therein. Learned counsel for the petitioner has referred to Annexure-6 to the writ petition, which is a representation made on 27.06.2014 by the wife of the petitioner, who claims to be an Assistant Teacher in Arya Kanya Intermediate College, Allahabad and therefore, submits that when the wife of the petitioner is also a government servant posted in Allahabad, hence in light of Clause 1-D of the transfer policy, the petitioner is entitled to be transferred at the said place and further that the prescribed period under the policy having not expired, it would be a mid term transfer insofar as the petitioner is concerned.

We find from the record that the transfer policy has provided that as far as possible the husband and wife, if they are both government servant should be posted at the same place and no representation can be made by the Government Servant against his transfer in light of Clause 14 of the said transfer policy. We are aware that the transfer policy is not enforceable in law however, the transfer policy which has been brought out by the Government is for the benefit of the employee and we find no reason as to why the Authority would not consider the grievance of the wife of the petitioner who also claims to be a government servant.

Under such circumstances, we find that the petitioner's wife has already made a representation dated 27.06.2014 filed as Annexure-6 to the writ petition, hence it would be appropriate that the respondent no.2, Consolidation Commissioner, U.P. Lucknow should consider the representation of the petitioner's wife in light of the transfer policy dated 04.06.2014 and particularly

consider the entitlement of the petitioner in view of Clause 1-D of the said policy.

The Consolidation Commissioner, U.P. Lucknow should consider the representation by passing a reasoned order preferably within two weeks from the date a certified copy of this order alongwith representation is served upon him. The order so passed, be communicated to the petitioner forthwith.

The order impugned shall therefore, be subject to the result of the decision so taken by the Consolidation Commissioner, U.P. Lucknow.

However, in case the petitioner is aggrieved by such order he shall have liberty to avail the remedy available to him in law against such decision taken by the Authority.

The writ petition stands disposed of.

No order is passed as to costs."

3. Thereafter the wife of the petitioner through her representation dated 11.07.2014 has served the certified copy of the order dated 07.07.2014 in the office of respondent no. 2, which has been received in the office on 16.07.2014. In the said representation the wife of the petitioner has stated that she is working as Assistant Teacher in Arya Kanya Inter College, Mutthiganj, Allahabad. Her daughter and son are studying in class 11th and 8th respectively. Her father-in-law had died and her mother-in-law aged 85 years is living with her. Her mother-in-law often remains ill and she is also the patient of Thyroid, High Blood Pressure and Depression, therefore, keeping in view the devotion, hard working and honesty of her husband, prays that the transfer of her husband from district Lalitpur be cancelled and if possible he may be posted at Varanasi, Kaushambi or Kanpur.

4. The respondent no.2- Consolidation Commissioner, Uttar Pradesh, Lucknow in compliance of the order of this Hon'ble Court dated 07.07.2014 and keeping in view the transfer policy dated 04.06.2014 and also considering the problem of the wife of the petitioner vide impugned order dated 13.08.2014 the respondent no. 2 disposed of the representation of the wife of the petitioner, whereby he has altered the transfer order dated 26.06.2014 and the petitioner has been given posting at district Kaushambi on the post of Settlement Officer Consolidation in place of district Lalitpur.

5. Learned counsel for the petitioner submits that the impugned order has been passed as a measure of punishment. Clause 1-D of the transfer policy dated 04.06.2014 has not been complied with as the grievance of the wife of the petitioner that she is working as Assistant Teacher in Arya Kanya Inter College, Mutthiganj, Allahabad has not been considered. Further the respondent no. 2 while passing the impugned order dated 13.08.2014 has not considered the fact that the children of the petitioner are also studying at Allahabad. His further submission is that the respondent no. 2 has clearly ignored Clause 1-D of the transfer policy wherein it has been provided that in case the husband and wife both are government servant then if possible they should be posted at one place.

6. Learned counsel for the petitioner vehemently argued that the passing of the impugned order transferring the petitioner to district Kaushambi clearly shows the bias attitude of the respondent authorities as in the impugned order the respondent

no. 2 has mentioned that the petitioner has weak administrative control over the subordinate staff, careless in performing the duty, failed in achieving the desired target and public interest were shown as the cause for transfer of the petitioner.

7. Further argument of learned counsel for the petitioner is that the bias and malafide attitude of the respondents are further fortified by the minutes of the meeting dated 29.01.2014 and Sections 23, 27 and 52 of the U.P. Consolidation of Holdings Act, clearly show that the progress of approximately 20 districts was zero and in the said minutes the name of district Allahabad does not find place and as such the impugned order of transfer has been passed as a measure of punishment.

8. In support of his submissions learned counsel for the petitioner has placed reliance on the judgment of the Apex Court rendered in the case of Somesh Tiwari Vs. Union of India and others 2009 (2) SCC 592 in which in paras 19 and 20 the Apex Court held that " it is one thing to say that the employer is entitled to pass an order of transfer in administrative exigencies but it is another thing to say that the order of transfer is passed by way of punishment. When an order of transfer is passed in lieu of punishment, the same is liable to be set aside being wholly illegal". He further submits that from the perusal of the transfer order it appears that the same has been passed in work interest public interest, whereas in fact it is based on complaint and so called enquiry report by way of punishment as is apparent from the consequential order dated 13.08.2014 which is impugned in this writ petition. It is also stated that the impugned order of transfer is totally based on malice in law as is apparent from the impugned order itself.

9. Learned counsel for the petitioner further placed reliance on the judgment of the Apex Court rendered in the case of Sarvesh Kumar Awasthi Vs. U.P. Jal Nigal and others [2003(11) SCC 740] wherein the Apex Court held as under:

"Laying down the transfer policy for I.A.S. And P.C.S. Officers would be strictly adhered to. In this view of the matter, this petition would not survive and stands disposed of accordingly. If any other officer is having any grievance, it would be open to him to approach the appropriate forum."

10. He submits that before the Apex Court the Chief Secretary, State of U.P. has given an undertaking and affidavit to frame the transfer policy and to adhere the same and thus the Consolidation Commissioner, U.P. cannot be allowed to pass such a transfer order contrary to what has been stated by the State Government before the Apex Court in Sarvesh Awasthi's case and as such the impugned order is in gross violation of the undertaking given by the State Government and is liable to be set aside.

11. It is also submitted by the learned counsel for the petitioner that the State Government keeping in view the decision of the Apex Court rendered in the case of Sarvesh Awashti (Supra) has issued the transfer policy dated 04.06.2014 and further the State Government/Consolidation Commissioner passed the impugned order as a measure of punishment totally ignoring the transfer policy and as such the impugned order is a punitive transfer and the same deserves to be set aside and quashed.

12. Learned counsel has further placed reliance on the judgment of the Apex Court rendered in the case of Arvind Dattatraya Dhande vs. State of Maharashtra and others decided on 10.07.1997 in which the Apex Court has quashed the transfer order which was passed on the basis of some complaint holding that the transfer order is not in public interest but is a case of victimization of a honest officer at the behest of the aggrieved complainant.

13. Learned Standing Counsel on the basis of counter affidavit has submitted that the petitioner while posted as Settlement Officer Consolidation, Allahabad in the financial year 2013-14 has failed to achieve the annual target of 7320 acre as provided under Section 23 of the Act, 15147 Gata as provided under Section 27 of the Act and further annual target of 13 villages as provided under Section 52 of the Act. Further the progress in consolidation work of the petitioner remained very slow and most unsatisfactory and due to this very reason and the complaints made by Sri Santosh Yadav, a villager before the higher authorities regarding village Naika in district Allahabad and also keeping in view the enquiry report of the two members committee dated 24.06.2014 vide order dated 26.06.2014 he has been transferred from district Allahabad to Lalitpur.

14. Further submission of learned Standing Counsel is that the transfer of the petitioner has been made in public interest and also in the interest of the Government work as such it cannot be said that the transfer of the petitioner has been made as a measure of punishment. It is also submitted that the wife of the petitioner Smt. Nivedita in her representation claimed the benefit of Clause 1-D of the transfer policy of the year 20014-15 wherein it has been provided that in case the husband and wife both are Government Servant, if possible, they should be posted at one place.

15. Thereafter the petitioner has preferred Writ Petition No. 941 (SB) of 2014 [Matadin Maurya Vs. State of U.P. and others] wherein this Hon'ble Court vide order dated 07.07.2014 while disposing of the writ petition directed the Consolidation Commissioner U.P. Lucknow should consider the representation by passing a reasoned order preferably within two weeks and the order so passed be communicated to the petitioner forthwith.

16. The certified copy of the order dated 07.07.2014 has been served on the respondent no. 2-Consolidation Commissioner, U.P. Lucknow through representation dated 11.07.2014 made by the wife of the petitioner wherein she claimed the transfer of her husband at district Allahabad and if it is not possible he may be transferred to districts Kaushambi, Varanasi and Kanpur where the posts are lying vacant.

17. It is also submitted that in compliance of the order of this Hon'ble Court dated 07.07.2014 and also keeping in view the option exercised by the wife of the petitioner, the respondent no.2-Consolidation Commissioner, U.P. Lucknow vide order dated 13.08.2014 altered the transfer order dated 26.06.2014 whereby the petitioner has been transferred to district Kaushambi instead of district Lalitpur which is 50

Kms away from district Allahabad where the wife of the petitioner is teaching in Arya Kanya Inter College, Mutthiganj, Allahabad and residing along with her old mother-in-law and children. In pursuance of the transfer order dated 13.08.2014, the petitioner has been relieved on 01.09.2014 to join in District Kaushambi on the post.

18. Again the petitioner has filed the present writ petition praying for quashing of the orders dated 26.06.2014 and 13.08.2014 passed by Consolidation Commissioner, U.P. Lucknow and further prayer is that not to transfer the petitioner from the post of Settlement Office Consolidation Allahabad to some other place.

19. Learned Standing Counsel submits that since the earlier transfer order dated 26.06.2014 has already been altered in compliance of the order of this Hon'ble Court dated 07.07.2014 and vide order dated 13.08.2014 the petitioner has been given posting at district Kaushambi as claimed by the wife of the petitioner, therefore, the instant writ petition lacks merit and is liable to be dismissed. He further submits that the request of the wife of the petitioner has been acceded too and as such it does not suffer from any infirmity. The order dated 13.08.2014 has not been passed by way of punishment.

20. In specific reply to paragraph-13 of the writ petition, learned Standing Counsel refers to supplementary counter affidavit and submits that the progress in consolidation work have been reviewed at the directorate level and in all such districts where the progress in disposal of the consolidation matters was found slow and unsatisfactory, the officers of such districts are warned to speed up consolidation work. In the financial year 2013-14 consolidation work was revised and in all such districts where the job under Sections 23, 27 and 52 of the Act, were found nil or zero, show cause notices were issued to them and charge-sheet have also been submitted before the State Government against such officer.

21. In so far as the matter pertaining to the cancellation of the transfer orders of certain alleged officers is concerned, keeping in view the D.O. letter dated 21.07.2014 of the District Magistrate, Ballia, the transfer of Sri Radhey Shyam Singh, Settlement Officer Consolidation has been cancelled. The transfer order of Sri B.N. Upadhyay has been cancelled since he is handicapped and also considering the D.O. letter of District Magistrate Ghazipur. The transfer of Sri Gynesh Tripathi has been cancelled keeping in view his family circumstances. The transfer of Sri Ram Kumar has been cancelled on the basis of letter dated 17.07.2014 of District Magistrate, Muzaffar Nagar as his retirement is due within two years which is less than two years.

22. We have heard Sri K.S. Pawar, learned counsel for the petitioner and learned Standing Counsel for the State-respondents.

23. From the perusal of the records, it is evidently clear that the petitioner while posted as Settlement Officer Consolidation, Allahabad in the financial year 2013-14 has failed to achieve the annual target of 7320 acre as provided under Section 23 of the Act, 15147 Gata as provided under Section 27 of the Act

and further annual target of 13 villages as provided under Section 52 of the Act. Further the progress in consolidation work of the petitioner remained very slow and most unsatisfactory and due to this very reason and the complaints made by Sri Santosh Yadav, a villager before the higher authorities regarding village Naika in district Allahabad and also keeping in view the enquiry report of the two members committee dated 24.06.2014 resulting into passing of the order dated 26.06.2014 wheeby the petitioner has been transferred from district Allahabad to Lalitpur.

24. In the said report it has been clearly mentioned that pursuant to the undated complaint made by Sri Santosh Yadav the work of the consolidation authorities posted at district Allahabad has been enquired and found that they have assessed the ceiling land and the same have been included in the land of other tenure holders and further the land of the scheduled castes and scheduled tribes have been sold to other tenure holders of the gram sabha concerned without taking permission from the District Magistrate and this has been done only with a view to give undue advantage to Bhoo Mafias and further keeping in view all these things the transfer of the petitioner has been made to district Lalitpur.

25. Against the said transfer the petitioner's wife made representation for cancellation of the transfer order and thereafter petitioner preferred Writ Petition No. 941 (SB) of 2014 claiming the benefit of Clause 1-D of the transfer policy. The Division Bench of this Court vide order dated 07.07.2014 while disposing of the writ petition directed the Consolidation Commissioner U.P. Lucknow to consider the representation by passing a reasoned order preferably within two weeks and the order so passed be communicated to the petitioner forthwith.

26. The wife of the petitioner served a certified copy of the order dated 07.07.2014 on the respondent no. 2-Consolidation Commissioner, U.P. Lucknow through her representation dated 11.07.2014 wherein she claimed that her husband should remain posted at district Allahabad and if it is not possible he may be transferred to districts Kaushambi, Varanasi or Kanpur where the posts are lying vacant.

27. In compliance of the order of this Court dated 07.07.2014 and also keeping in view the option exercised by the wife of the petitioner, the respondent no.2-Consolidation Commissioner, U.P. Lucknow vide order dated 13.08.2014 altered the transfer order dated 26.06.2014 whereby the petitioner has been transferred to district Kaushambi instead of district Lalitpur which is 50 Kms away from district Allahabad where the wife of the petitioner is teaching as Assistant Teacher in Arya Kanya Inter College, Mutthiganj, Allahabad and residing along with her old mother-in-law and children. The present writ petition has been filed for quashing of the transfer orders dated 26.06.2014 and 13.08.2014 with further prayer not to transfer the petitioner except Allahabad to some other place.

28. In Somesh Tiwari (Supra) dealing with the question of validity of an order of transfer on the ground of malice in law, the Apex Court in para 16 of the judgment observed as under:

"16.Indisputably an order of transfer is an administrative order. There cannot be any doubt whatsoever that transfer, which is ordinarily an incident of service should not be interfered with, save in cases, where inter alia mala fide on the part of the authority is proved. Mala fide is of two kinds--one malice in fact and the second malice in law. The order in question would attract the principle of malice in law as it was not based on any factor germane for passing an order of transfer and based on an irrelevant ground i.e on the allegations made against the appellant in the anonymous complaint. It is one thing to say that the employer is entitled to pass an order of transfer in administrative exigencies but it is another thing to say that the order of transfer is passed by way of or in lieu of punishment. When an order of transfer is passed in lieu of punishment, the same is liable to be set aside being wholly illegal."

29. In the case of Sarvesh Kumar Awasthi (Supra), the State Government has given its undertaking and pursuant to the same the State Government has issued transfer policy dated 04.06.2014. Clause 1-D of the said policy provides that in case the husband and wife both are government servant, if possible, they should be posted at one place.

30. In the case of Arvind Dattatraya Dhande (Supra) the Apex Court has quashed the transfer order which was passed on the basis of some complaint holding that the transfer order is not in public interest but the said proposition is not applicable in the instant case because the transfer of the petitioner has been made as in the financial year 2013-14 the petitioner has failed to achieve the annual target of 7320 acre as provided under Section 23 of the Consolidation of Holdings Act, 15147 Gata as provided under Section 27 of the Act and further annual target of 13 villages as provided under Section 52 of the Act. Further the progress in consolidation work of the petitioner remained very slow and most unsatisfactory and further he has lost his control over the subordinate staff of the consolidation department and hence the impugned order has been passed.

31. So far as the matter pertaining to the cancellation of the transfer orders of certain alleged officers is concerned, the transfer of Sri Radhey Shyam Singh, Settlement Officer Consolidation has been cancelled keeping in view the D.O. letter dated 21.07.2014 of the District Magistrate, Ballia. The transfer order of Sri B.N. Upadhyay has been cancelled since he is handicapped and also considering the D.O. letter of District Magistrate Ghazipur. The transfer of Sri Gynesh Tripathi has been cancelled keeping in view his family circumstances. The transfer of Sri Ram Kumar has been cancelled on the basis of letter dated 17.07.2014 of District Magistrate, Muzaffar Nagar as his retirement is due within two years which is less than two years but in the present case no such D.O. letter has been issued in favour of the petitioner and his transfer has been made in public interest as he has failed to achieve target in the financial year 2013-14, hence no illegality has been committed by the respondents in passing the impugned orders.

32. The malice in law is quite a distinct factor to malice of fact. The power which is said to have been exercised on account of mala fide may be

vitiated on account of either malice in fact or malice in law. In Shearer Vs. Shields, (1914) AC 808 at Page 813 Viscount Haldane described "malice in law" as under :-

"A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he must act within the law. He may, therefore, be guilty of malice in law, although, so far the state of his mind is concerned, he acts ignorantly, and in that sense innocently." Again in Pilling v. Abergele Urban District Council (1950) 1 KB 636 Lord Goddard, CJ said that where a duty to determine a question is conferred on an authority which state their reasons for the decision, and the reasons which they state show that they have taken into account matters which they ought not to have taken into account or that they have failed to take matters into account which they ought to have taken into account, the court to which an appeal lies can and ought to adjudicate on the matter."

Lord Esher M.R. in The Queen on the Prosecution of Richard Westbrook vs. The Vestry of St. Pancras, (1890) 24 QBD 371 at page 375 said :

"If people who have to exercise a public duty by exercising their discretion take into account matters which the Courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion."

16. Thus malice in its legal sense means malice such as may be assumed from the doing of a wrongful act intentionally but without just cause or excuse or for want of reasonable or probable cause.

33. The Apex Court has summarised "malice in law " in (Smt.) S.R.Venkatraman Vs. Union of India and another, AIR 1979, SC 49 as under :

"It is equally true that there will be an error of fact when a public body is prompted by a mistaken belief in the existence of a non-existing fact or circumstance. This is so clearly unreasonable that what is done under such a mistaken belief might almost be said to have been done in bad faith; and in actual experience, and as things go, these may well be said to run into one another." (Para 8)

34. The Apex Court further in para 9 of the judgment in S.R. Venkatraman (supra) observed:

"9.The influence of extraneous matters will be undoubted where the authority making the order has admitted their influence. It will therefore be a gross abuse of legal power to punish a person or destroy her service career in a manner not warranted by law by putting a rule which makes a useful provision for the premature retirement of Government servants only in the "public interest', to a purpose wholly unwarranted by it, and to arrive at quite a contradictory result. An administrative order which is based on reasons of fact which do not exist must, therefore, be held to be infected with an abuse of power."

35. In Mukesh Kumar Agrawal Vs. State of U.P. and others JT 2009 (13) SC 643 the Apex Court said :

"We also intend to emphasize that the distinction between a malice of fact and malice in law must be borne out from records; whereas in a case involving malice in law which if established may lead to an inference that the statutory authorities had acted without jurisdiction while exercising its jurisdiction, malice of fact must be pleaded and proved."

36. In HMT Ltd. and another Vs. Mudappa and others JT 2007(3) SC 112 the Apex Court in paras 18 and 19 defined malice in law by referring to "Words and Phrases Legally Defined, 3rd Edn., London Butterworths, 1989" as under:

"The legal meaning of malice is "ill-will or spite towards a party and any indirect or improper motive in taking an action". This is sometimes described as "malice in fact". "Legal malice" or "malice in law" means "something done without lawful excuse'. In other words, "it is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite'. It is a deliberate act in disregard of the rights of others."

"19. It was observed that where malice was attributed to the State, it could not be a case of malice in fact, or personal ill-will or spite on the part of the State. It could only be malice in law, i.e legal mala fide. The State, if it wishes to acquire land, could exercise its power bona fide for statutory purpose and for none other. It was observed that it was only because of the decree passed in favour of the owner that the proceedings for acquisition were necessary and hence, notification was issued. Such an action could not be held mala fide."

37. In brief the malice in law can be said when a power is exercised for an unauthorized purpose or on a fact which is claimed to exist but in fact, is non-est or for the purpose for which it is not meant though apparently it is shown that the same is being exercised for the purpose the power is supposed to be exercised. (See Manager Govt. Branch Press and another Vs. D.B.Belliappa AIR 1979 SC 429; Punjab Electricity Board Vs. Zora Singh and others AIR 2006 SC 182; K.K.Bhalla Vs. State of U.P. and others AIR 2006 SC 898; P. Mohanan Pillai Vs. State of Kerala and others (2007) 9 SCC 497; M.P.State Corporation Diary Federation Ltd. and another Vs. Rajneesh Kumar Zamindar and others (2009) 6 SCALE 17; Swarn Singh Chand Vs. Punjab State Electricity Board and others (2009) 7 SCALE 622 and Sri Yemeni Raja Ram Chandar Vs. State of Andhra Pradesh and others JT (2009) 12 SC 198.

38. Further in the matter of R.S. Garg Vs. State of U.P. [2006(6) SCC 430], the Hon'ble the Apex Court has observed as under:

" 'Malice' in its legal sense means malice such as may be assumed for a wrongful act done intentionally but without just cause or excuse or for one of reasonable or probable cause. The term 'malice of fact' would come within the purview of the said definition. Even, however, in the absence of any malicious intention, the principle of malice in law can be invoked." (para 26)

39. In Ravi Yashwant Bhoir v. District Collector, Raigad, [AIR 2012 SC 1339],The Hon'ble the Apex court while dealing with the issue of 'Legal Malice' held:

"Legal malice" or "malice in law" means something done without lawful excuse. It is a deliberate act in disregard

to the rights of others. It is an act which is taken with an oblique or indirect object. It is an act done wrongfully and willfully without reasonable or probable cause, and not necessarily an act done from ill-feeling and spite. Mala fide exercise of power does not imply any moral turpitude. It means exercise of statutory power for "purposes foreign to those for which it is in law intended." It means conscious violation of the law to the prejudice of another, a depraved inclination on the part of the authority to disregard the rights of others, where intent is manifested by its injurious acts. Passing an order for unauthorized purpose constitutes malice in law." (Para-37)

40. This Hon'ble Court in Writ Petition No. 36211 of 2013 [Const. Armourer Prakasha Nand Tiwari and two others Vs. State of U.P. and four others] in paragraph no. 25 has held as under:

"25. The oft quoted decision on this aspect is Director of School Education, Madras and others Vs. O. Karuppa Thevan and another, 1994 Supp.(2) SCC 666 but the said decision has been considered by a decision of Division Bench of this Court in Special Appeal No.1293 of 2005 (Gulzar Singh Vs. State of U.P. & Ors.) decided on 7.11.2005 and true import thereof has been explained as under:

"The case before the Hon'ble Apex Court pertains to education department and while granting indulgence clearly took into consideration the factum of absence of any urgent exigency of service in the case before it as it apparent from the following:

"We are of the view that in effecting transfer, the fact that the children of an employee are studying should be given due weight, if the exigencies of the service are not urgent." (Para-2)"

"Even otherwise the Hon'ble Apex Court in the above case observed that the children of an employee are studying should be given due weight. This shows that the matter is to be examined by the employer as to whether the transfer of an employee can be deferred till the end of the current academic session or not and not by the Court. The Court has neither any means nor sufficient material to assess as to whether there is any rule or urgency of administrative exigencies for necessitating immediate transfer or that such transfer can be deferred in a particular case. Therefore, the Hon'ble Sizngle Judge has rightly allowed liberty to the petitioner-appellant to raise this grievance before the authority concerned by making a representation, who will consider and pass a reasoned order thereupon."

The Hon'ble Apex Court in the case of M. Sumithra (Dr.) V. Bangalore University Jnana Bharathi [2006(109) FLR 592] has held that-it is immaterial whether it was done in good faith or bad faith-If exercise of such power actuated by extraneous considerations-same constitutes malice in law.

41. Before we advert to the submissions made by the learned counsel for petitioner, it will be necessary in the interest of justice to take note of the fact and law regarding the scope and ambit of interference in writ jurisdiction under Article 226 of the Constitution of India, while assailing an order of transfer.

42. The Hon'ble Apex Court in the case of E.P. Royappa V. State of Tamil

Nadu [1974 (2) SCR 348] has observed as under:

"It is an accepted principle that in public service transfer is an incident of service. It is also an implied condition of service and appointing authority has a wide discretion in the matter. The government is the best judge to decide how to distribute and utilize the services of its employees. However, this power must be exercised honestly, bona fide and reasonably. It should be exercised in public interest. If the exercise of power is based on extraneous consideration or for achieving an alien purpose or an oblique motive it would amount to mala fide and colourable exercise of power. Frequent transfers, without sufficient reasons to justify such transfers, cannot, but be held as mala fide. A transfer is mala fide when it is made not for professed purpose, such as in normal course or in public or administrative interest or in the exigencies of services but for other purpose, that is to accommodate another person for undisclosed reasons. It is the basic principle of rule of law that good administration, that even administrative actions should be just and fair.

Further Hon'ble Apex Court in the above cited case has held regarding violation of Articles 14 and 16 of the Constitution of India, which reads as under:

"Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable a like to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to malafide exercise of power and that is hit by Article 14 and 16. Malafide exercise of power and arbitrariness are different lethal radiations emanating from the same vice; in fact the later comprehends the former. Both are inhibited by Article 14 and 16.

43. In the case of Varadha Rao Vs. State of Karnataka and Others [1986(4) SCC 131], the Court has made following proposition, which reads as under:

"transfer of a government servant who is appointed to a particular cadre of transferable post from one place to another is an ordinary incident of service. No government servant can claim to remain in a particular place or in a particular post unless, his appointment itself is to a specified, non-transferable post. Therefore , a transfer order per se made in the exigencies of service does not result in alteration of any of the conditions of service, express or implied, to the disadvantage of the concerned government servant. However, a transfer order which is malafide and not made in public interest but made for collateral purposes, with oblique motives and in colourable exercise of power is vitiated by abuse of power and is open to challenge before court being wholly illegal and void."

44. In the matter of State of U.P. and Other Vs. Gobardhan Lal [AIR 2004 Supreme Court 2165], the Hon'ble the Apex Court has observed that,

" A challenge to an order of transfer should normally be eschewed and should not be countenanced by the Courts or Tribunal as though they are Appellate Authorities over such orders, which could assess the niceties of the administrative needs and requirements of the situation concerned. This is for the reason that Court or Tribunals cannot substitute their own decisions in the matter of transfer for that of competent authorities of the state and even allegations of mala fides when made must be such as to inspire confidence in the Court or are based on concrete materials and ought not to be entertained on the mere making of it or on consideration borne out of conjectures or surmises and except for strong and convincing reasons, no interference could ordinarily be made with an order of transfer"

45. The Hon'ble Apex Court in the case of Major General J.K. Bansal vs Union Of India And Others [AIR 2005 SC 3341] in paragraph nos. 9, 10 and 11 has held as under:

"9. In Mrs. Shilpi Bose and others vs. State of Bihar and others AIR 1991 SC 532, the appellants, who were lady teachers in primary schools, were transferred on their requests to places where their husbands were posted. The contesting respondents, who were displaced by the appellants, challenged the validity of the transfer orders before the High Court by filing a writ petition under Article 226 of the Constitution, which was allowed and the transfer orders were quashed. This Court allowed the appeal and set aside the judgment of the High Court by observing as under: - "In our opinion, the courts should not interfere with a transfer order which are made in public interest and for administrative reasons unless the transfer orders are made in violation of any mandatory statutory rule or on the ground of mala fide. A Government servant holding a transferable post has no vested right to remain posted at one place or the other, he is liable to be transferred from one place to the other. Transfer orders issued by the competent authority do not violate any of his legal rights. Even if a transfer order is passed in violation of executive instructions or orders, the Courts ordinarily should not interfere with the order instead affected party should approach the higher authorities in the Department.........."

10. In Union of India and others vs. S.L. Abbas AIR 1993 SC 2444, the respondent was working at Shillong in the office of Botanical Survey of India and his wife was also working there in a Central Government office. He was transferred from Shillong to Pauri in the hills of U.P. (now in Uttaranchal). He challenged the transfer order before the Central Administrative Tribunal on medical ground and also on the ground of violation of guidelines contained in the Government of India OM dated 3.4.1986. The Tribunal allowed the petition and quashed the transfer order. In appeal this Court set aside the order of the Tribunal and observed as under: - "Who should be transferred where, is a matter for the appropriate authority to decide. Unless the order of transfer is vitiated by mala fides or is made in violation of any statutory provisions, the Court cannot interfere with it. While ordering the transfer, there is no doubt, the authority must keep in mind the guidelines issued by the Government on the subject. Similarly if a person makes any representation with respect to his

transfer, the appropriate authority must consider the same having regard to the exigencies of administration. The guidelines say that as far as possible, husband and wife must be posted at the same place. The said guideline however does not confer upon the Government employee a legally enforceable right."

11. Similar view has been taken in National Hydroelectric Power Corporation Ltd. vs. Shri Bhagwan and another (2001) 8 SCC 574, wherein it has been held that no Government servant or employee of a public undertaking has any legal right to be posted forever at any one particular place since transfer of a particular employee appointed to the class or category of transferable posts from one place to another is not only an incident, but a condition of service, necessary too in public interest and efficiency in the public administration. Unless an order of transfer is shown to be an outcome of malafide exercise of power or stated to be in violation of statutory provisions prohibiting any such transfer, the courts or the tribunals cannot interfere with such orders, as though they were the appellate authorities substituting their own decision for that of the management."

46. In light of the arguments advanced by both the parties and keeping in view the pleadings placed on record, it appears that initially the petitioner was transferred from district Allahabad to Lalitpur vide order dated 26.06.2014 against which Writ Petition No. 941 (SB) of 2014 [Matadin Maurya Vs. State of U.P. and others] was preferred and this Court vide order dated 07.07.2014 disposed of the writ petition directing the respondent no. 2-Commissioner Consolidation, U.P. Lucknow to consider and decide the representation of petitioner's wife dated 27.06.2014 in light of clause 1-D of the transfer policy.

47. The main contention of learned counsel for the petitioner is that the transfer order is punitive in nature and the representation was not disposed of by the competent authority in light of order issued by this Court which is contemptuous.

48. In reply learned Standing Counsel submits that the transfer order is not punitive in nature. Moreover, as per the choice of the petitioner's wife the petitioner was transferred from district Lalitpur to Kaushahmi modifying the earlier transfer order dated 26.06.2014 and therefore, no cause of action arise and the filing of the subsequent writ petition is an abuse of the process of the Court and law both.

49. A perusal of case law cited by both the sides indicate that the transfer policy of the Government is that a government servant should be appointed on a particular post and his services are transferable from one place to another as the transfer is an incidence of service. No government servant can claim to remain posted at a particular place or any particular post unless his appointment is specified as non-transferable post. Transfer orders issued by the competent authority do not violate any of his legal rights. Even if a transfer order is passed in violation of executive instructions or orders, the Courts ordinarily should not interfere with the order instead affected party should approach the higher authorities in the department.

50. It is well settled that transfer does not im-pinch the status of an employee. It is within the domain of the

employer to determine to which place his services are required or could be utilized. Transfer order can only be interfered with if it is in contravention of any statutory rules or based on malafide considerations or has been passed by the authority not competent to transfer.

51. We are of the view that violation of administrative guidelines contained in the transfer policy does not give any right to an employee to assail its validity in court of law nor would the court interfere on such grounds.

52. As far as malice in law is concerned, it has to be shown that it is a deliberate and disregard the right of others and the order in question would attract the principles of malice in law if it was passed on irrelevant grounds.

53. It appears from the record that initially the transfer order was passed transferring the petitioner from district Allahabad to Lalitpur in public interest and exigencies of work vide order dated 26.06.2014. Subsequently writ petition no. 941 (SB) of 2014 was preferred in which order quoted above was passed. Thereafter the competent authority i.e. Consolidation Commissioner disposed of the representation of the wife of the petitioner altering the transfer of the petitioner from district Lalitpur to Kaushambi which is part of district Allahabad as it was carved out as a separate district from district Allahabad and it is also adjacent to Allahabad. After exchange of pleadings the petitioner has tried to show that the transfer order is punitive in nature as complaints were alleged to be made against the petitioner. The State-respondents have given a very detailed account of the complaints, constitution of committee, transferring various employees and possible initiation of disciplinary enquries as well.

54. As per petitioner's contention clause 1-D of the transfer policy clearly envisages that the husband and wife should be posted to the same station, if possible. We have already noted that the transfer policy is not enforceable in law. Wife of the petitioner is alleged to be working in Arya Kanya Inter College, Mutthiganj, Allahabad which appears to be an aided institution and the children are also studing in class 8th and 11th . There is nothing on record which can indicate that services of the petitioner's wife is a transferable job; rather for last so may years she is teaching in the same institution.

55. It also appears from the record that petitioner joined at Allahabad on 26.07.2012 and as such more than two years have already gone. As per petitioner's counsel petitioner has been relieved on 01.09.2014 and therefore in all possibility the respondent no. 5 must have joined at Allahabad and there is nothing on record to indicate that the petitioner has joined at district Kaushambi or not. Admittedly district Lalitpur was far away station but Kaushambi is adjacent district to Allahabad, which is as per the choice opted by the wife of the petitioner i.e. district Varanasi, Kaushambi and Kanpur therefore in the change circumstances no case of malice in fact or malice in law can be presumed. It is not a case that the petitioner has been transferred after his few months of posting at Allahabad. Moreover, altering the posting of district Lalitpur he has been posted to district Kaushambi as per the choice of the petitioner's wife as averred in her representation.

56. We find nothing on record to show that there was any political

interference in the matter of transfer of the petitioner.

57. In the case of Ajit Kumar Vs. State of U.P.[2004 RD-AH 572] the Division Bench of this Court has observed as under:

"Writ jurisdiction is a discretionary. It is not issued merely because if it is lawful to do so. Once a factual stand is taken, it cannot be changed on any legal proposition whatsoever nor it is permissible for the Court to examine the correctness of the findings of fact unless it is found to be perverse being based on no evidence or contrary to evidence, as the writ Court exercises its supervisory jurisdiction and not of appellate forum. The purpose of the writ Court is not only to protect a person from being subjected for violation of law but also to advance justice and not to thwart it. The Constitution does not place any fetter on the power of the extraordinary jurisdiction but leaves it to the discretion of the Court. However, being the power discretionary, the Court has to balance competing interest, keeping in mind that interest of justice and public interest can coalesce in certain circumstances. Petition can be entertained only after being fully satisfied about the factual statements and not in a casual and cavalier manner."

58. In the case of N.K. Singh Vs. Union of India and others [JT 1994(5) SC 298], the Apex Court in paras 24 and 25 held as under:

"24.The private rights of the appellant being unaffected by the transfer, he would have been well advised to leave the matter to those in public life who felt aggrieved by his transfer to fight their own battle in the forum available to them. The appellant belongs to a disciplined force and as a senior officer would be making several transfers himself. Quite likely many of his men, like him, may be genuinely aggrieved by their transfers. If even a few of them follow his example and challenge the transfer in courts, the appellant would be spending his time defending his actions instead of doing the work for which he holds the office. Challenge in courts of a transfer when the career prospects remain unaffected and there is no detriment to the government servant must be eschewed and interference by courts should be rare, only when a judicially manageable and permissible ground is made out. This litigation was ill- advised.

25. We do hope that this would be a passing phase in the service career of the appellant and his crusader's zeal would be confined to the sphere of his official activity for improving the image and quality of public service of the police force, in which he holds a high office. By achieving that purpose, he would render much greater public service. These observations are apposite in the present context."

59. From the above discussions, we are of the view that the order impugned dated 13.08.2014 has been passed by the competent authority after considering the request of petitioner's wife and that too in compliance of the order of Division Bench of this Court passed in Writ Petition No. 941 (SB) of 2014. Accordingly no case for interference is made out and the writ petition is liable to be dismissed. It is accordingly dismissed.

60. No orders as to cost

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.09.2014

BEFORE
THE HON'BLE RAKESH TIWARI, J.
THE HON'BLE ASHOK PAL SINGH, J.

Special Appeal No. 1904 of 2013

Meena Devi & Anr. ...Appellants
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Appellants:
Sri K.K. Singh

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226- **Compassionate appointment-petitioner admittedly living with her father-during pendency of suit for restitution of conjugal rights-husband of petitioner died-held-neither she was dependent upon income of her husband-nor living in financial crisis-Single Judge rightly rejected the claim-appointment on compassionate ground can not be as matter of right-appeal dismissed.**

Held: Para-7
Having heard learned counsel for the parties and on perusal of record, it is clear that appellant was not dependent upon her husband as she was living separately which is established from filing of the suit. It may also be pointed out here that in a case of compassionate appointment ground of indigent conditions of the family must be taken into account and the dependants of the deceased government servant have no legal right to claim appointment on compassionate ground as a matter of right, rather such an appointment is an exception to normal mode of recruitment. She was neither dependent upon the income of her husband nor living in indigent circumstances. In our opinion, there is no illegality or infirmity in the impugned judgment and compassionate appointment cannot be granted merely because the appellant was married to Navratan Kumar (since deceased) without proving her indigency and dependency upon him. Hence no interference is called for.

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

1. We have heard Sri K.K. Singh, learned counsel for the appellant, learned standing counsel, appearing for the State-Respondent and perused the record.

2. This special appeal has been preferred challenging the validity and correctness of judgment and order dated 30.09.2013 passed in Civil Misc. Writ Petition No. 6011 of 2012: Meena Devi & another Vs. State of U.P. & others, whereby writ petition of petitioners/appellants herein has been dismissed.

3. Brief facts of the case are that after a year of marriage of petitioner/appellant no. 1 with Navratan Kumar (since deceased) a child was born out of their wedlock. At that time the husband and wife were living separately and Original Suit No. 386 of 2008: Navratan Kumar Vs. Smt. Meena Devi before Principal Judge, Family Court, Allahabad was pending for restitution of conjugal rights. On 15.10.2009 due to illness husband of appellant was admitted in S.R.N. Hospital, Allahabad where he died. The appellant/petitioner applied for her appointment on compassionate ground and also submitted a representation in this regard. When her representation remained un-actioned she preferred writ petition no. 17662 of 2010 which was disposed of on 6.4.2010 with direction to respondent no.

3 for deciding her representation by a speaking order. After rejection of the representation aforesaid, she preferred writ petition no. 6011 of 2012 which too was dismissed vide judgment and order dated 30.9.2013. Aggrieved the appellant has preferred the present appeal.

4. While dismissing the writ petition, learned single judge has held thus:

"1. Admittedly, the petitioner was residing separately from the deceased employee (Navratan Kumar) and there is a dispute between them, for which they filed Original Suit No.386 of 2008 (Navratan Kumar Vs. Smt. Meena Devi) before Principal Judge, Family Court, Allahabad for restitution of conjugal rights. Neither the petitioner was living with the deceased employee nor she was dependent on deceased employee inasmuch as, she has had been maintaining herself of her own.

2. In these facts and circumstances of the case and considering the fact that the petitioner has been maintaining herself on her own, I do not find any reason to direct the respondent to provide compassionate appointment to the petitioner.

3. In taking the aforesaid view I am supported by a recent decision of the Apex Court in MGB Gramin Bank Vs. Chakrawarti Singh JT 2013 (12) SC 81. After referring various authorities on the subject including Umesh Kumar Nagpal vs. State of Haryana and others , JT 1994 (3) SC 525, A. Umarani Vs. Registrar, Cooperative Societies and others JT 2004(6) SC 110 and State Bank of India and another Vs. Raj Kumar (2010) 11 SCC 661, the Court in para 13 of MGB Gramin Bank (supra) observed as under:

"The Court considered various aspects of service jurisprudence and came to the conclusion that as the appointment on compassionate ground may not be claimed as a matter of right nor an applicant becomes entitled automatically for appointment, rather it depends on various other circumstances i.e. eligibility and financial conditions of the family, etc., the application has to be considered in accordance with the scheme. In case the Scheme does not create any legal right, a candidate cannot claim that his case is to be considered as per the Scheme existing on the date the cause of action had arisen i.e. death of the incumbent on the post." (emphasis added)"

4. The writ petition lacks merits. Dismissed."

5. Learned counsel for the appellants has assailed the impugned judgment on the grounds that the appellant no. 1 is legally wedded wife of late Navratan Kumar upon whom she and her daughter were wholly dependent, but due to some family disputes she left the house of her husband. However, this would not debar her from claiming compassionate appointment.

6. Per contra, learned standing counsel has supported the findings given in the judgment impugned in this appeal and contends that appellant had admittedly left the house of her husband within a year of marriage and was living with her father who was taking care of her and her child; hence she was not dependent upon her late husband.

7. Having heard learned counsel for the parties and on perusal of record, it is

clear that appellant was not dependent upon her husband as she was living separately which is established from filing of the suit. It may also be pointed out here that in a case of compassionate appointment ground of indigent conditions of the family must be taken into account and the dependants of the deceased government servant have no legal right to claim appointment on compassionate ground as a matter of right, rather such an appointment is an exception to normal mode of recruitment. She was neither dependent upon the income of her husband nor living in indigent circumstances. In our opinion, there is no illegality or infirmity in the impugned judgment and compassionate appointment cannot be granted merely because the appellant was married to Navratan Kumar (since deceased) without proving her indigency and dependency upon him. Hence no interference is called for.

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

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.09.2014

BEFORE
THE HON'BLE MRS. RANJANA PANDYA, J.

Criminal Revision No. 3029 of 2010

Imtyaz ...Revisionist
Versus
State of U.P. & Anr. ...Opp. Parties.

Counsel for the Revisionist:
Sri Sanjay Tripathi, Sri R.R. Kushwaha, Sri S.M.A. Abdy

Counsel for the Opp. Parties:
A.G.A.

Cr.P.C. Section 401-Criminal Revision-Scope of interference by Revisional Court-explained-conviction u/s 326/452 IPC-injuries corroborated by prosecution story contained as in FIR-no inconsistency found-no interference called for-dismissed.

Held: Para-9 & 24
9. It is settled principle of law that the revisional jurisdiction is not as wide as the appellate jurisdiction and under the former jurisdiction, the High Court is required to exercise its powers where there is material irregularity or manifest error of law or procedure, or there is misconception or misreading of evidence or where the court below has failed to exercise jurisdiction vested in it or has exercised the jurisdiction wrongly and perversely or where the facts admitted or proved do not disclose any offence. As a broad proposition, the interference of revisional court may be justified in cases (i) where the decision is grossly erroneous (ii) where there is no compliance with the provision of law (iii) where the finding of fact affecting the decision is not based on evidence on record (iv) where the material evidence of parties has not been considered (v) where the court below has misread or mis-appreciated the evidence on record (vi) where the judicial discretion has been exercised arbitrarily or perversely.

24. I have carefully examined the medical reports of all the injured which have been duly proved by Dr. Arya PW-3. I need not burden this judgment by reproducing the injury reports, as they have been noted by the Courts below in their respective judgments. The injuries found on the person of the injured fully corroborate the prosecution story as contained in the FIR and in the statements of witnesses of fact namely PW-1, PW-2 and PW-6. Thus the direct evidence of the crime is fully corroborated by the medical evidence and there is no inconsistency therein, rather they compliment each other.

Case Law discussed:

A.I.R. 1999 SC 981; A.I.R. 2002 SC 2229; A.I.R. 2002 SC 107; A.I.R. 1993 SC 1126; (2004) 12 SCC 521; 2003(47) ACC 7 (SC); 2012 (77) ACC 125; 2008(62) ACC 40; (2009) 7 SCC 254; (2012) 8 SCC 734; JT 2013 (3) SC 444.

(Delivered by Hon'ble Mrs. Ranjana Pandya. J.)

This revision has been preferred against the Judgment and order dated 11.5.2010 passed by the Additional Sessions Judge, Court No.1, Mahoba in Criminal Appeal No. 9 of 2010, Imtyaz Vs. State of U.P. and others, confirming the Judgment and order dated 22.3.2010 passed by the C.J.M. Mahoba in Criminal Case No. 2094 of 2008, State Vs. Imtyaz, under Sections 326, 452 I.P.C., Police Station Kotwali, District Mahoba whereby the revisionist as convicted under Section 326/452 I.P.C. and sentenced to undergo seven years' rigorous imprisonment and to pay fine of Rs.1,00,000/- and four years' rigorous imprisonment and to pay fine of Rs.20,000/- respectively with default stipulation. Out of the amount of fine, compensation was also awarded to three victims.

2. The prosecution case in brief is that the accused Imtyaz is son-in-law of complainant Rehana and Rosy is daughter of the complainant. Rosy was married to Imtyaz. On 3.8.2008 when the complainant Rehana, her daughter Rosy, niece Nikki and Rosy's daughter Alshifa along with other members of the family were sleeping, all of a sudden at about 12 a.m., accused Imtyaz entered the house of the complainant and threw acid on the daughter of the complainant Rosy, her niece Nikki and Rosy's daughter Alshifa and on their hue and cry the accused fled away from the house. As regards the motive for the offence is concerned, it has been mentioned in the first information report that a case under Section 125 Cr.P.C. was pending between Rosy and the accused and the accused had threatened Rosy that if she would not compromise in the petition under Section 125 Cr.P.C., he would not spare her.

3. After lodging of the F.I.R. investigation ensued and culminated into charge sheet under sections 452, 326 I.P.C. against the accused. Charges were framed against the accused under Sections 452, 326 I.P.C. who pleaded not guilty and claimed trial.

4. The prosecution had examined complainant Rehana (P.W.1), her injured daughter Rosy (P.W.2), Dr. R.B. Arya (P.W.3), Retired S.I. Har Narain (P.W. 4), Constable Ajay Singh (P.W. 5) and injured Nikki (P.W. 6).

5. The accused was examined under Section 313 Cr.P.C. who denied all the incriminating circumstances appearing against him in the prosecution evidence and pleaded false implication. The accused examined D.W. 1 Kallu in defence.

6. The trial court, after hearing both the sides as also assessment of the oral and documentary evidence, vide Judgment dated 22.3.2010, convicted and sentenced the revisionist as noted in para-1 of the judgment above.

7. Aggrieved the accused filed Criminal Appeal No. 9 of 2010, which was dismissed on 11.5.2010 and its judgment is under challenge in the present revision before this Court.

8. I have heard the learned counsel for the revisionist, learned A.G.A. and perused the record.

9. It is settled principle of law that the revisional jurisdiction is not as wide as the appellate jurisdiction and under the former jurisdiction, the High Court is required to exercise its powers where there is material irregularity or manifest error of law or procedure, or there is misconception or misreading of evidence or where the court below has failed to exercise jurisdiction vested in it or has exercised the jurisdiction wrongly and perversely or where the facts admitted or proved do not disclose any offence. As a broad proposition, the interference of revisional court may be justified in cases (i) where the decision is grossly erroneous (ii) where there is no compliance with the provision of law (iii) where the finding of fact affecting the decision is not based on evidence on record (iv) where the material evidence of parties has not been considered (v) where the court below has misread or mis-appreciated the evidence on record (vi) where the judicial discretion has been exercised arbitrarily or perversely.

10. In exercise of revisional jurisdiction the court may not exercise jurisdiction to reassess the evidence and reappraise the evidence. The Hon'ble the Apex Court in A.I.R. 1999 SC 981 State of Kerela Vs. Putthumana Illath Jathavedan Namboodiri has held that "the High Court while hearing revision does not work as an appellate court and will not re-appreciate the evidence, unless some glaring mistake is pointed out to show that injustice has been done".

11. In the case of Jagannath Chaudhary Vs. Ramayan Singh A.I.R. 2002 SC 2229, Hon'ble Apex Court has held that "revisional jurisdiction is normally to be exercised only in exceptional cases where there is a glaring defect in the procedure or there is a manifest error on point of law resulting in miscarriage of justice". Similarly in Munni Devi Vs. State of Rajasthan and others A.I.R. 2002 SC 107 it was held by the Apex Court that "while exercising the revisional power the High Court has no authority to re-appreciate the evidence in the manner as the trial court and appellate courts are required to do".

12. In another case of State of Karnataka Vs. Appa Balu Ingale and others, A.I.R. 1993 SC 1126 it has been held by the Hon'ble Apex Court that " generally speaking, concurrent findings of fact arrived at by two courts below are not to be interfered with by the High Court in absence of any special circumstances or unless there is any perversity."

13. As far as the F.I.R. is concerned, a perusal of the lower court record shows that the occurrence took place on 3.8.2008 at 12 O'clock in the night whereas the report was lodged on 4.8.2008 at .30 a.m., the distance of the police station from the place of occurrence being 1 km. It will not be out of place to mention here that there were three persons, who had sustained acid burns. Thus, the crime was promptly reported to the police which rules out chances of embellishment or concoction.

14. As regards motive, it is well settled principle of law that if there is direct evidence of the crime, motive looses its value. It is not possible to measure the extent of feelings, sentiments and reactions of someone, as may be, who under frustration or on mere possibility may take decision to commit crime. It all depends as to how a person reacts in a

give circumstance. The Hon'ble Apex Court in the case of Ranganayaki vs. State, (2004) 12 SCC 521, has held as under:

" The motive for committing a criminal act is generally a difficult area for the prosecution. One cannot normally see into the mind of anther. Motive is in the mind which impels a man to do a particular act. Such impulsion need not necessarily be proportionally grave to do grave crimes. Many murders have been committed without any known or prominent motive. It is quite possible that the aforesaid imputing factor would remain undiscovered."

15. In this connection, following observations of the Hon'ble Supreme Court given in the case of Thaman Kumar vs. State of Union Territory of Chandigarh 2003 (47) ACC 7 (SC) are also relevant:

"There is no principle or rule of law that where the prosecution fails to prove the motive for commission of the crime, it must necessarily result in acquittal of the accused. Where the ocular evidence is found to be trust-worthy and reliable and finds corroboration from the medical evidence, finding of guilt can safely be recorded even if the motive for the commission of the crime has not been proved."

16. Referring to the case of Nanhoon and others vs State of U.P.2012 (77) ACC 125, learned counsel for the revisionist has argued that if the motive for crime is not established or the motive is very week it may be of no importance. However the Hon'ble Apex Court in Mangaru and others vs. State of U.P., 2008 (62) ACC 40, has laid down that motive may be of importance in the cases of circumstantial evidence and it is well settled principle of law that in the case of direct evidence, motive looses its value.

17. In the instant case right from the inception of the F.IR. the complainant has specifically stated that an application under Section 125 Cr.P.C. was filed by her daughter Rosy, which was pending against the accused Imtyaz in which he had asked her for compromise else he would throw acid on Rosy. Coming to the oral evidence on this point, Rehana (P.W.1) has specifically stated that the accused had threatened Rosy either to compromise in the case she had filed for maintenance otherwise he would throw acid on her. In cross-examination, fishing inquiries have been made but the statement of this witness with regard to the real incident is consistent, cogent, clear and reliable.

18. The motive for the crime has been duly proved by P.W.-2 Rosy, who being the wife of the accused was his main target and was badly injured in the incident. She has specifically stated that the accused had threatened her to compromise in the petition under Section 125 Cr.P.C. otherwise he would throw acid on her. Thus, the motive set forth in the F.I.R. has been proved by the prosecution.

19. It has been argued on behalf of the revisionist that all the witnesses are related and interested witnesses, therefore, their evidence cannot be relied upon. It is not the law that the testimony of related or interested witness should be thrown out of board, rather they would be the last person to screen the real offender and falsely rope in an innocent

person in the case. In the instance case the witnesses of fact including the complainant are not only interse related with each other but each of them is equally closely related with the accused-revisionist. The prosecution has examined two injured witnesses out of the three, namely Rosy PW-2 (wife of the revisionist) and Nikki PW-6 (niece of the complainant i.e. sister-in-law of the revisionist). Thus, they had apparently no animus to falsely depose against the revisionist. However, it is trite law that testimony of related and interested witness should be closely scrutinized with care and caution.

20. The concept of interested witness essentially must carry with it the element of unfairness and undue intention to falsely implicate the accused. It is only when these elements are present, and statement of the witness is unworthy of credence that the Court would examine the possibility of discarding such statements. But where the presence of the eye-witnesses is proved to be natural and their statements are nothing but truthful disclosure of actual facts leading to the occurrence and the occurrence itself, it is not permissible for the Court to discard the statements of such related or friendly witnesses.

21. Law on the subject is thus, clear that in reference to appreciation of evidence of interested witnesses, version of interested witness cannot be thrown out but the same has to be examined carefully before accepting the same.

22. Keeping the above principles in mind, the statement of witnesses are being examined.

23. The injured witnesses, namely, Rosy, Nikki, and eye witness Rehana have categorically stated that the accused poured acid on all the three injured, i.e., Rosy, Nikki, Alshifa. As far as the evidence of P.W.1 Rehana, P.W. 2 Rosy and P.W. 3 Nikki are concerned, their evidence cannot be disbelieved because considering the time and place of the incident, in fact they are natural witnesses as their presence inside the house cannot be doubted and the presence of any outsider at the dead hour of night is totally ruled out. Besides this, being the injured witness, presence of of Rosy PW-2 and Nikki PW-6 cannot be questioned. All the three lady injured namely Nikki, Rosy and Alshifa were medically examined by the doctor, who had unequivocally opined that they have suffered acid burn injuries.

24. I have carefully examined the medical reports of all the injured which have been duly proved by Dr. Arya PW-3. I need not burden this judgment by reproducing the injury reports, as they have been noted by the Courts below in their respective judgments. The injuries found on the person of the injured fully corroborate the prosecution story as contained in the FIR and in the statements of witnesses of fact namely PW-1, PW-2 and PW-6. Thus the direct evidence of the crime is fully corroborated by the medical evidence and there is no inconsistency therein, rather they compliment each other.

25. On close scrutiny of testimony of both the witnesses, namely Rosy PW-2 and Nikki PW-6, it transpires that there are no material contradictions therein. They are victims of acid attack and they including the complainant had ample opportunity to identify the revisionist, who was not a stranger to them. Thus, in the absence of any adverse circumstance

or material contradiction in the testimony of witnesses of fact, the courts below have not at all erred in placing reliance on their testimony.

26. The counsel for the revisionist has placed reliance upon evidence of D.W.1 Kallu Khan, who has tried to give negative evidence. In my opinion such evidence is of little value as compared to the positive evidence of Rosy, Rehana and Nikki. In cross-examination D.W.1 Kallu has admitted that he came to know from the neighbours that Imtyaz had thrown acid on Rosy but, in the next breadth trying to mend himself, he stated that Imtyaz must have thrown acid on Rosy. He had also deposed that he had heard that Rosy was burnt due to acid. Thus, this witness has virtually supported the prosecution case.

27. Lastly the learned counsel for the revisionist has argued that the accused is in jail since the time of his arrest in the trial Court and has served major part of the sentence, so he may be released on sentence already undergone by him. I have seriously taken into consideration the submissions made by learned counsel for the revisionist in this behalf. +

28. As far as reduction of sentence is concerned, the imposition of appropriate punishment is the manner in which the Court responds to the society's call for justice against the criminal. Justice demands that the Courts should impose punishment befitting the crime so that the Courts reflect public abhorrence of the crime. The Court must not only keep in view the rights of the criminal but also the rights of the victim of the crime and the society at large while considering the imposition of appropriate punishment. In the case of Ahmed Hussein Vali Mohammed Saiyed and another Vs. State of Gujarat (2009) 7 SCC 254, a three-Judge Bench of the Apex Court has observed as follows:

"99....The object of awarding appropriate sentence should be to protect the society and to deter the criminal from achieving the avowed object to law by imposing appropriate sentence. It is expected that the courts would operate the sentencing system so as to impose such sentence, which reflects the conscience of the society and the sentencing process has to be stern where it should be. Any liberal attitude by imposing meager sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result-wise counter productive in the long run and against the interest of society which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.

100. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The court must not only keep in view the rights of the victim of the crime and the society at large while considering the imposition of appropriate punishment. The court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which both the criminal and the victim belong."

In this case, the court further goes to state that meager sentence imposed solely on account of lapse of time without considering the degree of the offence will be counter productive in the long run and against the interest of society.

29. In Guru Basavaraj @ Benne Settapa vs. State of Karnataka, (2012) 8 SCC 734, while discussing the concept of appropriate sentence, this Court expressed that:

"It is the duty of the court to see that appropriate sentence is imposed regard being had to the commission of the crime and its impact on the social order. The cry of the collective for justice, which includes adequate punishment cannot be lightly ignored."

30. Recently, the Apex Court in the case of Gopal Singh Vs. State of Uttarakhand JT 2013 (3) SC 444 held as under:-

"18. Just punishment is the collective cry of the society. While the collective cry has to be kept uppermost in the mind, simultaneously the principle of proportionality between the crime and punishment cannot be totally brushed aside. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence............"

31. Reverting back to the medical reports of Nikki, Rosy and Alshifa, it would be very important to note that Nikki was a fifteen year old young girl at the time of incident and she had sustained acid injury on the neck, right arm & forearm and right thigh. Rosy, the wife of the accused had suffered acid burn injuries on her face, scalp, left side of neck to right side chest, left arm & forearm and right arm & forearm, back and right thigh. Innocent Alshifa, who was only eleven months old at the time of incident, was the infant daughter of the accused and Rosy. What was her fault that the accused did not spare her also in as much as her face, chest, lower limbs and multiple places over the left and right limbs anterior aspect were also burnt by acid. The conduct of the accused and the way in which the offence was committed in predetermined manner disentitles the accused-revisionist for any sympathy or leniency from the court. The learned Magistrate has directed that out of the fine of Rs.1,00,000/-, injured Rosy was to be paid Rs.60,000/- while Alshifa and Nikki were to get Rs.10,000/- (each). Thus, there is absolutely no ground to reduce the sentence of imprisonment or the fine imposed on the accused.

32. Thus, in view of what has been stated above, there is no ground to interfere with the impugned judgment and orders passed by both the Courts below and this revision is liable to be dismissed.

33. Accordingly, the revision is hereby dismissed. The revisionist is in jail, as he has not been enlarged on bail during the pendency of the revision by this Court. He will serve out the remaining part of his sentence of imprisonment and would also pay fine as directed by the trial Court.

34. Let certified copy of the Judgment be sent to the trial court for ensuring compliance which should be reported to the court within eight weeks.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.09.2014

BEFORE
THE HON'BLE MAHESH CHANDRA TRIPATHI, J.

Civil Misc. Writ Petition No. 3057 of 2007

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

Counsel for the Petitioner:
Sri S.K. Mishra

Counsel for the Respondents:
C.S.C., Sri Satish Kumar Mishra

U.P. Regulation of Daily Wages Appointment on Group 'D' Post Rules 2001- Regularization-petitioner engaged as daily wages on 18.10.88 continuing on 27.11.06- being appointed prior to 29th June 1991- continuing in service on 21.12.01-held- entitled for Regularization.

Held: Para-22
From a perusal of number of working days as mentioned by the petitioner in his writ petition, which clearly shows that the petitioner was appointed in the year 1988 and remained in service and worked continuously till 2006 even-after the enforcement of the Regularization Rules.

Case Law discussed:
2008 (3) ADJ 19; 2013 (3) ADJ 574; 2008 (1) ADJ 60.

(Delivered by Hon'ble Mahesh Chandra Tripathi, J.)

1. Heard Sri S.K. Mishra and Sri Pankaj Rai, learned Additional Chief Standing Counsel for the State-respondents.

2. By means of the present writ petition, the petitioner has sought for a writ of certiorari quashing the order dated 11.10.2006 passed by respondent No. 2 (annexure No. 4 to the writ petition) by which the department has rejected the claim of the petitioner for his regularization and further a direction may be issued to the respondents to permit the petitioner to work on the class-IV post on which he was working and pay him salary.

3. Brief facts giving rise to the present writ petition are as follows:-

4. The petitioner was engaged as daily wager on 18.10.1988 as class-IV employee under the respondent No. 3 and was discharging his duties accordingly till 27.11.2006. In exercise of power under proviso to Article 309 of the Constitution, the State Government has framed U.P. Regularization of Daily wages Appointments on Group 'D' Posts Rules, 2001 (hereinafter referred to as "2001 Rules") published in the Gazette dated 21st December 2001 which provides for regularization of such daily wage employees in Group 'D' posts who were appointed before 29th June 1991 and were continuing in service on the date of commencement of said Rules. Since, the petitioner was appointed prior to 29th June 1991 and was continuing in service on 21st December 2001, he claimed that he was entitled for regularization under the said Rules.

5. Respondents have filed counter affidavit stating that the petitioner was initially engaged in the department on daily wage basis since 1991 to 2001. Categorical stand has been taken in paragraph No. 6 of the counter affidavit that time to time he had been engaged only for very limited period and there was no continuous work performed by the petitioner in the department. For ready reference, the details pertaining to his engagement in the department as averred in paragraph No. 6 of the counter affidavit is reproduced herein below:-

1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001
48	-	38	295	84	-	-	147.5	308	297	289

6. A plea has also been taken that his engagement was never on regular basis and his initial engagement was not on

substantive post. Therefore, the claim of the petitioner was not sustainable as per 2001 Rules.

7. Learned counsel for the petitioner drew attention of this Court that respondent No. 3 wrote a letter to the Chief Medical Officer, Ghaziabad on 04.08.2002, by which details were submitted about 20 daily wager employees working under him, so that their services could be regularized. In the said seniority list, petitioner was placed at serial No. 3.

8. Learned counsel for the petitioner further submitted that the respondent No. 3 vide letter dated 31.07.2004 had informed the petitioner for submitting the documents regarding his educational qualification and for furnishing other details, in response the details were submitted by the petitioner promptly. By the impugned order dated 11.10.2006, the claim of the petitioner for regularization was turned down on the ground that his engagement in the department was temporary in nature and he never performed permanently in the department and his case was not covered as per 2001 Rules.

9. On the other hand, Sri Pankaj Rai, learned Additional Chief Standing Counsel submitted that 2001 Rules do not permit consideration of candidature of any person for regularization against the vacancies, which may be available in future inasmuch a perusal of the said Rules would make clear that it is one time arrangement made by the Rule framing authority in respect to such daily wage employees, who have rendered about 10 years of service and the said right was limited against the vacancies, permanent or temporary, as were available on the date of commencement of the said Rules and not for future vacancies.

10. In the present matter, learned Additional Chief Standing Counsel submitted that the petitioner was not in continuous service throughout the period and not worked continuously, hence his claim for regularization cannot be sustained and the respondents had rightly rejected the claim of the petitioner for regularization, which cannot be sustained as per Rule 4 of the U.P. Regularization of Daily Wages Appointments on Group 'D' Post Rules, 2001.

11. Learned counsel for the petitioner has relied upon certain case laws which are as follows:-

1. Sri Ram Yadav vs. State of U.P. and others, 2008 (3) ADJ 19.
2. Ram Sajeewan vs. State of U.P. and others, 2013 (3) ADJ 574.
3. Janardan Yadav vs. State of U.P., 2008 (1) ADJ 60.

12. Learned counsel for the petitioner submitted that the case of the petitioner is squarely covered by these decisions.

13. Heard the rival submissions of learned counsel for the parties and perused the record.

14. A right of regularization cannot be claimed by a person who has never been engaged or appointed after undergoing process of selection in accordance with rules and without equal opportunity of employment granted to similarly placed persons under Article 16 of the Constitution of India. The Apex

Court, recently, in the case of State of Karnataka and others Vs. Uma Devi and Others, 2006(4) SCC 1 has held that regularization is not a mode of recruitment and a person who has not been engaged after giving opportunity of employment to all other eligible persons and after undergoing the process of selection in accordance with rules consistent with Article 16 cannot claim regularization. However, where the legislature has made some provision, the incumbents have been allowed benefit thereunder and may be considered for regularization. Referring to various earlier judgements on this aspect, recently, the Apex Court in M.P. State Corporation Bank Limited, Bhopal Vs. Nanuram Yadav & others JT 2007 (11) SC 369 has culled out the following principles in para-20 of the judgment :

"(1) The appointments made without following the appropriate procedure under the Rules/Government Circulars and without advertisement or inviting applications from the open market would amount to breach of Arts. 14 & 16 of the Constitution of India.

(2) Regularization cannot be a mode of appointment.

(3) An appointment made in violation of the mandatory provisions of the statute and in particular, ignoring the minimum educational qualification and other essential qualification would be wholly illegal. Such illegality cannot be cured by taking recourse to regularization.

(4) Those who come by back door should go through that door.

(5) No regularization is permissible in exercise of the statutory power conferred under Art. 162 of the Constitution of India if the appointments have been made in contravention of the statutory Rules.

(6) The Court should not exercises its jurisdiction on misplaced sympathy.

(7) If the mischief played so widespread and all pervasive, affecting the result, so as to make it difficult to pick out the persons who have been unlawfully benefited or wrongfully deprived of their selection, it will neither be possible nor necessary to issue individual show-cause notice to each selectee. The only way out would be to cancel the whole selection.

(8) When the entire selection is stinking, conceived in fraud and delivered in deceit, individual innocence has no place and the entire selection has to be set aside."

15. Since the facts are not is dispute and it is also not disputed that the petitioner was engaged on daily wage basis in 1988, i.e., before 29.6.1991 and was also working on the date of commencement of Rules 2001, i.e, on 21.12.2001, thus it is evident that he was entitled to be considered for regularization under the said Rules. The only question for consideration is whether the said Rules require continuous service throughout, i.e., from the date of initial engagement till the commencement of the Rules. In my view, there is no such requirement under the Rules as is apparent from perusal thereof. Rule 4(1) of Rules 2001 is reproduced as under:

"4. Regularization of daily wages appointments on Group "D' posts.- (1) Any person who-

(a)was directly appointed on daily wage basis on a Group "D' post in the Government service before June 29, 1991 and is continuing in service as such on the date of commencement of these rules; and

(b)possessed requisite qualification prescribed for regular appointment for that post at the time of such appointment on daily wage basis under the relevant service rules, shall be considered for regular appointment in permanent or temporary vacancy, as may be available in Group "D' post, on the date of commencement of these rules on the basis of his record and suitability before any regular appointment is made in such vacancy in accordance with the relevant service rules or orders."

16. The only requirement under Rule 4(1)(a) are that the incumbent was directly appointed on daily wage basis on a Group 'D' Post in a Government Service before 29.6.1991 and is continuing in service as such on the date of commencement of the said Rules. The further requirement under Clause (b) of Rule 4(1) is that he must have possessed requisite qualification required for regular appointment on that post at the time of such employment on daily wage basis.

17. Respondents have not disputed the existence of all the said three conditions but their further presumption that the Rules also contemplates continuous service throughout from the date of initial engagement till the date of commencement of the Rules and only then a person appointed on daily wage basis would be entitled for regularization is not sustainable and contrary to the Rules 2001.

18. A perusal of clause (a) of Rule 4 of the said Rules indicates that a person, who was directly appointed as daily wage basis on a Group-D post in the Government service before 29th June, 1991 and was continuing in service, would be considered for regularization.

19. In Ram Sajeewan case (supra), the Court has also considered the break in service or artificial break in service. Paragraph 5 of the said judgement reads as under:

5. The question is, whether break in service or artificial break in service would constitute a disability for ousting the claim of the petitioner. Rule 4 does not indicate anything, nor does it indicate that a daily wager should be in continuous service. All that Rule 4 (a) of the Rules of 2001 provides is that a person should be appointed on a daily wage basis prior to 29th June, 1991 and is continuing in service on the date of commencement of the Rules of 2001. Artificial break in service is to be ignored and cannot be taken into consideration nor does the Rule provide that the person should be in continuous service. The very nomenclature of the term "daily wager" does not indicate continuous service.

20. In Sri Ram Yadav case (supra), the question of artificial break was also considered. Paragraph 5 of the said Judgment, which reads as under:

5. The contention of the learned counsel for the petitioner is that the rejection of the petitioner's representation on the above ground is against the record and the order is based on incorrect facts. He has placed the report of the Forest Range Officer, Kalakanker, which was submitted by him in pursuance of the letter of the Divisional Director, Social

Forestry dated 25-10-2004. In the said report he had given the break up of the petitioner's working. It shows that the petitioner has worked for 348 days in the year 1990-91, 350 days in the year 1991-92, 351 days in the year 1992-93, 355 days in the year 1993-94, 353 days in the year 1994-95 and 230 days in the year 1995-96. He has also drawn my attention to the counter affidavit of respondents in earlier with petition No. 19670/02 filed by the petitioner, wherein it was clearly admitted by the respondents in paragraph 5 of the Counter affidavit that the petitioner had regularly worked from the year 1978-79 to 1994-95 and had also worked for 230 days in the year 1995-96 and 180 days in the year 1996-97. Therefore, in view of the admission of respondents on record the recital in the impugned order that the petitioner had not worked for a single day between the year 1991 and 1996 is factually incorrect and against the records. Accordingly, the rejection of the representation of the petitioner on the above ground is wholly unsustainable and, as such, the impugned order deserves to be quashed.

21. In Janardan Yadav case (supra), this Court while considering the matter of regularization of a class-IV employee under the U.P. Regularization of Daily Wages Appointment on Group 'D' Posts Rules, 2001 has held that for the purpose of regularization, the only requirement is that the incumbent should have been appointed directly on the daily wages before 29.6.1991 and should be continued, as such, on 21.12.2001. The said rules nowhere requires that such an incumbent seeking regularization would have worked throughout continuously from the date of his initial appointment till the date of enforcement of the rules.

22. From a perusal of number of working days as mentioned by the petitioner in his writ petition, which clearly shows that the petitioner was appointed in the year 1988 and remained in service and worked continuously till 2006 even-after the enforcement of the Regularization Rules.

23. Accordingly, the impugned order dated 11.10.2006 is hereby set aside and quashed. The matter is remanded to the authority concerned to reconsider the matter.

24. In view of the above, the writ petition is allowed and the respondents are directed to reconsider the matter of the petitioner for regularization in the light of the observations made above within six weeks from the date of production of a certified copy of this order.

25. In the result, the writ petition succeeds and is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.09.2014

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Service Single No. 3282 of 2006

Krishna Kant Pandey ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rakesh Kumar Srivastava, Smt. Seema Srivastava

Counsel for the Respondents:
C.S.C.

<u>Constitution of India, Art.-226-</u>Service law-consequential benefits-entitlement-

when dismissal order-quashed-become final-along with arrears of salary-petitioner entitled for selection grade and promotional pay in view of G.O. 03.06.89-word consequential benefit-includes flowing as consequence on corollary-entitled for selection and promotion grade-necessary direction given.

Held: Para-8 & 15

8. The word "consequential" would mean that flowing as a 'consequence' or a 'corollary'. The dictionary describes 'corollary' as a proposition which can be inferred from one already proved as self evidently true i.e., a natural consequence or result, the benefit or advantage or entitlement under an arrangement.

15. The petitioner has not actually worked in the department having been ousted, pursuant to an order of dismissal which was ultimately found illegal and set aside by this Court. Prior to that, service record of petitioner whether contain good, bad or otherwise entry has not been disclosed or shown anywhere and, therefore, it is difficult to accept that petitioner's service was not satisfactory, particularly when this aspect was not considered by competent authority and no order is said to have been passed thereupon.

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

1. By means of the present writ petition, the petitioner has sought a writ of mandamus commanding the respondents to grant him benefit of selection grade, promotional pay scale in compliance of the judgment dated 24.05.2014 passed in Writ Petition No.294(S/B) of 2000 and also entire arrears of salary and consequential retiral benefits along with interest at the rate of 18%.

2. The facts giving rise to the present petition are as under:

3. The petitioner was appointed as Collection Amin in the year 1957. He was suspended on 30.06.1982. A charge sheet was issued on 30.06.1982 containing four charges alleging that the petitioner is guilty for misconduct of dereliction of duty, doubtful integrity, lack of devotion of duty and embezzlement of the amount collected from defaulters, in exercise of his duty as Collection Amin. On completion of departmental enquiry, which was conducted ex parte, observing that petitioner did not respond to the charge sheet by submitting reply, the District Magistrate, Gorakhpur who is disciplinary authority of the petitioner, passed an order of punishment of dismissal on 03.10.1982. Petitioner's appeal against the dismissal order was dismissed by Commissioner, Gorakhpur vide order dated 07.09.1983. The petitioner thereafter preferred revision before Board of Revenue, which too, was rejected as communicated by Joint Secretary of Board of Revenue to the Commissioner vide letter dated 14.05.1985. Aggrieved thereto, petitioner assailed dismissal order and consequential appellate order before the U.P. Public Services Tribunal (hereinafter referred to as 'the Tribunal') in Claim Petition No.225/I/1986. The claim petition was dismissed by Tribunal vide judgment dated 19.11.1997 whereagainst petitioner preferred Writ Petition No.294(SB) of 2000, wherein, a Division Bench of this Court held that enquiry report was submitted without fixing any date for oral inquiry and without giving any opportunity to defend, hence the entire proceedings are illegal. Vide judgment dated 24.05.2004, the Court quashed the order of punishment dated 03.10.1982 as also the judgment of Tribunal. Operative part of the judgment reads as under:

"We, therefore, quash the impugned order of punishment dated 3.10.1982 and the order dated 19.11.1997 passed by the Tribunal. Since the petitioner has retired from service about 14 years back, there is no occasion for this court to order of holding a fresh enquiry. The petitioner would be entitled for all consequential benefits, as such.

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

4. Since the petitioner was not granted all consequential benefits, hence he preferred a Contempt Petition No.1381(C) of 2005, in which, notices were issued and thereafter the District Magistrate, Gorakhpur passed an order for payment of arrears of salary for the period of October 1982 to July 1989. Since the petitioner attained age of superannuation in July 1989, therefore, arrears of salary was paid till date of retirement of petitioner. Subsequently, retiral benefits were also paid.

5. The respondents, however, did not consider petitioner's claim for grant of selection grade and promotional pay scale which became available to him in view of the G.O. Dated 3rd June, 1989 whereby benefits had been given w.e.f. 01.01.1986. The petitioner made representation dated 28.06.2006. Despite that, nothing has been done.

6. Learned Standing Counsel pleaded, since "consequential benefits" would not include benefit of arrears etc., therefore, the same was not granted. In the alternative, he contended that service of petitioner was not satisfactory, which is condition precedent for grant of selection grade or promotional grade, hence petitioner is not entitled for the same.

7. The first question, therefore, would be as to "what the term "consequential benefits" means, and, secondly, "whether it would cover the claim of petitioner for consideration of selection grade and promotional pay scale".

8. The word "consequential" would mean that flowing as a 'consequence' or a 'corollary'. The dictionary describes 'corollary' as a proposition which can be inferred from one already proved as self evidently true i.e., a natural consequence or result, the benefit or advantage or entitlement under an arrangement.

9. In this regard, I find support from the Apex Court's decision in R.M. Ramaul Vs. State of Himachal Pradesh and others, AIR 1991 SC 1171. Therein the dispute of seniority was decided in favour of R.M. Ramaul but there was no further direction in the Court's order with respect to consequential benefits, promotion or monetary benefits etc. His seniority was restored, whereupon, it was found that junior was promoted to the post of Deputy General Manager w.e.f. 28.05.1982. Sri Ramaul was considered and promoted w.e.f. 28.05.1982. His period of promotion from 28.05.1982 to 03.09.1986, i.e., the date of actual promotion, was treated to be a notional promotion without any benefit. This denial of monetary benefit was held invalid and in consistent to the ultimate decision. The Apex Court observed as under:

"The withholding of the monetary benefits in respect of this period is inconsistent with what was decided in the judgment and what complainant was clearly entitled to. Since there was no specific direction in this behalf in the order, technically, there may be no case

for punishment for contempt; but we make it clear that the promotion for the period from 28-5-1982 to 3-9-1986 should be accompanied by the monetary benefits."

10. The Court further found that R.M. Ramaul also became eligible for promotion to the post of Additional General Manager on 05.05.1987, on which date, one of his junior, N.K. Sharma was already promoted. The Court directed that as a fall-out of restoration of seniority, R.M. Ramaul would also be entitled to be considered for further promotion to the post of Additional General Manager and, if found fit, it would be notional promotion for the period the post remained in existence, since subsequently post was abolished, and hence no monetary benefit shall be made from the date the post was abolished.

11. This judgment clearly fortifies the view, I am taking, that when a person, having gained in a Court of law, has been deprived certain benefits by the employer for its own fault, cannot be placed in a situation of loser of something for which, he is not responsible. In the present case, the Court has specifically directed that consequential benefits shall also be available to petitioners. Nothing has been shown to this Court that consequential benefits would not include monetary benefits of all kinds.

12. The next question now would be, "whether petitioner is entitled to be considered for grant of selection grade and promotional pay in the light of G.O. Dated 3rd June, 1989".

13. The respondents in the counter affidavit have pleaded that the work and conduct of petitioner was not satisfactory, hence he is not entitled for selection grade or promotional grade under G.O. Dated 3rd June, 1989. However, it is not the case of respondents that at any point of time, petitioner's case has been considered for such grant by any competent authority.

14. With regard to the question that the petitioner was not found fit for grant of selection grade and promotional scale, I find nothing on record to show that the competent authority actually has considered him for grant of such benefits.

15. The respondents have not stated in the counter affidavit that the competent authority considered the claim of petitioner at any point of time for the purpose of grant of selection grade or promotional pay scale, as the case may be, in the light of G.O. Dated 3rd June, 1989 and found him unfit for such benefit. In the counter affidavit, though it has been stated that petitioner's service was not satisfactory but whether this aspect has been found on consideration, by the competent authority, is not stated anywhere. Without considering the claim of petitioner for such grant by the competent authority, it was not open to the respondents to contest the petitioner's case by stating on their own that petitioner's service was not satisfactory. No material has been placed on record as to how the respondents found that petitioner's service was not satisfactory from October 1982. The petitioner has not actually worked in the department having been ousted, pursuant to an order of dismissal which was ultimately found illegal and set aside by this Court. Prior to that, service record of petitioner whether contain good, bad or otherwise entry has not been disclosed or shown anywhere

and, therefore, it is difficult to accept that petitioner's service was not satisfactory, particularly when this aspect was not considered by competent authority and no order is said to have been passed thereupon.

16. In view of the above discussion, this writ petition deserves to be allowed.

17. In the result, writ petition is allowed. The competent authority is directed to consider the claim of petitioner for grant of selection grade and promotional grade, as the case may be, in the light of G.O. Dated 3rd June, 1989 and pass a reasoned order within two months from the date of production of a certified copy of this order. In case petitioner is found entitled for such benefit, all consequential benefits, like refixation of pay, arrears etc. would be computed and shall be paid within two months thereafter.

18. The petitioner shall be entitled to cost which is quantified to Rs.5000/- (Five thousand only).

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 17.09.2014

BEFORE
THE HON'BLE AJAI LAMBA, J.

U/S 482/378/407 No. 3613 of 2013

Chhote Lal Singh ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri S.P. Singh, Sri R.P. Singh

Counsel for the Opp. Parties:
Govt. Advocate

Cr.P.C.-Section 482- **Quashing of summoning order-offence under Section 138 of negotiable instruments Act-cheque itself presented after an year-in view of Section 138(a) after expiry of period of six month-cheque lost its validity-moreover except on contingencies of insufficient amount in account or excesses amount of demand dishonored cheque-no offence made out-proceeding quashed.**

Held: Para-14 & 15

14. An order of summoning is required to be passed only after considering the relevant material in context of ingredients of the offence allegedly committed by an accused. The said exercise has not been done, as is apparent from the above-noted facts and circumstances of the case.

15. Section 138, N.I. Act could have been invoked only if the two conditions, in the facts of this case, had been satisfied viz. if the amount of money standing to the account of the petitioner was insufficient to honour the cheque; or in case the cheque amount exceeded the amount arranged to be paid from that account by an agreement made with that bank. None of the conditions stands satisfied in this case.

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

1. This petition filed under Section 482 of the Code of Criminal Procedure seeks quashing of order dated 7.7.2011 passed by Additional Chief Judicial Magistrate, Court No.1 in complaint case No.897 of 2011 titled 'Manju Gupta Vs. Chhote Lal Singh' under Section 138 of the Negotiable Instruments Act, 1881 (for short 'N.I. Act').

2. Short contention of learned counsel for the petitioner is that a negotiable instrument issued by the petitioner on 12.4.2010 for a sum of

Rs.2000/- was presented by the respondent no.2 on 26.5.2010. The cheque was dishonored on account of insufficiency of funds.

3. Respondent no.2 again presented the cheque on 11.5.2011 which was returned to respondent no.2 on 19.5.2011 with endorsement by the Bank that the cheque is out of allocated range.

4. Contention of learned counsel for the petitioner is that proceedings under Section 138 of the N.I. Act have been initiated in context of negotiable instrument dated 12.4.2010 presented on 19.5.2011. The negotiable instrument had already expired. The instrument could have been presented within six months only.

5. I have considered the contention of learned counsel.

6. None has put in appearance for the respondent despite service and, therefore, pleadings are being considered for adjudication.

7. It has become evident that an already expired cheque had been presented by respondent no.2-complainant for entertainment. The cheque has been returned with endorsement that the cheque is out of allocated range.

8. For considering the issue whether offence under Section 138 of the N.I. Act has been committed or not, relevant provisions of Sections 6,13 and 138 of the N.I. Act need to be considered :

"6. "Cheque".-- A "Cheque" is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand and it includes the electronic image of a truncated cheque and a cheque in the electronic form.

13."Negotiable instrument". - (1) A "negotiable instrument" means a promissory note, bill of exchange or cheque payable either to order or to bearer.

138. Dishonour of cheque for insufficiency, etc., of funds in the account.-- where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless--

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may

be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice."

9. Perusal of the above reproduced provisions of the N.I. Act indicate that "cheque" is a bill of exchange drawn on a specified banker.

10. Under Section 138 of the N.I. Act, in case "cheque" is returned by the bank unpaid either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence. It has further been provided in proviso (a) to main provision that Section 138, N.I. Act shall apply only if the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier.

11. Annexure-3 i.e. endorsement sent to respondent no.2 by the bank indicates that the cheque was out of allocated range.

12. Facts and circumstances of the case indicate that cheque dated 12.4.2010 was presented on 11.5.2011. The cheque was not validated for any further period. It is, therefore, evident that the cheque was presented beyond the period provided in Section 138 (a) of the N.I. Act. On expiry of the cheque, it lost its value as negotiable instrument. Period of validity was not extended. It is, therefore, clear that complaint in regard to the said cheque could not have been filed for commission of offence under Section 138 of the N.I. Act. A bare perusal of the pleadings indicates that no offence, as alleged, has been committed under Section 138 of the N.I. Act.

13. This Court has also taken note of the fact that although the facts and circumstances of the case were clear on perusal of the complaint read with Annexure-3, yet, impugned order of summoning dated 7.7.2011 has been passed. Perusal of the order of summoning indicates that relevant facts and circumstances have not been considered. Even if the facts emanating from the complaint and accompanying documents had been considered prima facie it would have become evident that the cheque had expired. Such an instrument could not have been presented for encashment. In any case if an expired cheque is presented by drawee of the cheque, surely the drawer of the cheque cannot be proceeded against under Section 138 of the N.I. Act.

14. An order of summoning is required to be passed only after considering the relevant material in context of ingredients of the offence allegedly committed by an accused. The said exercise has not been done, as is apparent from the above-noted facts and circumstances of the case.

15. Section 138, N.I. Act could have been invoked only if the two conditions, in the facts of this case, had been satisfied viz. if the amount of money standing to the account of the petitioner was insufficient to honour the cheque; or in case the cheque amount exceeded the amount arranged to be paid from that account by an agreement made with that bank. None of the conditions stands satisfied in this case.

16. In view of the above, the petition is allowed.

17. Order dated 7.7.2011 passed by Additional Chief Judicial Magistrate, Court No.1 in complaint case No.897 of 2011 titled 'Manju Gupta Vs. Chhote Lal Singh' is hereby quashed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.09.2014

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Consolidation No. 5001 of 1983

Ram Udit ...Petitioner
Versus
D.D.C. & Ors. ...Respondents

Counsel for the Petitioner:
Sri R.S. Pandey

Counsel for the Respondents:
C.S.C., Sri A.S. Chaudhary, Sri P.N. Gupta
Sri R.A. Chaudhary

U.P. Consolidation of Holdings Act 1953-Section-48-Scope of interference with finding of facts by D.D.C.-chak allotment-against proposal by ACO-objection filed-on ground having original holding just adjacent to abadi having more potential value-while proposed chak on usar "Barren" land-C.O. And SOC recorded findings in favor of petitioner-D.D.C. Ignoring the principle of allotment of chak under section 19 as well as the objections-arbitrary instead of doing justice in accordance with law-committed error-ignoring fundamental right of people 300 A of constitution-quashed with direction to decide revision within 2 month.

Held: Para-33-
Applying the above principles of law relating to allotment of chak and also statutory provision, this Court finds that specific objection was taken by petitioner regarding nature of land that it mostly comprised of Usar and further that original plot was near Abadi and main road, yet he has been allotted a chak at different place, but for rejecting his objection and setting aside the orders passed by subordinate authorities, the DDC has not at all looked into this objection and has gone to decide the matter only on the ground that since initially objection was raised by petitioner and not by others, against the proposed allotment of Chak, therefore, scheme proposed initially should be accepted. He has followed a majoritarian way. He has failed to consider that right of objection against allotment of Chak has been conferred upon aggrieved tenure holder by the statute. If such objection has been made, raising valid and relevant issue(s), it is incumbent upon consolidation authorities to decide the same and those issues cannot be bye-passed or ignored or omitted on irrelevant considerations, as has been done by DDC in the case in hand. The location of chak, its value, are all interconnected issues. The same cannot be ignored for fanciful conjectures and unmindful whims of consolidation authorities. It shows mere arbitrary act on their part, instead of an attempt to decide the matter by doing justice in accordance with law with the poor tenure holder whose entire livelihood depends on it. If a chak is altered by another one which is much inferior for various reasons, then what he initially held, it amounts to deprives him of his valuable property, by giving another land which is not equivalent as far as possible, but is apparently inferior in various ways and thereby he would stand deprived of his right to property affecting his constitutional right under Article 14 read with 300A of the Constitution of India. Consolidation authorities are therefore, bound to act more cautiously and objectively.

Case Law discussed:

(1978) 3 SCC 172; AIR 1975 All 126; 1981 SCC (Suppl.) 73; (1994) Supp (2) SCC 198; (1996) 2 SCC 270; 2000 (2) SCC 523; 2003 (94) RD 382; (2014) 5 SCC 707; 1985 AWC 604 All. 1982 LLJ 42; 1985 LLJ 330; 1988 (6) LCD 453.

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

1. This writ petition under Article 226 of Constitution of India has arisen from the judgment and order dated 28th July 1983 (Annexure-3 to the writ petition) passed by Deputy Director of Consolidation, Faizabad (hereinafter referred to as "DDC") in Revision no. 1443 under Section 48 of U.P. Consolidation of Holdings Act, 1953 (hereinafter referred to as "Act 1953"), whereby it has allowed revision and setting aside the orders dated 21.12.1982 of Consolidation Officer (for short "C.O.") and dated 29.01.1983 passed by Settlement Officer of Consolidation (For short "S.O.C."), has upheld the consolidation plan prepared by Assistant Consolidation Officer (hereinafter referred to as "ACO") in respect of plots no. 188, 164, 41, 158, 223, 71, 228, 153, 139 and 217.

2. The petitioner initially had two plots in Sector 4, one numbered as 50, area 2 Bighas 9 Biswas and 10 Biswansi and another number 30 area 2 Bighas, 2 Biswas and 4 Biswansi. It is said that plot no. 50 was adjacent to Abadi, close to main road. In consolidation proceedings, ACO alloted Chak No. 164 to petitioner which comprises of plots no. 48/M measuring 1 Biswa, 40/2M measuring 8/ biswa 10 biswansi 40/2M measuring 1 Biswa 10 biswansi, 40/3M measuring 5 biswa, 46/2M measuring 10 Biswa 12 biswansi, 46/1 measuring 2 Bigha and 17 Biswa and plot no. 42/M measuring 4 Biswa 4 Biswansi. The petitioner filed objection that Chak No. 164 consists of Usar land and none of original plots formed part thereof, besides the fact that plot no. 50 of petitioner was near Abadi and adjacent to main road and all these things have been ignored. The C.O. vide order dated 21.12.1982 accepted the objection and directed to divide Sector 4 in two sub-sectors and therefrom plots no. 50 and 30 were allotted to petitioner. One Ram Saran who was originally alloted Chak No. 198 on plots no. 50 and 51 got affected by the said order which had resulted in reducing the area of Chak No. 198 and allotting original plot no. 50 therefrom to the petitioner. He however, did not prefer any appeal. Instead, petitioner filed appeal under Section 21(2) before SOC. However, there came five other appeals, i.e. no. 214, Ram Udit Vs. Gaon Sabha; 216, Abhay Raj Vs. Sukhraji; 217, Smt. Sukhraji Vs. Abhay Raj; 219, Udai Bhan Vs. Saran and 221, Mati Ram Vs. Avtar, which included the dispute relating to plots and chaks in dispute. Therefore, all were heard together along with petitioner's appeal no. 213 and decided vide order dated 29.01.1983. Appeal No. 221 was dismissed. Appeal No. 219 was partly allowed and rest were allowed. SOC made respective amendments in the light of the directions contained in the last but one penultimate paragraph of the order, which would be discussed at a later stage, if necessity so arises.

3. Aggrieved thereby, three revisions were filed, being Revision No. 1358-Ram Laut Vs. State and others, 1443-Udai Bhan Vs. Ram Udit and others and 1514 Ram Awadh Vs. Saran and others, before DDC. All have been collectively decided by impugned order dated 28.07.1983.

4. Revisional Court after discussing entire things and having spot inspection

found that initial allotment made by ACO did satisfy almost all the parties, except one i.e. the petitioner whereas alteration made by SOC resulted in colossal dispute amongst various parties. Therefore, it would be appropriate to restore the original plan and set aside the amendment as directed by C.O. And SOC and hence, both the orders were set aside.

5. Learned counsel for petitioner contended that principles for allotment of Chaks to be followed in accordance with Section 19 of Act 1953 have not been adhered to. He has further contended that Rule 25 has not been complied with. The order by revisional authority is patently illegal as it has not considered grievance of petitioner that one of his plots was near Abadi and adjacent to main road. While allotting a Chak to petitioner, this aspect ought to have been considered. Besides, alleged chak constituted mostly Usar land which is large part, compared to what the petitioner's land was. He further contended that in absence of any finding recorded by DDC that there was any patent error or violation of principles of natural justice or otherwise illegality, it was not open to revisional authority to exercise jurisdiction under Section 48 and here he has committed manifest error, thereby exceeded his jurisdiction.

6. Sri A.S. Chaudhary who has put in appearance on behalf of respondent no.14 also supported the stand taken by petitioner in respect of the grounds on which impugned order passed by DDC has been challenged.

7. Respondents no.1 and 2 are represented by learned Standing Counsel while none has appeared on behalf of other respondents.

8. It is worthy to notice that vide order dated 20.2.1994, service of notice upon respondents no. 6, 9, 10, 11 and 13 was deemed sufficient under Chapter 8 rule 12 of High Court Rules. Rest of the respondents were already represented through their respective counsel.

9. The contentions advanced above gives rise to two issues:

(i) Whether DDC rightly interfered with the impugned order and power exercised by him is within four corners of Section 48 of Act 1953 ?

(ii)Whether in allotment of Chaks to the petitioner relevant principles had been followed and grievance of petitioner had been attended or not?

10. The Scheme of the statute contemplates a tentative plan, inviting objection from stake-holder, i.e. tenure holder, and, after considering the same, finalization of plan, i.e., allotment of Chaks. Thereagainst appellate power has been conferred upon SOC under Section 21(2) of Act 1953. The power which is exercised by DDC, is termed "Revision and reference" under Section 48 of Act, 1953.

11. The original Section 48, as enacted initially, read as under:

"48. Revision.- Director of Consolidation may call for the record of any case if the Officer (other than the Arbitrator) by whom the case was decided appears to have exercised a jurisdiction not vested in him by law or to have failed to exercise jurisdiction so vested, or to have acted in the exercise of his jurisdiction illegally or with substantial

irregularity and may pass such orders in the case as it thinks fit."

12. It was amended by substitution by U.P. Act No. 24 of 1956 as under:

"48. Powers of Director of Consolidation to call for records and to revise orders.- The Director of Consolidation may call for the record of any case or proceeding if the Officer (other than the Arbitrator) by whom the case was decided or proceeding taken appears to have exercised jurisdiction not vested in him by law or to have failed to exercise jurisdiction so vested, or to have acted in the exercise of his jurisdiction illegally or with substantial irregularity and may pass such orders in the case as it thinks fit." (amendment in bold)

13. Within a short period, it was again amended by U.P. Amendment Act No.38 of 1958 as under:

"48. Revision.- The Director of Consolidation may call for the record of any case decided or proceedings taken, where he is of opinion that a Deputy Director, Consolidation has -

(i) exercised jurisdiction not vested in him in law, or

(ii) failed to exercise jurisdiction vested in him, or

(iii) acted in the exercise of his jurisdiction illegally or with substantial irregularity, and as a result of which, substantial injustice appears to have been caused to a tenure-holder and he may4, after affording reasonable opportunity of hearing to the parties concerned, pass such order in the case or proceeding as he thinks fit." (amendment in bold)

14. Section 48 underwent a minor amendment vide Section 39 of U.P. (Amendment) Act No. VIII of 1963. An Explanation was added by Act No. 4 of 1969 with retrospective effect. Major amendment came to be made by U.P. Act No. 20 of 1982 inasmuch as, in sub section(1) the words "other than an interlocutory order" were inserted w.e.f. 10.11.1980. The explanation inserted in 1969 was re-numbered as Explanation-(1) by Act No. 20 of 1982 w.e.f. 10.11.1980 and then Explanation(2) was added w.e.f. 10.11.1980.

15. Presently, Section 48 reads as under:

"48. Revision and reference.-(1) The Director of Consolidation may call for and examine the record of any case decided or proceedings taken by any subordinate authority for the purpose of satisfying himself as to the regularity of the proceedings; or as to the correctness, legality or propriety of any order [other than interlocutory order] passed by such authority in the case of proceedings and may, after allowing the parties concerned an opportunity of being heard, make such order in the case of proceedings as he thinks fit.

(2) Powers under Sub-section (1) may be exercised by the Director of Consolidation also on a reference under Sub-section (3).

(3) Any authority subordinate to the Director of Consolidation may, after allowing the parties concerned an opportunity of being heard, refer the record of any case or proceedings to the Director of Consolidation for action under subsection (1).

Explanation (1) - For the purposes of this section, Settlement Officer, Consolidation, Consolidation Officers, Assistant Consolidation Officers, Consolidator and Consolidation Lekhpals shall be subordinate to the Director of Consolidation.

Explanation (2). For the purpose of this section the expression 'interlocutory order' in relation to a case or proceedings, means such order deciding any matter arising in such case or proceeding or collateral thereto as does not have the effect of finally disposing of such case or proceeding.

Explanation (3).- The power under this section to examine the correctness, legality or propriety of any order includes the power to examine any finding, whether of fact or law, recorded by any subordinate authority, and also includes the power to re-appreciate any oral or documentary evidence." (emphasis added)

16. Section 48 as it was initially enacted came to be considered in Sher Singh (dead) Vs. Joint Director of Consolidation and others (1978) 3 SCC 172. The Court observed that a bare reading show that it is pari materia with Section 115 CPC which confines revisional jurisdiction of High Court to cases of illegal or irregular exercise or non exercise or illegal assumption of jurisdiction by subordinate Courts. If a subordinate court is found to possess the jurisdiction to decide a matter, it cannot be said to exercise it illegally or with' material irregularity even it it decides the matter wrongly. Relying on the cases interpreting Section 115 CPC, the Court held that whatever revisional jurisdiction was available to High Court under Section 115, the same was the scope of revisional jurisdiction of DDC under Section 48 and it has no jurisdiction to go into errors of facts. The Court said that an erroneous decision on a question of fact or of law reached by subordinate court which has no relation to question of jurisdiction of that court, cannot be corrected by High Court under Section 115 CPC and same would apply to DDC under Section 48. The Court further observed that consolidation authorities subordinate to Joint Director possess plenary jurisdiction and competence to go into the question of correctness or otherwise of entries in revenue records. If there are concurrent findings of fact of two Courts, which do not leave any ground, as observed above, in revisional jurisdiction, interference by Joint Director of Consolidation would not be competent. In para 16 of the judgement, the Court said :

" Thus the subordinate Consolidation authorities not having acted illegally in exercising their jurisdiction, the Joint Director of Consolidation was not competent to interfere with their decisions."

17. Section 48 as amended in 1963 then came to be considered in Ramakant Singh Vs. Deputy Director of Consolidation, U.P. and others AIR 1975 All 126 but therein the Court while considering Section 48(1), to the question, whether Deputy Director of Consolidation, once has called for record, is it incumbent on him to decide the matter on merit or it can decline and dismiss the revision on any technical ground like lack of impleadment of proper party etc.

18. Amended section 48 in 1963, then came to be considered in Shanti

Prakash Gupta Vs. DDC 1981 SCC (Suppl) 73. Therein the Court observed that Section 48 as then stood, vide amendment of 1963, was wider than Section 115 CPC. However, it proceeded to hold that Director should not lightly interfere with discretion of C.O. unless the order sought to be reversed is palpably erroneous or likely to cause miscarriage of justice. To the same effect and imposing similar restriction, observations were made in Ram Dular Vs. Dy. Director of Consolidation (1994) Supp(2)SCC 198 as under:

" It is clear that the Director had power to satisfy himself as to the legality of the proceedings or as to the correctness of the proceedings or correctness, legality or propriety of any order other than interlocutory order passed by the authorities under the Act. But in considering the correctness, legality or propriety of the order or correctness of the proceedings or regularity thereof it cannot assume to itself the jurisdiction of the original authority as a fact-finding authority by appreciating for itself of those facts de novo. It has to consider whether the legally admissible evidence had not been considered by the authorities in recording a finding of fact or law or the conclusion reached by it is based on no evidence, any patent illegality or impropriety had been committed or there was any procedural irregularity, which goes to the root of the matter, had been committed in recording the order or finding."

19. A slight different observation came to be made in Preetam Singh Vs. Assistant Director of Consolidation and others (1996) 2 SCC 270 where the Court said:

"When the matter was in revision before the Assistant director (Consolidation), he had the entire matter before him and his jurisdiction was unfettered. While in seisin of the matter in his revisional jurisdiction, he was in complete control and in position to test the correctness of the order made by the Settlement Officer (Consolidation) effecting remand. In other words, in exercise of revisional jurisdiction the Assistant Director (Consolidation) could examine the finding recorded by the Settlement Officer as to the abandonment of the land in dispute by those tenants who had been recorded at the crucial time in the Khasra of 1359 Fasli. That power as a superior court the Assistant Director (Consolidation) had, even if the remand order of the Settlement Officer had not been specifically put to challenge in separate and independent proceedings. It is noteworthy that the Court of the Assistant Director (Consolidation) is a court of revisional jurisdiction otherwise having suo moto power to correct any order of the subordinate officer. In this situation the Assistant Director (Consolidation) should not have felt fettered in doing complete justice between the parties when the entire matter was before him. The war of legalistics fought in the High Court was of no material benefit to the appellants. A decision on merit covering the entire controversy was due from the Assistant Director (Consolidation). (para -6) (emphasis added)

20. Yet in Ram Avtar Vs. Ram Dhani, AIR 1997 SC 107, the Court, in para 8, observed:

"This Court has repeatedly pointed out that howsoever wide the power under statutory revision may be in contrast to Section 115 of the Code of Civil

Procedure, still while exercising that power the authority concerned cannot act as a Court of appeal so as to appreciate the evidence on record for recording findings on question of fact."

21. These observations again put the things in the shape bringing the scope of jurisdiction under Section 48 nearer to jurisdiction as contained in Section 115 CPC.

22. Section 48(1) as it stood before its amendment in 1963 and subsequent thereto, both came to be noticed in Sheshmani and another vs. The Deputy Director of Consolidation, District Basti, U.P. and others 2000(2)SCC 523. Referring to earlier decision in Sher Singh Vs. Joint Director of Consolidation (supra) and Ram Dular Vs. DDC (supra) and the intervening amendment, the Court followed the observations made in Ram Dular, as noticed above and then upheld the order passed by DDC holding that orders of CO and Additional Settlement Consolidation Officer were against settled principles of law, therefore, DDC was justified in exercise of revisional power, for coming to a different conclusion.

23. It is in these circumstances, Legislature intervened by inserting Explanation-3, by U.P. Act No. 3 of 2002, giving effect from 10.11.1980 but in Karan Singh Vs. DDC 2003(94)RD 382 this Court said that even after addition of Explanation-3, DDC cannot substitute its own finding in place of subordinate authorities.

24. Recent decision in Jagdamba Prasad Vs. Kripa Shankar (2014) 5 SCC 707 which has also considered Section 48 as amended in 1963, in para 15, following the earlier decision in Sher Singh Vs. Joint Director of Consolidation (supra) it has said :

"15. According to the legal principle laid down by this Court in the case mentioned above, the power of the Revisional Authority under Section 48 of the Act only extends to ascertaining whether the subordinate courts have exceeded their jurisdiction in coming to the conclusion. Therefore, if the Original and Appellate Authorities are within their jurisdiction, the Revisional Authority cannot exceed its jurisdiction to come to a contrary conclusion by admitting new facts either in the form of documents or otherwise, to come to the conclusion. Therefore, we answer point no. 1 in favour of the appellants by holding that the Revisional Authority exceeded its jurisdiction under Section 48 of the Act by admitting documents at revision stage and altering the decision of the subordinate courts."

25. It is thus difficult to observe that Explanation III to Section 48 has brought the scope of revision at par with the appellate jurisdiction so as to assess the evidence on pure issue of fact and recording findings de novo. Revisional power is not a power of first or second appellate Court which are final Courts of fact and findings recorded therein would be possible to be interfered under Section 48 on the ground discussed in Ram Dular (Supra), Sheshmani (Supra) and Jagdamba Prasad (supra).

26. Impugned orders in these matters are all subsequent to 1980 and, therefore, could be governed by aforesaid provision as it is. Sub Section (1) of Section 48 in effect deals revisional

power while sub sections (2) and (3) relate to reference made by an authority subordinate to Director of Consolidation. From a bare and plain reading of Section 48(1) it is evident that Director of Consolidation has been given power to call for and examine any case decided or proceedings taken by any subordinate authority for the purpose of satisfying himself (i) to the regularity of the proceedings and (ii) to the correctness, legality or propriety of any order.

27. Scope of reference is not under consideration before this Court, and, therefore, I find no reason to look into it. Question no.1 is, therefore, answered accordingly.

28. Power of interference by DDC in revisional jurisdiction having been discussed above, now questions no. 1 and 2 both can be answered together to find out whether the two authorities below i.e CO and SOC, both have considered the question of allotment of Chaks in accordance with law or not, for the reason, that if their decision was not in accordance with law, it was open for the revisional authority to interfere with and not otherwise.

29. It is not in dispute that the allotment of Chaks is to be made taking into consideration principles laid down under Section 19 of Act 1953. These principles have been considered by this Court in Bechan Singh Vs. Deputy Director of Consolidation and others 1985 AWC 604 All. In para 4 thereof, this Court has said that allotment of Chak has to be made consistent with the principles, namely, (i) every tenure holder should be allotted compact area at the place where he holds largest part of his holding (ii) the tenure holder, as far as possible, should be allotted the plot on which exists his private source of irrigation or any other improvement together with the area in the vicinity equal to valuation of the plot originally held by him and (iii) every tenure holder, as far as possible, would be allotted Chak in conformity with the process of rectangulation. The Court further held that the area held by tenture holder prior to start of consolidation proceedings, is relevant only to ascertain whether the area allotted to the tenure holder, varies by more than 25% or not, as contained in the first proviso of Section 19 of the Act, 1953.

30. In Dr. A.N. Srivastava Vs. DDC 1982 LLJ 42 Hon'ble K. N. Misra J. referring to Section 19(1)(e) of Act 1953 said:

"The petitioners under the provisions of Section 19 (1) (e) of the Act were entitled to get a chak at a place where they had held largest part of their original holding. The words 'as for as possible' used in the said sub-section do not confer any jurisdiction upon the consolidation authorities to act arbitrarily ignoring the provisions contained therein. The Settlement Officer (Consolidation) while altering the chak of the petitioners should have assigned reasons for not making allotment to the petitioners on the aforesaid plots Nos. 1082 and 1087 which were admittedly largest part of their holding. In my opinion the words as far as possible used in Section 19 (1) (e) of the Act require the provisions contained therein to be followed unless their compliance cannot be made for specific reasons to be assigned for it" (emphasis added)

31. This was reiterated in Samai Lal Vs. Deputy Director of Consolidation, Pratapgarh and others 1985 LLJ 330 and the Court further said:

"In the present case the Assistant Consolidation Officer appears to have acted illegally and in violation of the provisions contained in Section 19 (1) (e) of the Act which lays down that every tenure-holder, as for as possible, should be allotted a Chak at a place where he held his largest holding. The Assistant Consolidation Officer should have proposed a Chak of the petitioners on this very plot No. 1703 in accordance with the aforesaid provisions and in case it is not possible, then the reasons should have been mentioned for not allotting a Chak to the petitioners on their plot. The words "as far as possible" used in the said sub-section do not confer any jurisdiction upon the consolidation authorities to act arbitrarily, ignoring the provisions contained thereunder." (emphasis added)

32. In Doodh Nath Vs. DDC and others 1988(6)LCD 453 the Court held, if a tenure holder has his Chak with private source of irrigation, allotment of chak must be weighed so as to keep intact private source of irrigation of such person. The Court said that there cannot be any legal justification for refusing to allot a Chak to a tenure holder at a particular place, where he had held his private source of irrigation on the ground that his sons or other relations may have been allotted a chak in its vicinity. Every tenure holder would be entitled to get allotment of chak at a place where he could be allotted chak, keeping in view the provisions contained in Section 19 of the Act. The tenure holder would be entitled to get near village Abadi so much of land which he originally held at that place and also at the place of his private source of irrigation. The Court also said that undoubtedly, while deciding objection filed by a tenure holder against proposed allotment of chaks, equities are to be adjusted taking into consideration location of original land-holding of the other tenure holders whose chaks are likely to be affected while determining the objection. But while doing so, just and appropriate claim put forth by the tenure holder cannot be rejected merely on the ground that he is a big tenure holder as compared to the opposite parties or that his son or some other relation has been allotted chak near the place where the objector claims an allotment of chak as against his original holding. The Court added a few words of caution for the consolidation authorities, in the following manner:

" In the matter of allotment of chaks a care is to be taken by the authorities to allot chak to the tenure holders to which they are entitled as against their original holdings. If appropriate chak is not allotted to a tenure holder, he sustains irreparable loss and injury for all times to come. Thus in exercise of powers under Article 226 of the Constitution, this Court is not to feel hesitant in interfering with the impugned orders which are found to be unwarranted in law and facts of the case, merely on the ground that the writ petition could not be taken up earlier for disposal. The impugned orders cannot be left to survive merely on the delay in disposal of the writ petition for no fault of the petitioner." (para-11)

33. Applying the above principles of law relating to allotment of chak and also statutory provision, this Court finds that specific objection was taken by petitioner regarding nature of land that it mostly comprised of Usar and further that original plot was near Abadi and main road, yet he has been allotted a chak at

different place, but for rejecting his objection and setting aside the orders passed by subordinate authorities, the DDC has not at all looked into this objection and has gone to decide the matter only on the ground that since initially objection was raised by petitioner and not by others, against the proposed allotment of Chak, therefore, scheme proposed initially should be accepted. He has followed a majoritarian way. He has failed to consider that right of objection against allotment of Chak has been conferred upon aggrieved tenure holder by the statute. If such objection has been made, raising valid and relevant issue(s), it is incumbent upon consolidation authorities to decide the same and those issues cannot be bye-passed or ignored or omitted on irrelevant considerations, as has been done by DDC in the case in hand. The location of chak, its value, are all interconnected issues. The same cannot be ignored for fanciful conjectures and unmindful whims of consolidation authorities. It shows mere arbitrary act on their part, instead of an attempt to decide the matter by doing justice in accordance with law with the poor tenure holder whose entire livelihood depends on it. If a chak is altered by another one which is much inferior for various reasons, then what he initially held, it amounts to deprives him of his valuable property, by giving another land which is not equivalent as far as possible, but is apparently inferior in various ways and thereby he would stand deprived of his right to property affecting his constitutional right under Article 14 read with 300A of the Constitution of India. Consolidation authorities are therefore, bound to act more cautiously and objectively.

34. In the result, the writ petition is allowed. The impugned order passed by DDC is hereby set aside. The matter is remanded to DDC to decide petitioner's revision afresh, in the light of observations made above, and, in accordance with law expeditiously and, in any case, within two months from the date of production of a certified copy of this order before him, after giving due opportunity of hearing to all concerned parties.

35. No costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.03.2014

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 5441 of 2002

M/S Kranti Steel Pvt. Ltd. Bahraich Petitioner
Versus
Chief Controlling Revenue Authority & Ors. .Respondents

Counsel for the Petitioner:
Sri Shashi Nandan, Sri Pooja Agarwal
Sri Sanjiv Kumar, Sri Udayan Nandan

Counsel for the Respondents:
C.S.C.

<u>Indian Stamp Act, Section 33/47-A</u>- Demand of additional stamp duty with penalty-property purchases being factory premises-no where in sale deed-mentioned the machinery and tools shall be removed-hence demand proper-in view of Full Bench decision Girish Kumar Srivastava-penalty can not be imposed.

<u>Held: Para-21 & 22</u>
21. In view of above, I find no error on the part of respondents-Revenue Authorities in holding that stamp duty was chargeable on entire sale consideration of Rs. 118 lacks and to this extent the impugned orders warrants no interference.

22. Now coming to second aspect regarding penalty, I find that the

transaction of sale took place on 02.03.1995 and the impugned order was passed by Additional Collector (Finance & Revenue), Bahraich on 30.01.1996. On that day under Section 33/47-A of Act, 1899 there was no provision empowering Collector to impose penalty in case the value of property set forth in document presented for registration is not true market value of the entire value and there is a deficiency of stamp duty. Such a provision has been brought in statute book by amendment made in U.P. vide Act No. 38 of 2001. This amendment is not retrospective. The law before aforesaid amendment was clear that no penalty could have been imposed and, therefore, imposition of penalty in the present case is without jurisdiction. A Full Bench decision of this Court in Girish Kumar Srivastava Vs. State of U.P and others, 1998 (1) All.C.J. 199, has held that in the absence of any provision authorizing the Collector to impose penalty, the same cannot be imposed.

Case Law discussed:
AIR 1959 All 247; 1904 ACJ 466; AIR 2000 SC 355; AIR 1998 SC 1489; 2004 (135) STC 90; 1998 (1) All. C.J. 199; AIR 1986 All 107; AIR 2007 Alld. 39.

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

1. Heard Sri Udayan Nandan, learned counsel for the petitioner and perused the record.

2. This writ petition under Article 226 of the Constitution of India has arisen from the orders passed by stamp authorities raising a demand on account of deficiency of stamp duty in respect of a transaction of sale whereby the petitioner has purchased an industrial unit of M/s Gauri Steels and Alloys (P) Ltd. for consideration of Rs. 23,20,000/- and paid stamp duty of Rs. 33,600/-. The Sub-Registrar made reference under Section 33/47-A of Indian Stamp Act, 1899 (hereinafter referred to as the "Act, 1899") whereafter a show cause notice was issued to petitioner and after considering reply dated 01.01.1996, the Additional Collector (Finance & Revenue), Bahraich, vide order dated 30.01.1996, has determined market value of entire property under transaction, as Rs. 118 lacs, whereupon the stamp duty chargeable comes to Rs. 17,11,000/-, hence deficiency of Rs. 13,74,600/- has been determined and demanded from the petitioner. Penalty of Rs. 13,74,500/- has also been imposed upon petitioner.

3. Against aforesaid order, the petitioner preferred revision which has been dismissed by Chief Controlling Revenue Authority, U.P., Allahabad, vide order dated 06.12.2001.

4. Learned counsel for the petitioner submitted that the value of plant and machinery ought not to have been included in the sale consideration and the Revenue Authorities have committed a patent error of law in including the value of plant and machinery and other item as the same were liable to be treated as "movable property". It is however not in dispute that the entire industrial unit was purchased alongwith its land, building, plant, machinery etc. for a total consideration of Rs. 118 lacs but the stamp duty was paid on partial sale consideration of Rs. 23,20,000/-, treating it to be the value of land and building only.

5. The only question up for consideration is, "whether plant and machinery, in the present case, have rightly been included towards part of sale transaction of immoveable property so as to attract chargeability of stamp duty on entire consideration of Rs. 118 lacs".

6. Copy of sale deed dated 04.03.1995 is Annexure-2 to the writ

petition. Para 3 thereof shows that the U.P. Financial Corporation took over possession of entire industrial unit of M/s Gauri Steel & Alloys (P) Ltd., situate at Plot No. 217, Mauza Vishunpur Rahu, Pargana, Tehsil and District Bahraich by exercising its power under Section 29 of State Financial Corporation Act, 1951 and the entire mortgaged property together with free hold right of land, building etc. was transferred to vendee, i.e., petitioner, vide para 4 of the sale deed.

7. Learned counsel for the petitioner has not disputed that another agreement was executed between parties on 02.03.1995 (Annexure-7 to the writ petition), whereby entire property, building, plant and machinery was shown as purchased by petitioner for a total consideration of Rs. 118 lacs. Para 5 thereof would be relevant to reproduce hereat:

"5. It is agreed between the corporation and the purchaser that the former will sell and later will purchase the entire mortgaged properties together with the free hold/lease hold land, building, plant and machinery etc. on as is where is basis more specifically stated in the schedule attached herewith."

8. For total consideration of Rs. 118 lacs, Rs. 35 lacs were already deposited by petitioner and balance Rs. 82.60 lacs were to be paid in installments of Rs. 10.32 lacs payable in August, 1995; February, 1996; August, 1996; February, 1997; August, 1997; February, 1998; August, 1998; and, February, 1999 together with interest at the rate of Rs. 18% per annum. It is also not disputed by learned counsel for the petitioner that plant and machinery was fixed throughout. It is thus evident that petitioner has purchased entire industrial undertaking, alongwith its building, plant and machinery, for a total consideration of Rs. 118 lacs, but in order to evade stamp duty, in the sale deed in question, in a clandestine manner, the words land, building etc. have been used and partial sale consideration alleging to be the value of only land and building has been set forth as market value of property under transfer, excluding other properties which have also been purchased in the single sale transaction.

9. Learned counsel for the petitioner argued that "plant and machinery" even if attached to earth, but since it is/was removable, therefore, it is/was a moveable property, and not chargeable for stamp duty for the purpose of the document in question.

10. In my view the orders impugned in this writ petition are perfectly valid and just, except to the extent of penalty, which has been imposed upon petitioner though no such power vested in the authorities at that time.

11. Now coming to first part of the matter, whether sale consideration of plant and machinery etc. is chargeable alongwith building and land, I find that it is not disputed that plant and machinery in the case in hand is the one which is affixed to earth or to the things embedded to earth. Now the only question which is to be considered is, whether these items can be termed as "moveable property" or "immoveable property".

12. The term "immoveable property" has been defined in General Clauses Act (Central), 1897 and reads as under:

"'immovable property' shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth."

13. Under Section 3 of the Transfer of Property Act 1882 (hereinafter referred to as "Act, 1882") the term "immoveable property" has also been defined and it reads as under:

"immoveable property" does not include standing timber, growing crops or grass."

14. Whether plants and machinery set up in a factory premises, fastened to earth or things attached to earth, can be held to be a moveable or immoveable property, came to be considered before this Court in Official Liquidator Vs. Sri Krishna Deo and Ors., AIR 1959 All 247. The Court appointed an Advocate Commissioner to inspect premises of company to ascertain whether machinery and plants were fixed and attached to earth or not. The report submitted shows that plants and machinery of company were either embedded in the earth or permanently fastened to things attached to earth. On behalf of State, argument was raised that most parts of machinery are fixed to their bases with bolts and nuts, and can be removed by removing the nuts. It thus cannot be said that such machineries are permanently fastened inasmuch as, the same can be moved away by removing the nuts and hence should be held "movable property". The argument was noticed and rejected, by following House of Lords decision in Reynolds Vs. Ashby & Son, 1904 ACJ 466, wherein Lord Lindley has observed:

"The purpose for which the machines were obtained and fixed seems to me unmistakable; it was to complete and use the building as a factory. It is true that the machines could be removed if necessary, but the concrete beds and bolts prepared for thorn negative any idea of treating the machines when fixed as movable chattels."

15. This decision in Official Liquidator Vs. Sri Krishna Deo (supra) has been affirmed and approved in Duncans Industries Ltd. Vs. State of U.P. and Ors., AIR 2000 SC 355. The Court held :

"We are inclined to agree with the above finding of the High Court that the plant and machinery in the instant case are immovable properties. The question whether a machinery which is embedded in the earth is movable property or an immovable property, depends upon the facts and circumstances of each case. Primarily, the court will have to take into consideration the intention of the parties when it decided to embed the machinery whether such c was intended to be temporary or permanent. A careful perusal of the agreement of sale and the conveyance deed along with the attendant circumstances and taking into consideration the nature of machineries involved clearly shows that the machineries which have been embedded in the earth to constitute a fertiliser plant in the instant case, are definitely embedded permanently with a view to utilise the same as a fertiliser plant. The description of the machines as seen in the Schedule attached to the deed of conveyance also shows without any doubt that they were set up permanently in the land in question with a view to operate a fertilizer plant and the same was not embedded to dismantle and remove the

same for the purpose of sale as machinery at any point of time. The facts as could be found also show that the purpose for which these machines were embedded was to use the plant as a factory for the manufacture of fertiliser at various stages of its production. Hence, the contention that these machines should be treated as movables cannot be accepted. Nor can it be said that the plant and machinery could have been transferred by delivery of possession on any date prior the date of conveyance of the title to the land."

16. The decision in Sirpur Paper Mills Vs. Collector of Central Excise Hyderabad, AIR 1998 SC 1489 was distinguished observing that it was on account of particular facts in that case that plants and machinery, therein was found moveable property. However, where there is no agreement to severe machines and plants and entire factory is leased out with plants and machinery, which are fastened to earth or attached or fixed to the things permanently attached to earth and such positions is necessary for the purpose of beneficiary enjoyment thereof, it would be an "immoveable property" and no otherwise view can be taken. This is how the facts of this case also find distinction from what was involved in Sirpur Paper Mills Vs. Collector of Central Excise Hyderabad (supra).

16. Whether chattel attached to the earth or building constitute an immoveable property, would depend upon degree, manner, extent and strength of attachment of chattel to earth or building. Broadly speaking, there are certain broad features, which are to be looked into in such cases. The attachment should be such as to partake the character of attachment of trees or shrubs, rooted to earth, or walls or buildings, embedded in that sense, and, further test is whether, such an attachment is for permanent beneficial enjoyment of immovable property to which it is attached. For a property and to be regarded as such property, it must become attached to immovable property as permanently as a building or a tree is attached to earth. If, in the nature of things, the property is a movable property and for its beneficial use or enjoyment, it is necessary to embed it or fix it on earth, though permanently, that is, when it is in use, it may not be regarded as immovable property, but not otherwise.

17. The term "permanently fastened or attached to earth" has to be read, in the context, for the reason that nothing can be fastened to earth permanently, so that it can never be removed. When machines are attached to earth, not only they are attached for beneficial enjoyment of machines but also for beneficial enjoyment of land which is on lease. A similar question came up before Rajasthan High Court also in C.T.O. Vs. Sadulshahar Krai Vikrai Sahkari Samiti, 2004 (135) STC 90, and learned Single Judge, said in para 31 of the judgment, as under:

"If a comprehensive reading is done of all the relevant provisions, then what goes to show that the whole factory premises including the plant, machinery, land and building were given on lease. A lease of entire establishment was necessary for beneficial enjoyment of rights under the lease. If from the lease, plant and machinery is excluded, the land could not have been used for any purposes designed to be fulfilled by lease. The machinery and plant embedded to

earth to give it a character of immovable property for beneficial use of land facilitated the lease otherwise, the lessee would not take the premises on lease and land could only be used if the plant and machinery was attached to earth. Thus, according to the definition of "plant and machinery" as contained in General Clauses Act, makes it a immovable property."

18. In the present case it is not disputed that besides plants and machinery, entire land and building was sold and there was no provision/agreement that plants and machinery shall be severed or removed from earth. In fact, the industrial unit has been leased out for the purpose of running. Removal of plants and machinery would not have allowed the factory to run. There is no agreement between parties that plants and machinery shall be severed or removed from earth.

19. Even according to definition of 'goods' under Sale of Goods Act, in my view it cannot be included therein. One has to understand the concept of fastening of plants and machinery to earth or its fixing or attached to earth in a reasonable and practicable manner. Scientifically speaking, nothing can be treated immoveable. In the context of plants and machinery, where it is permanently fastened or attached to earth, it has to be seen from the point of utility also. If it cannot be used without being attached to earth, it may be immovable property in the industries like one up for consideration in this matter. Unless, such fastening is there, the plant and machinery cannot be put to a rational use. They generally do not move or taken away unless a particular plant and machinery has become obsolete or when the factory is closed or otherwise circumstances so warrant and the owner decide to remove and sell it. Such contingency do not arise every day. They are very rare and occasional. Removal of plants and machinery from earth in a working unit is a decision which is not normally taken in ordinary circumstances, that too when entire land, building along with machinery is leased out for the purpose of running the same.

20. It is worthy to mention that in the entire writ petition there is no pleading that the plant and machinery which has been purchased by petitioner is to be removed or displanted or that it is not affixed or attached to earth etc. Though it has been pleaded that only land and building has been purchased but paras 3 and 4 of sale deed clearly show that U.P. Financial Corporation took over physical possession of entire building and its assets. In para 4 it is mentioned that entire mortgaged property including free hold rights of land, building etc. on as is where is basis transferred to vendee, i.e., petitioner.

21. In view of above, I find no error on the part of respondents-Revenue Authorities in holding that stamp duty was chargeable on entire sale consideration of Rs. 118 lacks and to this extent the impugned orders warrants no interference.

22. Now coming to second aspect regarding penalty, I find that the transaction of sale took place on 02.03.1995 and the impugned order was passed by Additional Collector (Finance & Revenue), Bahraich on 30.01.1996. On that day under Section 33/47-A of Act,

1899 there was no provision empowering Collector to impose penalty in case the value of property set forth in document presented for registration is not true market value of the entire value and there is a deficiency of stamp duty. Such a provision has been brought in statute book by amendment made in U.P. vide Act No. 38 of 2001. This amendment is not retrospective. The law before aforesaid amendment was clear that no penalty could have been imposed and, therefore, imposition of penalty in the present case is without jurisdiction. A Full Bench decision of this Court in Girish Kumar Srivastava Vs. State of U.P and others, 1998 (1) All.C.J. 199, has held that in the absence of any provision authorizing the Collector to impose penalty, the same cannot be imposed.

23. The Full Bench, referred to above, approved earlier Division Bench judgment of this Court in Kaka Singh Vs. Additional Collector and District Magistrate, (Finance and Revenue) Bulandshahr, AIR 1986 All 107. This has been reiterated in a recent Full Bench judgment in Ramesh Chandra Srivastava vs. State of U.P., AIR 2007 Alld. 39.

24. In view thereof, the writ petition is partly allowed. The impugned orders dated 30.01.1996 and 06.12.2001, in so far as penalty of Rs.13,74,500/- has been imposed upon petitioner, being wholly without jurisdiction, cannot be sustained and are hereby set aside. Rest part of orders is held valid and to that extent the writ petition shall stand dismissed.

25. In view of partial success of both the sides, there shall be no order as to costs.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.09.2010

BEFORE
THE HON'BLE SHRI KANT TRIPATHI, J.

Criminal Misc. Application No. 6277 of 2003
(U/s 482 Cr.P.C.)

Mubassir @ Musavir @ Guddoo & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:
Sri Nasiruzzaman

Counsel for the Opp. Parties:
A.G.A.

Cr.P.C.-Section 482-Quashing of Criminal proceeding-offence u/s 364 IPC-read with Section 3(2)(v) of SC/SC (prevention of atrocities) Act-prosecutrix-on her own proceeded with applicant-solemnized marriage-living as husband and wife-with their wedlock two children born-as per statement recorded before C.J.M.-in view of Lalta Singh case-futile exercise to proceed with Trail-quashed-application allowed.

Held: Para-7
In view of the fact that the prosecutrix and the petitioner no. 1 have solemnized marriage and are peacefully living together as husband and wife and two children have also born from their wedlock, it would be a futile exercise to proceed with the trial against the petitioners, therefore, quashing of the proceedings of the aforesaid criminal case would not only be in the interest of justice but also would be in accordance with the aforesaid verdict of the Apex Court.

Case Law discussed:
2006(2) Supreme Court Cases (Crl.)

(Delivered by Hon'ble Shri Kant Tripathi, J.)

1. Heard learned counsel for the petitioners and the learned AGA for the respondent no.1 and perused the record.

2. None appeared for the respondent no.1.

3. Counter affidavit and rejoinder affidavit have been exchanged.

4. This is a petition under section 482 CrPC for quashing the proceedings of the criminal case arising out of crime no. 227 of 2003 under section 364 IPC and section 3(2)(V) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, police station Didauli, district J.P. Nagar.

5. The main contention of the learned counsel for the petitioners is that the prosecutrix has herself proceeded with the petitioner no. 1 and solemnized the marriage with him and since then she is living as his wife. Two children have also borne from their wedlock. On the direction of this Court, the statement of the prosecutrix was recorded by the Chief Judicial Magistrate, J.P. Nagar before whom the prosecutrix supported the story of marriage and stated that she herself went in the company of the petitioner no.1. Other petitioners are the relatives of the husband. The counsel for the petitioners further submitted that in view of the fact that the victim and the petitioner no.1 are living as husband and wife and two children have also borne from their wedlock, it would be futile exercise to proceed with the trial. It was further submitted that according to the school record and other materials the prosecutrix was major on the date of occurrence and was, therefore, competent to accord consent.

6. In the case of Lata Singh vs. State of U.P. & another 2006 (2) Supreme Court Cases(Crl.), page 478, the Apex Court has propounded the following principle:

"...This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such inter-caste or inter-religious marriage the maximum they can do is that they can cut off social relations with the son or the daughter, but they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter-caste or inter- religious marriage. We, therefore, direct that the administration/police authorities throughout the country will see to it that if any boy or girl who is a major undergoes inter-caste or inter-religious marriage with a woman or man who is a major, the couple are not harassed by any one nor subjected to threats or acts of violence, and any one who gives such threats or harasses or commits acts of violence either himself or at his instigation, is taken to task by instituting criminal proceedings by the police against such persons and further stern action is taken against such persons as provided by law........"

7. In view of the fact that the prosecutrix and the petitioner no. 1 have solemnized marriage and are peacefully living together as husband and wife and two children have also born from their wedlock, it would be a futile exercise to proceed with the trial against the petitioners, therefore, quashing of the proceedings of the aforesaid criminal case would not only be in the interest of justice

but also would be in accordance with the aforesaid verdict of the Apex Court.

8. The petition under section 482 CrPC is allowed. Consequently the proceedings of the aforesaid criminal case are quashed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 11.09.2014

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

Misc. Bench No. 8898 of 2014

Mohd. Nasir Husain ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Afzal Hasan

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-25 & 26- Seeking permission to sacrifice the buffalo-in madarsa or school on occasion of Idul Zuha-by Muslim community-held considering little hardship of particular community-administration or the court can not compromise with sanctity of institution-in absence of statutory provision or rights granted under constitution-Court are loath to grant indulgence-state authority to consider and take appropriate decision-keeping in view of statutory and constitutional provision-petition disposed of.

Held: Para-18
While preferring the Writ Petition, the petitioner has not come forward with the pleading to indicate that some statutory or Constitutional rights has been granted to Muslim community by the Parliament or the State Legislature to sacrifice buffaloes at any place including Madarsa or schools. In the like manner, for every community, Hindus or Christians, rights conferred by the Constitution or the statute may be protected by the Courts, being custodian of law. But in the event of right which is not guaranteed by the Constitution, or by any statute legislated by the Parliament or the State Legislature within their jurisdiction, the Courts are loath to interfere and grant indulgence.

Case Law discussed:
2011 (5) ADJ 674; AIR 1958 SC 255; AIR 1984 SC 51; AIR 1954 SC 388; AIR 1954 SC 282.

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

1 Heard learned counsel for the petitioner Sri Afzal Hasan, learned counsel for the petitioner and the learned Additional Standing Counsel.

2 The present writ petition under Article 226 has been preferred being aggrieved with the inaction on the part of the district administration in not permitting the petitioner and his Muslim community to perform their religious rites, "Qurbani" (sacrifice) which according to petitioner's counsel is the message of Holy Quran. It is submitted that the petitioner possesses fundamental right conferred by Articles 25 and 26 of the Constitution of India to perform the religious rites of Quarbani under Personal Law and practice.

The petitioner in the present writ petition, has claimed for following reliefs:-

(i) issue a writ order or direction in the nature of mandamus commanding the Opp. Parties to permit the petitioner and other members of Muslim community to sacrifice buffalo on the occasion of Idul-Zuha in Village-Sattijor, Post-Bankasahi, Pargana-Charda, Tehsil-Nanpara, District-Bahraich.

(ii) 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.

(iii) allow the instant writ petition of the petitioner with costs.

3 According to petitioner's counsel, an application was moved to District Magistrate, Bahraich by Muslim community of village Sattijor, post office Bankasahi, Pargana Charda, Tehsil Nanpara, district Bahraich to permit them to perform religious rites of Quarbani of buffaloes and goats etc., at courtyard of school namely, Aljametul Nooriya Darul Barkat (Madarsa), which is a registered society under the Societies Registration Act. It is submitted that on the festival of Idul-Zuha (Bakreed), the muslims of the country have right to sacrifice goats buffaloes etc., to perform Quarbani. It is done at the occasion of Idul-Zuha. Submission of petitioner's counsel is that sacrifice is performed at the high price of goats ranging from 5000/- to 25000/-.

4 The petitioner's counsel relied upon earlier Division Bench judgment of this court dated 6.3.1995 passed in Writ Petition No.6177 of 1990 Mohd. Farooq Nori Vs. State of U.P. And others. Relying upon the said judgment, petitioner's counsel submits that the petitioner has right to perform Qurbani at the Madarsa or alike schools.

5 So far as the judgment delivered by the Division Bench of this court in the case of Mohd. Farooq Nori (supra) is concerned, the argument advanced by learned counsel for the petitioner seems to be not sustainable for the reason that in the case of Mohd. Farooq Nori (supra), their lordships held, to quote:-

"... But, however, we are of the view that the District Magistrate is appropriate cases any may regulate the place where such buffalos could be slaughtered."

The Division Bench further held as under:-

"... Hence the petitioner can be granted only a limited relief that he may be permitted to sacrifice buffalos on the Idul-Zuha day or two days thereafter and the place where the sacrifice may take place would be for the administration to decide. With the aforesaid observations the writ petition is disposed of.

Sd/- R.K. Gulati.
Sd/- S.H.A. Raza.
6.3.95"

From the aforesaid conclusion, the finding recorded by the division Bench, there appears to be no room of doubt that Court declined to issue the mandamus with regard to place of sacrifice and leave it open for the administration to take a decision.

6 Learned counsel for the petitioner has given much emphasis and relied on Articles 25 and 26 of the Constitution of India. For convenience, Article 25 and 26 are reproduced as under:-

""25. Freedom of conscience and free profession, practice and propagation of religion.-- (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience

and the right freely to profess, practice and propagate religion.

2. Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—

a. regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

b. providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation I: The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.

Explanation II: In sub-Clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

26. Freedom to manage religious affairs.-- Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—

a. to establish and maintain institutions for religious and charitable purposes;

b. to manage its own affairs in matters of religion;

c. to own and acquire movable and immovable property; and

d. to administer such property in accordance with law."

7 A combined reading of Articles 25 and 26 reveals that the conscience and free profession, practice and propagation of religion is subject to public order, morality and health. The religious affairs have also been subjected to public order, morality and health. Thus, right to perform religious rites, has been subjected to public order, morality and health. The public order, morality and health is a question which falls within the domain of the Administration subject to statutory and constitutional limitations.

8 In a case reported in 2011 (5) ADJ 674: Vasudev Gupta Vs. State of U.P. And Others, (Writ Petition No.3362 (M/B) of 2011 (Vasudev Gupta Vs. State Of U.P., through Principal Secy., Home & Others Judgment date 9.5.2011), a Division Bench of this Court, of which one of us (Hon'ble Mr. Justice Devi Prasad Singh) was a member, has observed as under:-

"33. In A.S. Narayana's case (supra), Hon'ble Supreme Court reiterated that right to religion guaranteed under Articles 25 and 26 of the Constitution of India is not absolute and unfettered right to propagate religion which is subject to legislation by the State limiting or regulating any activity - economic, financial, political or secular which are associated with religious belief, faith, practice or custom. The religious practice is subject to reform on social welfare by appropriate legislation by the State(para 19).

35 ...Enjoyment of one's rights must be consistent with the enjoyment of rights

by others. Where in a free play of social forces it is not possible to bring about a voluntary harmony, the State has to step in to set right the imbalance between competing interests. A particular fundamental right cannot exist in isolation in a water-tight compartment. One fundamental right of a person may have to co-exist in harmony with the exercise of another fundamental right by others also with reasonable and valid exercise of power by the State in the light of the directive principles. "

9 Hon'ble Supreme Court in a case reported in AIR 1958 SC 255: Venkataramana Devaru v. State of Mysore,, while considering Article 25, held that restriction provided by clause (b) of Article 25 (2), may be the ground to regulate religious practice. On the other hand, clause (a) of Article 25 (2) further provides that appropriate restriction may be imposed regulating and restricting any economic, financial political or other secular activities which may be associated with religious practice.

10 In AIR 1984 SC 51: Jagadishwaranand Avadhuta, Acharya Vs. Police commissioner, Calcutta, Hon'ble Supreme Court upheld the restriction imposed in performing Tandava by Anand Margi at public places. In a case reported in AIR 1997 SC 1711: Bhuri Nath v. State of Jammu & Kashmir, Hon'ble Supreme Court held that service of priest is a secular activity and can be regulated by the State under Article 25 (2).

11 In AIR 1954 SC 388: Rati Lal Vs. State of Bombay, Hon'ble Supreme court held that State is a primary concern with secular aspect of religious practice than the essential religion as approved by judicial pronouncements.

12 By catena of judgments, Hon'ble Supreme court upheld that 'Religion' is a matter of faith but belief in God is not essential to constitute religion. Doctrine of each religion constitute its essential part, but the court is competent to examine them..vide, AIR 1954 SC 282 : Endowments, Madras v. Lakshmindra Thirth Swamiar.

13 While dealing with the subject matters apart from the statutory provisions, Courts and citizens should not forget the preamble of Indian Constitution pledging for sovereign, socialist and secular and democratic republic. Accordingly, ordinarily, it is not for the Court to interfere with such matters as to where a sacrifice should be done. Broadly it is for the administration to take a decision.

14 The fundamental right flowing from Article 25 and 26 as held (supra), is always subject to morality, law and order and it does not confer blanket right to perform religious ceremonies at the cost of morality, health and law and order. The constitutional framers were conscious of multiplicity of Indian culture, practice and traditions. Hence they have imposed certain conditions to perform such rites in the Articles 25 and 26. Articles 25 and 26 itself provide that integrity, unity of the country broadly, may not be sacrificed at the alter of religious rites.

15 Moreover in the present case, the petitioner claims right to perform sacrifice in the Madarsa or schools--the temple of knowledge, education and teachings. Whether the Madarsas or the schools can

be used for sacrifice of the goats or buffaloes while performing religious ceremonies? Whether, will it not spoil the academic atmosphere of Madarsa or other alike schools and may be health hazard to the children on account of blood and flesh and fecal matter etc.?

16 In case the petitioner a member of Muslim community claims right to perform sacrifice of goats buffaloes in Madarsa, then others may come to claim right for performing sacrifice (□□□) of goats and buffaloes in their respective schools on the occasion of Ma Kali Puja. Once such practice is started, then schools and Madarsa meant for teaching purpose, may be converted into "slaughter house" though for a limited period in due course of time at the cost of health, morality and, law and order.

17 In India, there are thousands of sects, communities, castes, creeds and religions from far East to West and from North to South and substantial number of them indulge into sacrifice of goats etc. We are of the view that the educational institutions whether it is Madarsa, school, college or university, should not be permitted to perform the ceremony of sacrifice of goat, buffaloes or any other animals. Ordinarily, there appears to be no reason to permit sacrifice in Madarsa, schools, colleges or institutions for sacrifice of goats, buffaloes etc. A little hardship in performing sacrifice at the eve of festival, does not mean that administration or courts should compromise with the sanctity of schools, colleges or Madarsas. In the present case, the petitioner has not invited attention of any statutory provisions which may confer him right to perform sacrifice in the Madarsa or schools. Hence it shall not be appropriate for us to permit to perform sacrifice in the Madarsa or schools etc., which are meant to educate children.

18 While preferring the Writ Petition, the petitioner has not come forward with the pleading to indicate that some statutory or Constitutional rights has been granted to Muslim community by the Parliament or the State Legislature to sacrifice buffaloes at any place including Madarsa or schools. In the like manner, for every community, Hindus or Christians, rights conferred by the Constitution or the statute may be protected by the Courts, being custodian of law. But in the event of right which is not guaranteed by the Constitution, or by any statute legislated by the Parliament or the State Legislature within their jurisdiction, the Courts are loath to interfere and grant indulgence.

19 Of-course, it is for the authorities or the Government to look into such matters and take appropriate decision within the Constitutional parameters or the statutory mandate. In the cosmopolitan country like India, having thousands of communities, castes and creeds, in case Courts start interfering, then the Courts may loose their impartial stature, and it shall be a remorseful and bad day in the history of administration of justice.

20 Subject to what has been observed hereinabove, we are not inclined to pass any order/direction with regard to the relief claimed by the petitioner. We leave it open to the good sense of the Government and its authorities to look into such matters in case they are represented for the purpose and it shall be incumbent upon them to act within the

four corners of the Constitution while dealing with such matters. Application moved by the petitioner be considered expeditiously.

21 Subject to above and with liberty to respondents and adjudication of dispute by District Magistrate expeditiously, the writ petition is disposed of finally.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.09.2014

BEFORE
THE HON'BLE DR. DHANANJAYA YESHWANT CHANDRACHUD, C.J.
THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.

Misc. Bench No. 9502 of 2014

Kismat & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ramendra Kumar Misra

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-Petition claiming compensation-failure of vasectomy operation- unwanted child birth-unless negligence of doctor proved-no such claim can be entertained under writ jurisdiction-moreover even after noticing pregnancy-no positive steps taken to remove rather decided to give birth-itself denotes desirable delivery-case law relied by petitioner based on civil court decree-can not be basis to award compensation-petition dismissed with liberty to approach civil court.

Held: Para-9
Whether, as a matter of fact, the operating surgeon had exercised due and reasonable care while performing the surgery or conversely whether, as the claimant suggests, there was negligence on the part of the surgeon in performing the surgery, cannot be determined in writ proceedings under Article 226 of the Constitution. These are matters of evidence which, in fact, can be resolved only on the basis of material which is produced in the course of the trial of a suit. Santra (supra), in fact, was a case which originated in a suit before the trial Court as was the subsequent decision of the Supreme Court in Shiv Ram (supra). The remedy under Article 226 of the Constitution can, in appropriate cases, be availed of for remedying a violation of the fundamental rights, such as the right to life and personal liberty under Article 21 of the Constitution. Where, however, a claim of the nature, such as the present, intrinsically depends upon proof of an act of medical negligence, such a claim cannot be determined in exercise of writ jurisdiction under Article 226 of the Constitution. A suit for the recovery of the amount of a claim of that nature would be dealt with under the provisions of Section 9 of the Code of Civil Procedure, 1908.

Case Law discussed:
(2000) 5 SCC 182; (2005) 7 SCC 1.

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

1. The first petitioner has moved this Court in its writ jurisdiction under Article 226 of the Constitution, seeking compensation of Rs.5 lacs for a failed vasectomy operation, claiming this amount to be necessary for the education and survival of the second petitioner, who is the child born subsequent to the surgery.

2. The marriage of the first petitioner is stated to have been solemnized sixteen years ago. The first petitioner and his spouse have five children of whom the last was stated to have been adopted. The first petitioner

was operated upon by the district hospital, Hardoi on 27 February 2009 by the fourth respondent. The case is that, despite the surgery, the spouse of the first petitioner became pregnant after a few months of the date of the surgery and the second petitioner was born. An amount of Rs.30,000/- was admittedly paid to the first petitioner and his spouse on 29 May 2013 for the failed vasectomy surgery under and pursuant to an insurance policy of ICICI Lombard General Insurance Co. Ltd. The insurance policy has been obtained by the State and a compensation of Rs.30,000/- was paid.

3. The petitioner has relied upon a decision of the Supreme Court in State of Haryana vs. Santra (Smt.)1 in support of the claim for compensation. That was a case where a patient had been admitted to a Government Hospital for a sterilization operation. A child was born despite the surgery following which, a suit for damages was filed for medical negligence. The trial Court decreed the claim for an amount of Rs.54,000/- together with interest @ 12% per annum against which, an appeal before the District Court and thereafter a Second Appeal before the High Court were dismissed. The facts of the case would indicate that there was a specific finding of negligence on the part of the surgeon in performing the surgery inasmuch as though the patient had sought a complete sterilization, one of the Fallopian tubes had not been operated upon in the course of the surgery. These facts are clear from the findings recorded in paragraphs 18 and 20 of the judgment of the Supreme Court, which are as follows:

"18. The facts which are not disputed are that Smt. Santra, respondent, had undergone a sterilization operation at the General Hospital, Gurgaon, as she already had seven children and wanted to take advantage of the scheme of sterilization launched by the State Government of Haryana. She underwent the sterilization operation and she was issued a certificate that her operation was successful. She was assured that she would not conceive a child in future. But, as luck would have it, she conceived and ultimately gave birth to a female child. The explanation offered by the officers of the appellant State who were defendants in the suit, was that at the time of the sterilization operation, only the right Fallopian tube was operated upon and the left Fallopian tube was left untouched. This explanation was rejected by the courts below and they were of the opinion, and rightly so, that Smt. Santra had gone to the hospital for complete and total sterilization and not for partial operation. The certificate issued to her, admittedly, was also in respect of total sterilization operation.

20. If Smt. Santra, in these circumstances, had offered herself for complete sterilization, both the Fallopian tubes should have been operated upon. The doctor who performed the operation acted in a most negligent manner as the possibility of conception by Smt. Santra was not completely ruled out as her left Fallopian tube was not touched. Smt. Santra did conceive and gave birth to an unwanted child."

4. The decision in Santra (supra) did not arise out of the exercise of the writ jurisdiction under Article 226 of the Constitution, but arose out of a decree of the trial Court in a regular civil suit.

5. The decision in Santra (supra) was rendered by a Bench of two learned

Judges of the Supreme Court and subsequently, it was considered in a decision of three learned Judges of the Supreme Court in State of Punjab v. Shiv Ram2. That was also a case where a decree for compensation was passed by the trial Court following the birth of a child, despite a tubectomy operation. The decree was upheld by the first appellate Court, while the second appeal was dismissed by the High Court. The Supreme Court observed, after reviewing the medical literature on the subject that there is, in a sterilization operation, no guarantee of a successful operation in every case and authoritative medical learning on the subject recognizes the possibility of failure depending upon the technique which is chosen. This is evident from the observations contained in paragraph 17 of the judgment, which read as follows:

"17. It is thus clear that there are several alternative methods of female sterilization operation which are recognized by medical science of today. Some of them are more popular because of being less complicated, requiring minimal body invasion and least confinement in the hospital. However, none is foolproof and no prevalent method of sterilization guarantees 100% success. The causes for failure can well be attributable to the natural functioning of the human body and not necessarily attributable to any failure on the part of the surgeon. Authoritative textbooks on gynaecology and empirical researches which have been carried out recognise the failure rate of 0.3% to 7% depending on the technique chosen out of the several recognised and accepted ones. The technique which may be foolproof is the removal of the uterus itself but that is not considered advisable. It may be resorted to only when such procedure is considered necessary to be performed for purposes other than merely family planning."

6. In this state of medical knowledge and medical science, the Supreme Court observed as follows:

"25. We are, therefore, clearly of the opinion that merely because a woman having undergone a sterilization operation became pregnant and delivered a child, the operating surgeon or his employer cannot be held liable for compensation on account of unwanted pregnancy or unwanted child. The claim in tort can be sustained only if there was negligence on the part of the surgeon in performing the surgery. The proof of negligence shall have to satisfy Bolam's test. So also, the surgeon cannot be held liable in contract unless the plaintiff alleges and proves that the surgeon had assured 100% exclusion of pregnancy after the surgery and was only on the basis of such assurance that the plaintiff was persuaded to undergo surgery. As noted in various decisions which we have referred to hereinabove, ordinarily a surgeon does not offer such guarantee."

7. Hence, the view of the Supreme Court was that the cause of action for claiming compensation in a case of a failed sterilization operation would arise on account of negligence of the surgeon and not on account of childbirth. Failure due to natural causes would not provide any ground for claim. It is for the woman who has conceived the child to opt or not to opt for medical termination of pregnancy. Having known of the pregnancy in spite of having undergone

the sterilization operation, if the couple opts for bearing the child, it ceases to be an unwanted child. Compensation for maintenance and upbringing of such a child cannot, the Supreme Court held, be claimed.

8. While allowing the appeal, the Supreme Court however, observed that the State Government should contemplate devising welfare schemes or take up the matter with Insurance Companies for obtaining appropriate insurance policies to provide coverage of such claims where a child is born of a woman, despite having undergone a successful sterilization operation. It is in pursuance of these observations that it would appear that a claim of the present nature has been covered under the insurance policies obtained by the State pursuant to which, an amount of Rs.30,000/- has already been paid to claimant in the present case by way of compensation.

9. Whether, as a matter of fact, the operating surgeon had exercised due and reasonable care while performing the surgery or conversely whether, as the claimant suggests, there was negligence on the part of the surgeon in performing the surgery, cannot be determined in writ proceedings under Article 226 of the Constitution. These are matters of evidence which, in fact, can be resolved only on the basis of material which is produced in the course of the trial of a suit. Santra (supra), in fact, was a case which originated in a suit before the trial Court as was the subsequent decision of the Supreme Court in Shiv Ram (supra). The remedy under Article 226 of the Constitution can, in appropriate cases, be availed of for remedying a violation of the fundamental rights, such as the right to life and personal liberty under Article 21 of the Constitution. Where, however, a claim of the nature, such as the present, intrinsically depends upon proof of an act of medical negligence, such a claim cannot be determined in exercise of writ jurisdiction under Article 226 of the Constitution. A suit for the recovery of the amount of a claim of that nature would be dealt with under the provisions of Section 9 of the Code of Civil Procedure, 1908.

10. Consequently, we decline to entertain the petition only on the ground that disputed questions of fact, which would arise in these proceedings, would have to be adjudicated upon by the trial Court in a regular civil suit.

11. Leaving it open to the petitioner to pursue the ordinary civil remedy available in law, we dismiss the petition. However, there shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.09.2014

BEFORE
THE HON'BLE DR. DHANANJAYA YESHWANT CHANDRACHUD, C.J.
THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.

Misc Bench No. 9514 of 2014

Ram Sijore [PIL] ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Nripendra Mishra

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-Removal of encroachments on public land-when complete machinery provided in section 122-B of UPZA & LR Act as well as Rule 115(D)-1 -without availing alternative remedy-petition not maintainable- writ court can not be substitute to normal remedy-petition dismissed.

Held: Para-11
This Court has been moved under Article 226 of the Constitution without a due invocation of the remedy under Section 122-B. Where the Statute itself as well as the Rules provide a comprehensive remedy, there is no reason or justification to move the Court under Article 226 without exhausting the remedy available in law. It is only where the Court is satisfied that there is an inaction on the part of the competent statutory authority designated to exercise powers under Section 122-B and Rule 115-D, that the Court may assume jurisdiction in an appropriate case and issue directions. Otherwise, the filing of a writ petition before this Court under Article 226 should not be taken as a substitute for invocation of the normal remedies which are provided under the Act and the Rules.

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

1. The petitioner has moved this Court seeking invocation of jurisdiction under Section 122-B of the U.P. Zamindari Abolition & Land Reforms Act, 19501 in respect of certain illegal encroachments on a land which is recorded for public utility purposes in the revenue records of Village Ismilepur Dubkhar, Pargana and Tehsil Akbarpur, District Ambedkar Nagar.

2. The records would indicate that the petitioner has moved a representation to the Collector, Ambedkar Nagar merely only on 18 September 2014, i.e. one day before the date of filing of these proceedings under Article 226 of the Constitution on 19 September 2014.

3. Sub-section (1) of Section 122-B of the Act provides that where any property vested under the provisions of the Act in a Gaon Sabha or a local authority is damaged or misappropriated or where any Gaon Sabha or local authority is entitled to take or retain possession of any land under the provisions of the Act and such land is occupied otherwise than in accordance with the provisions of the Act, the Land Management Committee or the local authority, as the case may be, shall inform the Assistant Collector concerned in the manner prescribed. Under sub-section (2) of Section 122-B of the Act, the jurisdiction of the Assistant Collector is invoked on the information received under sub-section (1) or otherwise.

4. Sub-section (2) of Section 122-B provides as follows:

"Where from the information received under sub-section (1) or otherwise, the Assistant Collector is satisfied that any property referred to in sub-section (1) has been damaged or misappropriated or any person is in occupation of any land, referred to in that sub-section, in contravention of the provisions of this Act, he shall issue notice to the person concerned to show cause why compensation for damage, misappropriation or wrongful occupation as mentioned in such notice be not recovered from him or, as the case may be, why he should not be evicted from such land."

5. Similarly, Rule 115-D (1) of the U.P. Zamindari Abolition & Land

Reforms Rules, 19522 makes the following provisions:

"Where the Land Management Committee or the local authority, as the case may be, fails to take action in accordance with Section 122-B, the Collector shall--

(a) on an application of the Chairman ; Member of Secretary of the Committee ; or

(b) on a report made by the Lekhpal under sub-rule (3) of Rule 115-C; or

(c) on the report of the local authority concerned or its official referred to in the proviso to sub-rule (5) of Rule 115-C;

(d) on facts otherwise coming to his notice;

call upon the person concerned through notice in Z.A. Form 49-A to refrain from causing damage or misappropriation, to repair the damage or make good the loss or remove wrongful occupation and to pay damages or to do or refrain from doing any other thing as the exigencies of the situation may demand or to show cause against it in such time not exceeding fifteen days as may be specified in the notice."

6. From these provisions, it is clear that, initially, what sub-section (1) of Section 122-B contemplates is that the Land Management Committee or the local authority shall inform the Assistant Collector in the manner prescribed where any property, which is vested in a Gaon Sabha or a local authority, has been damaged or misappropriated or where it is entitled to take or retain possession of a land which is occupied otherwise than in accordance with the provisions of the Act. However, sub-section (2) of Section 122-B makes it abundantly clear that the Assistant Collector can be satisfied in regard to the damage or misappropriation as contemplated in sub-section (1) or in regard to unlawful occupation of a land either on the basis of the information which is received under sub-section (1) or otherwise.

7. The expression 'or otherwise' is wide enough to include information which is received from any person in regard to an unlawful occupation or possession of a land which is vested in a Gaon Sabha or a local authority.

8. Rule 115-D makes the position equally clear because if the Land Management Committee or the local authority fails to take action in accordance with Section 122-B, the Collector is thereafter empowered to act. Under clause (d) of sub-rule (1) of Rule 115-D, the Collector can act on facts otherwise coming to his notice.

9. Thus, a comprehensive procedure is laid down in Section 122-B of the Act as well as in Rule 115-D (1) of the Rules for invoking the jurisdiction of the Assistant Collector or, as the case may be, the Collector.

10. The expression 'Collector' for the purposes of Rule 115-D would include the Assistant Collector of the First Class as defined in Section 3 (4) of the Act.

11. This Court has been moved under Article 226 of the Constitution without a due invocation of the remedy under Section 122-B. Where the Statute itself as well as the Rules provide a comprehensive remedy, there is no reason or justification to move the Court under

Article 226 without exhausting the remedy available in law. It is only where the Court is satisfied that there is an inaction on the part of the competent statutory authority designated to exercise powers under Section 122-B and Rule 115-D, that the Court may assume jurisdiction in an appropriate case and issue directions. Otherwise, the filing of a writ petition before this Court under Article 226 should not be taken as a substitute for invocation of the normal remedies which are provided under the Act and the Rules.

12. In view of this discussion, we leave it open to the petitioner to pursue the remedy available under Section 122-B or, as the case may be, under Rule 115-D.

13. At this stage, the interference of the Court would not be warranted. Hence, we are not inclined to entertain the petition at the present stage.

14. The petition is, accordingly, dismissed. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.09.2014

BEFORE
THE HON'BLE MAHESH CHANDRA TRIPATHI, J.

Civil Misc. Writ Petition No. 13307 of 2008

Munni Prasad Mishra ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri A.K. Rai, Sri Vishnu Kumar Singh, Sri D.K. Singh, Sri H.P. Shahi

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-Voluntary Retirement-application filed on 29.08.2003-by notice dated 19.09.2003 S.P. Required the petitioner disclose reason for seeking voluntary retirement-petitioner given explanation on 24.09.2003-S.P. Passed termination order on 09.03.2004-appeal also got same fact-held-once petitioner sought voluntary retirement-as per Rule 56(c) and (d)-S.P. Bound to inform in writing within 90 days otherwise- deemed to be accepted-termination as well appellate order-not sustainable-deemed retirement since 29.08.2003.-petition allowed.

Held: Para-18 & 19
18. It is admitted situation that in spite of the said acknowledgment, the same was never acted upon and his application for voluntarily retirement was never decided, and, it is apparent that the said application, had never been processed by the competent authority as per the U.P. Fundamental Rules.

19. Since the petitioner had never been informed before the expiry of the notice period (three months) since his application dated 19.9.03, it would will deemed to be accepted by the department and the petitioner would deemed to be voluntarily retired on the expiry of three months.

Case Law discussed:
(1978) 2 Supreme Court Cases 202; (1) [1970] 2 S.C.R. 657; AIR 1978 Supreme Court 17; 2004 (1) AWC 412; 1995 (1) LBESR 871.

(Delivered by Hon'ble Mahesh Chandra Tripathi, J.)

1. Heard Shri H.P. Shahi, who appears for the petitioner and Mr. Pankaj Rai, learned Additional Chief Standing Counsel for the respondents.

2. By means of the present writ petition the petitioner has prayed for quashing of the impugned termination

order dated 9.3.2004(Annexure No.1 to the writ petition) passed by Senior Superintendent of Police, Kanpur Nagar as well as order dated 10.12.2007 (Annexure No.2 to the writ petition) passed by the State Government.

3. The brief facts giving rise to the present writ petition are as follows. :-

4. The petitioner was initially appointed as Constable in the year 1978 and, thereafter, he was promoted to the post of Head Constable. Due to absence from the duty since 28.9.2002 he had been served upon charge sheet on 3.3.2003. Subsequently, the petitioner moved an application seeking for voluntary retirement on 29.8.2003. Immediately on 19.9.2003 the Superintendent of Police had issued notices calling upon the petitioner to explain as to why he is seeking voluntary retirement. The notice dated 19.9.2003 is being brought on record as Annexure - 6 to the writ petition. In response to the notice dated 19.9.2003 the petitioner made application giving reasons for voluntary retirement on 24.9.2003. Thereafter, the impugned termination order dated 9.3.2004 had been passed. The reasons mentioned in the impugned termination order was only unauthorized absence of 181 days.

5. Aggrieved by the said termination order, the petitioner has filed an appeal under Rule 25 of Uttar Pradesh Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991. Thereafter, the State Government had rejected the claim of the petitioner and affirmed the termination order. Aggrieved by the said rejection order dated 10.12.07 the present writ petition is being filed.

6. The law relating to voluntary retirement has now been settled by the Apex Court as well as by this Court. Some of the Judgments are referred herein. :-

7. The Hon'ble Apex Court, while considering the voluntary retirement in B.J. Shelat Versus State of Gujarat and others (1978)2 Supreme Court Cases 202 especially considered the intention to withhold and also considered the duty of the State Government to communicate such intention to withhold. Relevant portion of the judgement are reproduced as hereunder. :-

"Mr. Patel next referred us to the meaning of the word "withhold" in Webster's Third New International Dictionary which is given as "hold back" and submitted that the permission should be deemed to (1) [1970] 2 S.CR. 657.

(2) A.T.R: 1966 S.C. 1313.

559 have been withheld if it is not communicated. We are not able to read the meaning of the word "withhold" as indicating that in the absence of a communication is must be understood as the permission having been withheld. It will be useful to refer to the analogous provision in the Fundamental Rules issued by the Government of India applicable to the Central Government servants. Fundamental Rule 56(a) provides that except as otherwise provided in this Rule, every Government servant shall retire from service on the afternoon of the last day of the month in which lie attains the age of fifty-eight years. Fundamental Rule 56 (j) is similar to Rule 161 (aa) (1) of the Bombay Civil Services Rules conferring an absolute

right on the appropriate authority to retire a Government servant by giving not less than three months notice. Under Fundamental Rule 56(k) the Government servant is entitled to retire from service after he has attained the age of fifty-five years by giving notice of not less than three months in writing to the appropriate authority on attaining the age specified. But proviso (b) to sub-rule 56(k) states that it is open to the appropriate authority to withhold permission to a Government servant under suspension who seeks to retire under this clause. Thus under the fundamental Rules issued by the Government of India also the right of the Government servant to retire is not an absolute right but is subject to the proviso wherever the appropriate authority may withhold permission to a Government servant under suspension. On a consideration of Rule 161(2) (ii) and the proviso we are satisfied that it is incumbent on the Government to communicate to the Government servant its decision to withhold permission to retire on one of the ground specified in the proviso."

8. The Hon'ble Apex Court in the case of Dinesh Chandra Sangma Vs. State of Assam and others in AIR 1978 Supreme Court 17 has also considered the same issue. The relevant paragraphs are reproduced hereunder. :-

"7.Before we proceed further we may read F. R. 56 as amended "F.R.56(a) The date of compulsory retirement of a Government servant is the date on which he attains the age of 55 years. He may be retained in service after this age with sanction of the State Government on public grounds which must be recorded in writing, and proposals for the retention of a Government servant in service after this age should not be made except in very special circumstances.

(b) Notwithstanding anything contained in these rules the appropriate authority may, if he 'is of the opinion that it is in the public interest to do so, retire Govt. servant by giving him notice of not less than three months in writing or three months' pay and allowances in lieu of such notice, after he has attained fifty years of age or has completed 25 years of service, whichever is earlier.

(c) Any Govt. servant may, by giving notice of not less than three months in writing to the appropriate authority, retire from service after he has attained the age of fifty years or has completed 25 years of service, whichever is earlier".

It is clear from the above that under F. R. 56(b) the Government may retire a Government servant in the public interest by giving him three months: notice in writing or three months pay and allowance,; in lieu thereof after he has attained the age of fifty years or has completed 25 years of service, whichever is earlier.

8. As is well known Government servants hold office during the pleasure of the President or the Governor, as the case may be, under Article 310 of. the Constitution. However, the pleasure doctrine under Article 3 1 0 is limited by Article 3 1 1 (2). It is- clear that the services of a permanent Government servant cannot be terminated except in accordance with the rules made under Article 309 subject to Article 311(2) of the Constitution and the Fundamental Rights. it is also well-settled that even a temporary Government servant or a

probationer cannot be dismissed or removed or reduced in rank except in accordance with Article 311(2). The above doctrine of pleasure is invoked by the Government in the public interest after a Government servant attains the age of 50 years or has completed 25 years of service. This is constitutionally permissible as compulsory termination of service under F.R. 56(b) does not amount to removal or dismissal. by way of punishment. While the Government reserves its right to compulsorily retire a Government servant, even against his wish, there is a corresponding right of the Government servant under F. R. 56(c) 611 to voluntarily retire from service by giving the Government three months' notice in writing. There is no question of acceptance of the request for voluntary retirement by the Government when the Government servant exercises his right 'under F. R. 56(c). Mr. Niren De is therefore right in conceding this position.

9. We have, therefore, next to turn to rule 119 of the DISI Rules which is the sheet-anchor of the respondents. Rule 119, so far as material, reads as follows :-

"(3) Any person engaged in any employment or class of employment to which this rule applies, who-

(a) x xx

(b) Without reasonable excuse abandons any such employment or absents himself from work, or

(c) x x x shall be deemed to have contravened this rule ".

"Explanation 2. A person abandons his employment within the meaning of cl. (b), who, notwithstanding that it is an express or implied term of this contract of employment that he may terminate his employment on giving notice to his employer of his intention to do so, so terminates his employment without the previous consent of his employer Clause (5) of rule 1 19 may be read "If any person contravenes any provisions of this rule or of any order made under this rule, he shall be punishable, without prejudice to any action which may be taken against him under any other law for the time being in force, with imprisonment for a term which may extend to one year, or with fine or with both".

13. F.R. 56 is one of the statutory rules which binds the Government as well as the Government servant. The condition of service which is envisaged in rule 56(c) giving an option in absolute terms to a Government servant to voluntarily retire with three months' previous notice after he reaches 50 years of age or has completed 25 years of service cannot therefore be equated with a contract of employment as envisaged in Explanation 2 to rule 119.

14.The field occupied by F. R. 56 is left untrammelled by Explanation to rule 1 19. The words "his contract of employment" in Explanation are clinching on the point.

15. It is a cardinal rule of construction that no words should be considered redundant or surplus in interpreting the provisions of a statute or a rule. Explanation 2 does not say an express or implied term of employment, but refers to "an express or implied term of his contract of, employment". If the language in Explanation 2 were different, namely, an express or implied term of employment, instead of "con tract of employment", the position would have been different, Explanation 2 in rule. 119, albeit, a penal rule, takes care to use the

words "contract of employment" and necessarily excludes the two categories (1) [1968] (1) S.C.R. 185.

(2) Salmond and Williams of Contracts, 2nd edition p. 12.

614 of employment, namely, the one under the Central Government and the other under the State Government. Explanation 2 only takes in its sweep the third category of employment where the relationship between the employer and the employee is one governed by a contract of employment Since F. R. 56 is a statutory condition of service, which operates in law, without reference to a contract of employment, there is nothing inconsistent between rule 119 and F.R. 56.

16. The appellant has voluntarily retired by three months' notice, not in accordance with an express or implied term of his contract of employment, but in pursuance of a statutory rule. Explanation 2 to rule 119 makes no mention of retirement under a statutory rule and hence the same is clearly out of the way. The submission that rule 119 is super-imposed on F.R. 56 has no force in this case.

17.The High Court committed an error on law in holding that consent of the Government was necessary to give legal effect to the voluntary retirement of the appellant under F.R. 56

(c). Since the conditions of F.R. 56(c) are fulfilled in the instant case, the appellant must be hold to have lawfully retired as notified by him with effect from 2nd August, 1976.

18. In this view of the matter the permission accorded by the Government to retire and its subsequent order of July 28, 1976, revoking the permission, are ineffectual in law and are therefore null and void. Since the appellant voluntarily retired in accordance with F.R. 56(c), the High Court's order of July 31, 1976, on the administrative side, transferring him to Dhubri is invalid and is hereby quashed. In the result the judgment and order of the High Court of March 4, 1977, are set aside and the Writ Petition is allowed. The appeal is allowed with costs in this Court as well as in the High Court.

S.R. Appeal allowed."

9. The Hon'ble High Court in the case of Surendra Kumar Agarwal Versus Engineer-in-Chief, U.P. P.W.D. Lucknow and another 2004(1) AWC 412 has also considered the U.P. Fundamental Rules-Rule 56 c&d in which the Court has held if the petitioner moves voluntary retirement on the said date when vigilance enquiry was pending against him, as per provisions of second proviso to Rule 56d the Government Servant is to be informed before 90 days that his notice has not been accepted.

10. In the present matter, learned counsel for the petitioner has placed reliance to the U.P. Fundamental Rules 56 c & d by which he has submitted that the authority concerned was duty bound to decide the application of the petitioner for voluntary retirement within a stipulated time i.e., within three months' time. The said rule had been flouted and his application for voluntary retirement had never been considered and finally the impugned termination order had been passed.

11. The Hon'ble High Court, while considering premature retirement in Surendra Narain Singh Vs. D.I.G. of

Police, Gorakhpur 1995(1)LBESR 871 has held that on expiry of a period of three months notice, the pre-mature retirement of the employee stood accepted, subsequent suspension and dismissal from service on ground of absence from leave is totally unacceptable and void. For ready reference the relevant paragraphs 7, 8 &9 are reproduced here under. :-

"7. In string of judicial precedents it has been held that request for premature retirement does not require a specific order accepting it by the concerned authority before an employee can be deemed to have retired from service. In other words, unless a particular Rule says otherwise, on the expiry of the period of the notice for premature retirement, the employee seeking it shall be deemed to have retired, unless, in the meanwhile, a specific order has been passed, to the contrary, whether on account of contemplated disciplinary proceedings or otherwise.

8. In a recent judement, the Supreme Court in Union of India V. Sayeed Muzaffar Mir, (1995) I UPLBEC 146 held, while interpreting Rule 56(c) of the Fundamental Rules, that where the Government servant seeks premature retirement, the same does not require any acceptance and comes into effect on the completion of the notice period. A similar view was expressed in two earlier judgments of the Supreme Court in Dinesh Chandra Sangama V. State of Assam, AIR 1978 SC 17 and B.J.. Shelat v. State of Gujarat, (1978) 2 SCC 202.

9. Applying the rationals as enunciated by the Supreme Court in the judicial precedents referred to, it cannot but follow that the request of the appellant for premature retirement must be deemed to have stood accepted on the expiry of the three months' period of notice from the date thereof, that is, February, 1989. This being so, the subsequent orders of suspension and of dismissal passed against the appellant have inevitably to be held to be void."

12. For ready reference Fundamental Rules 56 c&d are read as follows. :-

"4. Fundamental Rule 56 (c) and (d) read as follows:

"(c) Notwithstanding anything contained in clause (a) or clause (b) the appointing authority may, at any time by notice to any Government Servant (whether permanent or temporary), without assigning any reason, require him to retire after he attains the age of fifty years or such Government servant may by notice to the appointing authority voluntarily retire at any time after attaining the age of forty-five years or after he has completed qualifying service of twenty years.

(d) The period of such notice shall be three months:
provided:

(i) any such Government servant may by order of the appointing authority, without such notice or by a shorter notice, be retired forthwith at any time after attaining the age of fifty years, and on such retirement the Government servant shall be entitled to claim a sum equivalent to the amount of his pay plus allowances, if any, for the period of the notice, or as the case may be, for the period by which such notice falls short of three months, at

the same rates at which he was drawing immediately before his retirement.

(ii) It shall be open to the appointing authority to allow a Government servant to retire without any notice or by a shorter notice without requiring the Government servant to pay any penalty in lieu of notice:

Provided further that such notice given by the Government servant against whom a disciplinary proceeding is pending or contemplated, shall be effective only if it is accepted by the appointing authority, provided that in the case of a contemplated disciplinary proceeding the Government servant shall be informed before the expiry of his notice that it has not been accepted."

5. A perusal of the impugned order shows that the petitioner's application had been rejected on the ground that a vigilance enquiry is pending.

6. The submission of the learned counsel is that no order has been passed with reference to the second proviso to clause (d) of Fundamental Rule 56, within 90 days of the submission of the said application and hence in view of the second proviso to clause (d) the petitioner will be deemed to have voluntarily retired.

7. No doubt, it has not been specifically mentioned in the second proviso to clause (d) of Fundamental Rule 56 that if the prayer of the employee seeking voluntary retirement is not accepted within three months it will be deemed to have been accepted. However, in our opinion, since second proviso puts a time limit for intimating the applicant about the refusal of his prayer, this by implication means that if no such intimation is given within three months the prayer will be deemed to have been accepted.

8. In this connection we may refer to the series of decisions of the Supreme Court which have laid down that while ordinarily a probationer will be deemed to have continued on probation even after the period of probation has expired, if the maximum period of probation has been fixed in the service rules, then there will be deemed to have been implied confirmation on the expiry of that maximum period, vide Wasim Beg V. State of U.P.1998 (2)AWC 1342 (SC) 1998(3) SCC 321 (vide para 15) State of Punjab v. Dharam SIngh, AIR 1968 SC 1210; State of Gujarat v. Akhilesh Bhargava, (1987) 4 SCC 482 O.P. Maurya v. U.P. Cooperative Sugar Factories Federation, 1986 (Supp) SCC 95 and M.K. Agarwal v. Gurgaon Gramin Bank, 1987 (Supp) SCC 643 etc.

9.The analogy of these decisions applies in this case too. Here the maximum period within which the intimation of rejection of the application seeking voluntary retirement is fixed by the rules. Hence on the expiry of that period, if no intimation is sent by them, the application will be deemed to have been allowed.

10. No doubt, it has been stated in Annexure-22 to the writ petition that petitioner's application dated 4.12.2000 has not been received by the Chief Engineer and the Government. However, this statement does not appear to be correct because it has been positively asserted in paragraphs 16,19 and 27 of the writ petition that petitioner served a

notice dated 2.12.2000 on respondent No.2. It has been stated in paragraph 27 of the writ petition that the said application seeking voluntary retirement was received in the office of the Engineer-in-Chief and for this a receipt has also been received by the office (vide Annexure-15 to the writ petition). Since there is no counter affidavit these allegations are unrebutted and have to be accepted.

11. Since the petitioner was not informed before the expiry of the notice period (three months) that his application has not been accepted, it will be deemed to have been accepted and the petitioner would have also be deemed to have voluntarily retired on the expiry of three months.

12. For the reasons given above, the petition is allowed. The impugned orders are quashed. Respondents are directed to treat the petitioner as having voluntarily retired with effect from the expiry of 90 days from 4.12.2000."

13. Learned counsel for the petitioner has criticized the impugned order on two folds. Firstly the charge against the petition was only unauthorized absence for 181 days in different spells which he had adequately explained, but in spite of the categorical stand the same was not taken care of, and the impugned termination order was clearly disproportionate to the charges leveled against him. Secondly, once the petitioner had moved the application for voluntary retirement, the authority was duty bound to decide the said application as per Fundamental Rule 56 c&d and the Government Servant is to be informed before 90 days that his notice has not been accepted. He further submits that the said rule had been flouted and his application for voluntary retirement had never been considered, even though which was duly acknowledged by the authority.

14. However, Mr. Pankaj Rai, learned Additional Chief Standing Counsel has refuted the claim on the ground that the petitioner was habitual absconder from the duty without any proper leave. Due to absence from duty the departmental proceeding was initiated against him and in preliminary enquiry the petitioner was prima-facie found guilty. Thereafter, departmental proceeding under Rule 14(1) of the U.P. Police Officer of Subordinate Rank (Punishment & Appeal) Rules, 1991 was initiated against the petitioner and after conducting detailed enquiry vide order dated 09.03.2004 the services of the petitioner were terminated by the respondent no.2. Against the said termination order dated 09.03.2004 the petitioner filed an appeal before the State Government, which was rejected by the State Government vide order no.5409(1)/6-Po-1-2007 dated 10.12.2007.

15. Heard rival submission and perused the record.

16. A perusal of the impugned order shows that the petitioner's application for voluntary retirement was never been rejected in the matter and further the submission of the learned counsel for the petitioner is that no order has been passed, the same is apparant from the records.

17. In the present matter, admittedly, the petitioner has moved an application seeking voluntary retirement on 29.8.03. Immediately thereafter, the notices had been sent by the Superintendent of Police calling upon the petitioner as to explain

why he is seeking voluntary retirement. This clearly shows that the application was served upon the competent authority, the same is also reflected from paragraph 6 of the counter affidavit filed by State, the same is reproduced herein.:-

"6. That the contents of paragraph no.10 of the writ petition as stated are incorrect and as such are denied. In reply thereto it is stated that although the petitioner has moved an application on 01.01.2004 seeking voluntary retirement, but since departmental proceeding was pending against the petitioner he was not allowed pension."

18. It is admitted situation that in spite of the said acknowledgment, the same was never acted upon and his application for voluntarily retirement was never decided, and, it is apparent that the said application, had never been processed by the competent authority as per the U.P. Fundamental Rules.

19. Since the petitioner had never been informed before the expiry of the notice period (three months) since his application dated 19.9.03, it would will deemed to be accepted by the department and the petitioner would deemed to be voluntarily retired on the expiry of three months.

20. For the reasons given above, the impugned termination order dated 9.3.2004 and appellate order dated 10.12.2007 are unsustainable and, accordingly, quashed. The respondents are directed to treat the petitioner as having voluntarily retired with effect from the expiry of 90 days since 29.8.03.

21. With the aforesaid orders, this writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.09.2014

BEFORE
THE HON'BLE RAJAN ROY, J.

Civil Misc. Writ Petition No. 13505 of 2011

Sunder Singh **...Petitioner**
Versus
State of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:
Sri Anil Kumar Sharma

Counsel for the Respondents:
C.S.C.

U.P. Secondary Service Commission Rule 1998-Rule-14-Recruitment by promotion-on post of lecturer-vacancy advertised on 30.06.2003-petitioner being selected as L.T. Grade teacher joined on basis of mutual consent on 26.05.2006-in pursuance of recommendation of service selection board on 23.11.2004-contention that period of working on substantive post of L.T. Grade prior to selection by board be also taken account for considering eligibility for promotion held-when the post of lecturer-advertised-petitioner being not selected even on post of L.T. Grade-ineligible for consideration under rule 14-order passed by DIOS-justified-petition dismissed.

Held: Para-21
In view of the above, it is not possible to accept the contention of the learned counsel for the petitioner that services rendered from 30.10.1996 to 31.07.2004 should be counted for determining his eligibility for the promotion in question. The petitioner not having been appointed nor in service as per the Act of 1982, as on the date of occurrence of vacancy, i.e. 30.06.2003, he was not eligible for consideration. It being so, I do not find any error in the impugned order dated 04.02.2011. The claim of the petitioner is misconceived. The respondents have rightly

judged the eligibility of the petitioner with effect from the date of his substantive appointment under the Act of 1982 and the Rules made thereunder, i.e. w.e.f. 23.11.2004 and not from a prior date.

Case Law discussed:
2004 ALJ 3711; 2007 (3) UPLBEC 2489; 2008(10) ADJ 183; 2010(8) ADJ 325.

(Delivered by Hon'ble Rajan Roy, J.)

1. Heard Sri Anil Kumar Sharma, learned counsel for the petitioner.

2. By means of this writ petition, the petitioner is challenging the order dated 04.02.2011 passed by the Regional Selection Committee, Agra Region, Agra, by which his claim for promotion to the post of lecturer-Physics has been declined on the ground that on the date of occurrence of vacancy, he did not possess requisite five years qualifying service on the feeder post of Assistant Teacher, as is required under Rule 14 of the relevant Rules of 1998.

3. The petitioner claims to have been appointed as Assistant Teacher, L.T. Grade in Sri Parmeshwari Devi Dhanuka Saraswati Vidhya Mandir, Vrindawan, District Mathura, on a regular substantive post, on 30.10.1996, and worked as such till 31.07.2004, thereafter, the petitioner was selected by the U.P. Secondary Service Selection Board, Allahabad for appointment as Assistant Teacher, L.T. Grade on 23.11.2004 in pursuance to an advertisement issued by it in this regard under the provisions of the Uttar Pradesh Secondary Education [Services Selection Boards] Act, 1982 and the Rules of 1998 made thereunder and was allotted Sri Krishna Uchchatar Madhyamik Vidyalaya, Parlauni, Mathura. Thereafter, the petitioner was transferred on the basis of mutual consent between Sri Krishna Uchchatar Madhyamik Vidyalaya, Parlauni, Mathura and Sri Vrindawan Vidhyapeeth Inter College, Vrindavan, District Mathura and appointed as Assistant Teacher L.T. Grade. He joined in the latter college on 26.05.2006.

4. Prior to this, i.e. on 30.06.2003, the post in question, i.e. the post of lecturer-Physics in Sri Krishna Uchchatar Madhyamik Vidyalaya, Parlauni, Mathura fell vacant on the retirement of the then incumbent Sri Chandra Prakash Dwivedi. The petitioner staked his claim for being eligible for consideration for promotion to the aforesaid post. The claim of the petitioner was not acceded by the authorities, who sent a requisition to the Commission for direct recruitment, as, according to them, no eligible Assistant Teacher L.T. Grade was available for promotion.

5. Being aggrieved, the petitioner filed a writ petition before this court bearing Writ Petition No.56559 of 2009, wherein, an interim order was passed that the selection held by the Commission on the post in question shall be subject to the further orders passed by the court and also that it shall be open to the petitioner to get his promotion matter disposed of by the competent authority.

6. The petitioner filed a writ petition bearing Writ-A No.1674 of 2011 challenging the select list prepared by the Commission. The said writ petition was disposed of inter alia with the observations that this second writ petition on the same cause of action would not lie, but so far as the promotion of the petitioner on the post of lecturer in Physics is concerned, the Regional Director of Education, Agra Region, Agra

may take a final decision in pursuance to the aforesaid order i.e. the order dated 28.10.2009 passed in Writ Petition No.56559 of 2009.

7. In the meantime, one Raghuwesh Kumar Sharma was selected by the Commission for direct appointment on the post in question and in pursuance thereof, he joined on 30.03.2011.

8. Thereafter, the claim of the petitioner for promotion was considered by the Regional Selection Committee and the same was rejected vide impugned order dated 04.02.2011 on the ground that the services rendered by him prior to his appointment on 23.11.2004 under the Act of 1982 and Rules made thereunder, i.e. the service rendered in Sri Parmeshwari Devi Dhanuka Saraswati Vidhya Mandir, Vrindawan, District Mathura could not be counted for computing the requisite five years regular service under Rule 14, therefore, he was not eligible for consideration for promotion.

9. The submission of the learned counsel for the petitioner is that as the petitioner was employed on regular basis in the earlier institution Sri Parmeshwari Devi Dhanuka Saraswati Vidhya Mandir, Vrindawan, District Mathura w.e.f. 30.10.1996 till 31.07.2004, therefore, the said regular service rendered by him as Assistant Teacher L.T. Grade should be counted under Rule 14 of the Rules of 1998 for the purposes of determining his eligibility for consideration for promotion to the post in question. In this regard, he also relied upon a certificate issued by his erstwhile employer/ institution dated 18.07.2007. He relies upon a judgment of this court dated 15.07.2010 passed in Writ-A No.2842 of 2010, the judgment of the Supreme Court dated 20.02.2002 in Civil Appeal No.961-962 of 1999 and the judgment of the Supreme Court dated 28.08.2002 passed in Contempt Petition No.372 of 2002 in Civil Appeal No.962 of 1999.

10. The further submission of the learned counsel is that in view of the aforesaid, the requisition sent by the respondents to the Commission, for direct recruitment on the post in question, and the consequent selection, as also, the appointment and joining of Sri Raghuwesh Kumar Sharma, is not sustainable in law and the same is already under challenge in the earlier writ petition filed by the petitioner.

11. For the aforesaid reasons, the impugned order dated 04.02.2011 is liable to be quashed and the petitioner is entitled to be considered for promotion.

12. Except the above, no other argument was advanced by the learned counsel for the petitioner nor any other authority was cited by him.

13. The other writ petitions filed by the petitioner are not before me today, however, if the claim of the petitioner for promotion, as raised in this writ petition is decided, the consequences will follow. If the claim is accepted, then the direct recruit may have to go and if it is not accepted, the direct recruit shall be unaffected.

14. Before proceeding to deal with the submissions of the learned counsel for the petitioner, it is relevant to mention that promotion on the post of Assistant Teacher L.T. Grade as also lecturer grade is to be made as per the provisions

contained in the Uttar Pradesh Secondary Education [Services Selection Boards] Act, 1982 and the U.P. Secondary Secondary Education Services Commission Rules, 1998.

15. Rule 14 of the Rules of 1998 reads as under:

"14. Procedure for recruitment by promotion:- (1) Where any vacancy is to be filled by promotion all teaches working in trained graduates grade or certificate of training grade, if any, who possess the qualification prescribed for the post and have completed five years continuous regular service as such on the first day of the year of recruitment shall be considered for promotion to the lecturers grade or the trained graduates grade, as the case may be , without their having applied for the same.

Note:- For the purposes of this sub-rule, regular service rendered in any other recognized institution shall be counted for eligibility unless interrupted by removal dismissal or reduction to a lower post.

(2) The criterion for promotion shall be seniority subject to the rejection of unfit.

(3) The Management shall prepare a list of teachers referred to in sub-rule (1), and forward it to the Inspector with a copy of seniority list, service records, including the character rolls, and a statement in the pro forma given in Appendix-A

(4) Within three weeks of the receipt of the list from the management under sub-rule (3), the Inspector shall verify the facts from the record of his office and forward the list to the Joint Director.

(5) The Joint Director shall consider the cases of the candidates on the basis of the records referred to in sub-rule (3) and may call for such additional information as it may consider necessary. The Joint Director shall place the records before the Selection Committee referred to in sub-section (1) of Section 12 and after the Committee's recommendation, shall forward the panel of selected candidates within one month to the Inspector with a copy thereof to the Management.

(6) With ten days of the receipt of the panel from the Joint Director under sub-rule(5) the Inspector shall send the name of the selected candidates to the Management of the institution which has notified the vacancy and the Management shall accordingly on authorization under its resolution issue the appointment order in the proforma given in Appendix "F' to such candidate."

16. Rule 14(1) and the note thereto makes it evident that in order to be ineligible for consideration for promotion to the promotional post of lecturer, the candidate/ Assistant Teacher L.T. Grade must possess the qualifications prescribed for the post and should have completed five years of continuance service, as such, i.e. as Assistant Teacher L.T. Grade, on the first day of the year of recruitment. It is now settled that the eligibility of a candidate for promotion under Rule 14 is to be seen as on the date of occurrence of vacancy vide Subhash Prasad Vs. Regional Selection Committee, Gorakhpur and others, 2004 ALJ 3711, which has been followed in various decisions such as Avnish Singh Vs. State

of U.P. and others, 2007 (3) UPLBEC 2489, Vijay Kant Singh Vs. Joint Director of Education, 2008 (10) ADJ 183 (DB) and Km. Sweta Garg Vs. State of U.P. and others, 2010 (8) ADJ 325.

17. The Note to Rule 14(1) further provides that regular service rendered in other recognised institution shall be counted unless interrupted by removal dismissal or revision to a lesser post. The words 'recognised institution' have to be understood in the light of the definition of 'Institution' contained in Section 2(c) of the Act of 1982 as meaning 'an Intermediate College or a Higher Secondary School or a High School under the Intermediate Education Act, 1921, and includes institution maintained by a local authority but does not include an institution maintained by the State Government. The term 'Recognition' as defined in Section 2(d) of the Intermediate Education Act, 1921 means recognition for for the purpose of preparing candidates for admission in the Boards Examination. 'Board' is defined under Section 2(a) of the Act, 1921 as the Board of High School and Intermediate Education which in this case is Madhyamik Shiksha Parishad. Sri Parmeshwari Devi Dhanuka Saraswati Vidhya Mandir, Vrindawan, District Mathura was recognised by C.B.S.E. It was not recognised by the 'Board' under the Intermediate Education Act, 1921 nor was it an institution as per Section 2(e) of the Act, 1982, therefore services rendered under it could not be counted for purposes of Rule 14.

18. The term 'regular service' has not been defined in Rule 14, however, Rule 2(d) of the said Rules, 1998 defines substantive appointment to mean as as under:

"(d) 'Substantive appointment' means an appointment, not being an ad hoc appointment on the post of a teacher made in accordance with the provisions in the Act and the rules made thereunder and includes the appointments regularised under Section 33-A or 33-B or 33-C."

19. The definition of substantive appointment excludes ad hoc appointment and means an appointment, in accordance with the provisions in the Act and the Rules made thereunder and includes the appointments regularised under Section 33-A or 33-B of the Act. The terms 'Act and Rules', referred therein, mean the Uttar Pradesh Secondary Education [Services Selection Boards] Act, 1982 and the Rules of 1998 made thereunder in view of Rule 2(a) therein. The use of the word 'regularisation and exclusion of Ad Hoc appointment' therein clearly indicates that substantive appointment in fact refers to regular appointment.

20. Indisputably, the appointment and service prior to 23.11.2004 was not in accordance with the Rules of 1998 made thereunder. The substantive appointment of the petitioner as Assistant Teacher L.T. Grade as per the Act of 1982 and the Rules of 1998 was made only on 23.11.2004 and thereafter he rendered regular service in Sri Krishna Uchchatar Madhyamik Vidyalaya, Parlauni, Mathura and then after transfer, in Sri Vrindawan Vidhyapeeth Inter College, Vrindavan, District Mathura and it is only these services, which could be counted for purposes of Rule 14. As the legal position is that the eligibility condition should be satisfied on the date of occurrence of vacancy and in this case the vacancy occurred on 30.06.2003, i.e. prior to petitioner's appointment on 23.11.2004, he was clearly ineligible for consideration for this vacancy.

21. In view of the above, it is not possible to accept the contention of the learned counsel for the petitioner that services rendered from 30.10.1996 to 31.07.2004 should be counted for determining his eligibility for the promotion in question. The petitioner not having been appointed nor in service as per the Act of 1982, as on the date of occurrence of vacancy, i.e. 30.06.2003, he was not eligible for consideration. It being so, I do not find any error in the impugned order dated 04.02.2011. The claim of the petitioner is misconceived. The respondents have rightly judged the eligibility of the petitioner with effect from the date of his substantive appointment under the Act of 1982 and the Rules made thereunder, i.e. w.e.f. 23.11.2004 and not from a prior date.

22. The judgments relied upon by the petitioner, copies of which are annexed with the writ petition, relate to direct recruitment and are not based on the provisions of Rule 14 read with Rule 2(c) of the Rules of 1998 , therefore, the same have no application in the facts and circumstances of the case as the entitlement/ eligibility of the petitioner for promotion has to be considered, in this case, in the light of the aforesaid provisions and not independent of them.

23. The writ petition is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.08.2014

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

Civil Misc. Writ Petition No. 23055 of 2013

Paresh Yadav & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Bhagwati Prasad Singh, Sri Vivek Srivastava
Sri Vivek Kumar Singh

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-read with Financial Hand Book Chapter VI Para 49 (i)-entitlement of salary-working on higher post-unless appointed by competent authority-either temporary or officiating capacity-not entitled for salary of higher post.

Held: Para-20
The referring order makes a reference to the proviso to Para 49 (iii) and one of the issues which was raised by the referring Bench was whether this would qualify only clause (iii). Prima facie, it is evident that several of the sub-clauses of Para 49 have separate provisos. But that, in our view, does not carry the case of the petitioners any further for the simple reason that for a claim to fall within the purview of Para 49 (i), as suggested by the petitioners, there has to be a formal appointment of a government servant for holding full charge of the duties of a higher post. In the present case, as we have indicated, there was no such appointment by the appointing authority as contemplated in Rule 19 (4) of the 1990 Rules. A mere endorsement by the Transport Commissioner who, it must be emphasized at the cost of repetition, was not the appointing authority, would not entitle the petitioners to the higher salary attached to the substantive post of ARTO merely because the petitioners discharged the duties of that post.

(B) Doctrine of 'merger' explained-

The answer to this issue would have to be closely analysed, based on the doctrine of merger. The doctrine of merger postulates that when a decree or order of an inferior court or tribunal is subject to a remedy before a superior forum, the disposal of the lis by the superior forum - whether the decree or order in appeal is set aside, modified or confirmed - renders the decree or order of the superior court final and binding. The decree or order which was passed by the original court, tribunal or authority merges in the final and binding decree and order of the superior forum.
This is, indeed, a well settled principle of law. Once a decision of the High Court is set aside by the Supreme Court, the decision of the High Court ceases to exist and it is not open to urge that a particular submission was not considered by the Supreme Court. The issue in this case is, however, distinct. The issue in the present case is, whether on a plain reading of the judgment of the Supreme Court dated 4 September 2013, can it be held that the statement of law or the reasons which were contained in the judgment of the Division Bench of this Court in Subhash Chandra Kushwaha had merged in the decision of the Supreme Court. For the reasons which we have indicated, the answer is in the negative.

Case Law discussed:
Writ-A No. 51469 of 2012 and Writ-A No. 55030 of 2012; W.P. No. 1448(S/B) of 2002; S.B. No. 563 of 2012; Petition for special leave to Appeal (Civil) No. 25574 of 2013; 1991 Supp. (2) SCC 733; AIR 1993 SC 2273; 2007 (4) AWC 3636; AIR 5000 SC 2587; (2002) 8 SCC 361; 85 LW 760; AIR 1958 SC 86; AIR 1967 SC 681; (2010) 13 SCC 158.

(Delivered by Hon'ble D.Y. Chandrachud, C.J.)

1. In the writ proceedings out of which this reference to the Full Bench arises, the seven petitioners seek a mandamus directing the State and its officers to allow to them the scale of pay admissible to Assistant Regional Transport Officers for the period during which they discharged the duties of Assistant Regional Transport Officers, prior to their substantive appointment to the post.

2. The case of the petitioners is that they were regularly promoted on the post of Assistant Regional Transport Officer1 in 2003 from the lower post. On 18 July 2003, an order was issued by the Principal Secretary in the Transport Department in the name of the Governor, promoting the petitioners on the post of ARTO. They claim that between 1996 to 2003, they were required to discharge the duties of the post of ARTO. Hence, for instance, by an order dated 13 June 1997, a direction was issued by the Commissioner of Transport, requiring some of the petitioners, who were working as Regional Inspectors (Technical) to discharge the duties of ARTO, though in the substantive post of Regional Inspector (Technical). Relying on the provisions of Para 49(i) of Chapter VI of the Financial Handbook, Volume II (Parts II to IV), the petitioners claim to be entitled to the payment of salary of the higher post, while holding a dual charge. Two earlier writ petitions2 were filed under Article 226 of the Constitution, on the ground that the request of the petitioners for the grant of salary in the higher post of ARTO for the period during which they were holding two posts has not been considered. By orders dated 4 October 2012 and 17 October, 2012, the State Government was directed to examine the grievance of the petitioners individually on the basis of a decision rendered by this Court at Lucknow in Subhash Chandra Kushwaha Vs. The State of U.P. & Ors.3. The State Government, by an order dated 16 January 2013, rejected the request of

the petitioners. The State Government held that the claim of the petitioners for the payment of salary in the higher post, for having discharged the duties of two posts is not covered by Para 49 of Chapter VI of the Financial Handbook, Volume II (Parts II to IV), on the ground that they had not initially been appointed to a higher post but were only called upon to look after the work of a higher post. The State was of the view that the petitioners did not raise any grievance in regard to the payment of their salary during the relevant period and, hence, it was too late in the day to accept their requests for the payment of salary of the post of ARTO for the period from 1996 to 2003, when they held charge of the post.

3. The foundation of the case of the petitioners is two decisions of the Division Benches of the Court at Lucknow in Prem Chandra Srivastava Vs. State of U.P. & Ors.4 which relied upon an earlier decision in Subhash Chandra Kushwaha (supra). The decision in Prem Chand Srivastava was carried in appeal to the Supreme Court and resulted in an order dated 4 September 2013 to which, we will shortly advert.

4. In Subhash Chandra Kushwaha, this Court dealt with the grievance of a person who was working as a Passenger Tax Officer in the Transport Department and was directed to officiate on the post of ARTO since 1996 until 1999 when he was substantively promoted to the post. The claim was for the payment of salary for the period 1996 to 1999 in the higher post of ARTO. The Division Bench after adverting to Para 49 of Chapter VI of the Financial Handbook, Volume II (Parts II to IV) held:

"From the plain reading of the provisions contained in Para 49 of Chapter VI of Financial Handbook Vol. II (Parts II to IV), it is evident that a government servant who is formally appointed to hold full charge of the duties of a higher post in the same office as his own and in the same cadre/line of promotion, in addition to his ordinary duties, shall be paid the pay admissible to him, if he was appointed to officiate in the higher post, unless his officiating pay is reduced under Rule 35 but no additional pay shall be allowed for performing the duties of a lower post. The provisions contained in Rule 49 of the Financial Handbook seem to provide that a government servant who officiates on the higher post shall be entitled for payment of pay-scale admissible to such higher post. ..."

5. Thereupon, the conclusion which was arrived at, was as follows:

"Right to livelihood is fundamental right, protected by Article 21 of the Constitution of India, vide 1991 Suppl. (1) SCC 600, Delhi Transport Corporation versus D.T.C. Mazdoor Congress. Once the petitioner was permitted to discharge duty on the post of A.R.T.O. for reasonably long period of time, the respondents were not justified in not making payment of pay-scale admissible to the said cadre. Admittedly, there is a difference between the pay-scale of the Passenger Tax Officer and the Assistant Regional Transport Officer. In view of the above, we are of the opinion that the petitioner is entitled to claim higher pay-scale of the post of A.R.T.O. for the period he had discharged duty of the said post."

6. A similar issue was considered by a Division Bench of this Court at

Lucknow in the case of Prem Chandra Srivastava (supra), where a person who was employed on the post of Passenger Tax Superintendent claimed the salary of the post of ARTO for the period between 2003 and 2008 when he was called upon to discharge the duties of the post of ARTO. The Division Bench followed the earlier decision in Subhash Chandra Kushwaha (supra) and held that:

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

7. In addition, the Division Bench held that since eight persons who were working on the post of Passenger Tax Officers and who had officiated as ARTOs had been given the salary of the post of ARTO for the period of officiation, it was not open to the State to discriminate against the petitioner. A mandamus was issued to the State directing it to pay the difference of salary and arrears for the period when the petitioner discharged the duties and officiated on the post of ARTO together with costs which were quantified at Rs. 2 lac, of which an amount of Rs. 1 lac was to be withdrawn by the petitioner and the balance was to be paid over to the Mediation Centre of the High Court at Lucknow.

8. The decision of the Division Bench in Prem Chandra Srivastava was challenged by the State of Uttar Pradesh by filing a Special Leave Petition5 before the Supreme Court. On 4 September 2013, the Supreme Court disposed of the proceedings with the following order:

"Taken on Board.

Leave granted.

Upon hearing the learned counsel for the appellants and looking to the facts of the case, in our opinion, the cost awarded by the High Court is quite excessive. We reduce the amount of Rs. 2 lacs to Rs. 10,000/-, which shall be paid to the present respondent within two months from today.

Subject to above modification, the appeal is dismissed with no order as to costs."

9. When the writ proceedings in the present case, came up for hearing before the Division Bench, the learned Judges found themselves unable to agree with the principle enunciated in both the decisions in Subhash Chandra Kushwaha and Prem Chandra Srivastava. The Division Bench was of the view that the earlier decisions of the Court have failed to correctly interpret the provisions of Para 49 of Chapter VI of the Financial Handbook, Volume II (Parts II to IV). Accordingly, the following questions of law have been referred for decision6:

(a) Whether the law laid down by the Division Bench of the High Court in the case of Prem Chandra Srivastava which directs that merely on holding additional charge of an additional post, the incumbent would become entitled to salary of higher post even in absence of sanction from the finance department, lays down the correct law or not;

(b) What is the effect of the order of the Supreme Court dated 4 September 2013 dismissing the appeal filed by the

State of U.P. against the judgment of the Division Bench of this Court at Lucknow in the case of Prem Chandra Srivastava (supra); and

(c) Whether proviso to Para 49 of Chapter VI of Financial Handbook, Vol. II (Parts II to IV) which requires the concurrence of the finance department, if officiating appointment is to be continued beyond 90 days would be applicable in respect of appointments covered by Clauses (i) & (ii) of Para 49 or the said proviso would be applicable to appointments under Clause (iii) only.

10. On behalf of the petitioners, the following submissions have been urged:

(1) The post of Passenger Tax Officer/Goods Tax Officer and of Regional Inspector is in the same cadre in the Transport Department of the State of U.P. The next promotional post is that of ARTO. The petitioners were holding the permanent post of Regional Inspectors at different places and were directed to hold charge of the post of ARTO in addition to their original post on the place of posting as Regional Inspector. The first petitioner officiated on the post of ARTO from 31 July 1996 to 17 July 2003, petitioner no. 2 from 14 May 1998 to 17 July 2003, petitioner no.3 from 31 July 1996 to 17 July 2003, petitioner no. 4 from 14 May 1998 to 27 May 1999, and petitioner nos. 5 to 7 from 16 June 1997 to 17 July 2003 and thereafter all the petitioners were regularized/appointed substantively on the post of ARTO without any break with the approval of the Uttar Pradesh Public Service Commission7;

(2) Five other officers who were officiating on the post of ARTO withdrew the salary of the higher post on their own signatures being Drawing and Disbursing Officers. The government issued recovery notices and thereafter they had filed a contempt petition following which the government cancelled the recovery notices and accepted their claim;

(3) The decisions of two Division Benches of this Court at Lucknow in the case of Subhash Chandra Kushwaha and Prem Chandra Srivastava allowed the claim of salary in the higher post of ARTO for the period during which the employees in a lower substantive post had discharged the duties of the post of ARTO. The Supreme Court in a special leave petition which arose from the decision in Prem Chandra Srivastava granted leave and dismissed the appeal, save and except for a modification of the quantum of costs from Rs. 2 lac to Rs. 10,000/-;

(4) The petitioners would be entitled to the benefit of the decisions in Subhash Chandra Kushwaha and Prem Chandra Srivastava. The reference has been made in the present case by the Division Bench only because the Court was in doubt whether the proviso to Para 49 (iii) of Chapter VI of the Financial Handbook, Volume II (Parts II to IV) is applicable to Para 49(i). However, according to the petitioners, government servants covered by Para 49 (i) are entitled to the salary of the higher post on which they are officiating without the concurrence of the Finance Department.

(5) Once the Supreme Court had granted leave to appeal and dismissed the appeal filed by the State against the decision of the Division Bench in Prem Chandra Srivastava, the judgment of the

Division Bench has merged in the order of the Supreme Court. Consequently, it would not be open to the State Government to contend that the decision of the Division Bench at Lucknow Bench did not consider any aspect of the matter since the decision of the Supreme Court would bind the State; and

(6) The petitioners would be governed by Para 49(i) of Chapter VI of the Financial Handbook and not by Para 49 (iii). Moreover, it is not open to the State to discriminate against the petitioners.

11. On the other hand, the following submissions have been made on behalf of the State:

(A) The doctrine of merger has a limited application. It is not a doctrine of rigid and universal application. The application of the doctrine depends on the nature of the appellate or revisional order in each case and the scope of the statutory provisions conferring the appellate or revisional jurisdiction;

(B) Even if the doctrine of merger is applied, the order of the Supreme Court dated 4 September 2013 granting leave and dismissing the appeal subject to a reduction of the costs awarded by the High Court from Rs. 2 lac to Rs. 10,000/-, does not make any declaration of law within the meaning of Article 141 of the Constitution either expressly or by necessary implication. It cannot be said that the same is binding as a precedent and is not open to reconsideration by a larger Bench of the High Court; and

(C) A decision which is not expressed and is not founded on reasons nor proceeds on a consideration of the issue cannot be deemed to be law declared to have a binding effect as is contemplated by Article 141 of the Constitution. Uniformity and consistency are core of judicial discipline. But that which escapes in the judgment without any occasion is not the ratio decidendi.

12. The rival submissions now fall for consideration.

13. At the outset, it would be necessary to note the existence of two separate sets of rules framed under Article 309 of the Constitution:

(i) The Uttar Pradesh Transport (Subordinate) Technical Service Rules, 19808 govern the services of persons appointed as Technical Inspector/Regional Inspector (Technical) and Assistant Regional Inspector (Technical). The appointing authority as defined in Rule 3(a) is the Transport Commissioner.; and

(ii) The Uttar Pradesh Transport Service Rules, 19909 govern the services of persons appointed as Assistant Regional Transport Officer, Regional Transport Officer, Deputy Transport Officer and Additional Transport Commissioner. The salient features of the 1990 Rules are that:

(a) The appointing authority is the Governor [Rule 3(a)];

(b) The procedure for appointment is provided in Rules 15 and 16;

(c) Academic qualifications are provided in Rule 8;

(d) Sources of recruitment are provided in Rule 5;

(e) Appointment is provided in Rule 19.

14. The source of recruitment to the post of ARTO is under Rule 5(1) which provides for 50 percent by promotion and 50 percent by direct recruitment by the Commission on the basis of a combined State Services' Examination. The promotional avenue to 50 percent of the posts is through the Commission from amongst permanent Passenger/Goods Tax Officers and Technical Inspectors/Regional Inspectors (Technical) who have put in at least five years' continuous service. Rule 15 provides for the procedure which is to be followed by the Commission in carrying out direct recruitment to the post of ARTO. Rule 16 lays down the procedure for making recruitment by promotion to the post of ARTO and stipulates as follows:

"16. Procedure for recruitment by promotion to the post of Assistant Regional Transport Officer.- Recruitment by promotion shall be made on the basis of merit in accordance with the Uttar Pradesh Promotion by selection in consultation with Public Service Commission (Procedure) Rules , 1970 as amended from time to time."

15. Rules 17 deals with the procedure for recruitment by promotion to the posts other than ARTOs. Rule 19 states that the appointing authority shall make appointments by taking the names of candidates in the order in which they stand in the lists prepared under Rules 15, 16 or 17, as the case may be.

16. Significantly, under Rule 19, it has been stipulated that even appointments in a temporary or officiating capacity have to be made from the lists mentioned in Rule 19(1). If no candidate borne on these lists is available, the appointing authority may make appointments in such vacancy from amongst persons eligible for appointment. Such an appointment shall not last for a period exceeding one year or beyond the next selection under the rules, whichever is earlier. Rule 19 (4) reads as follows:

"(4) The appointing authority may make appointments in temporary or officiating capacity also from the list mentioned in sub-rule (1). If no candidate borne on these lists is available, he may make appointments in such vacancy from amongst persons eligible for appointment under these rules. Such appointments shall not last for a period exceeding one year or beyond the next selection under these rules, whichever be earlier, and where the post is within the purview of the Commission, the provisions of Regulation 5(a) of the U.P. Public Service Commission (Limitation of Function) Regulations 1954 shall apply."

Rule 23 deals with scales of pay.

17. The petitioners were appointed as Regional Inspectors (Technical). The substantive post which they held at the material time was admittedly not that of an ARTO. They were transferred as Regional Inspector (Technical) by the Transport Commissioner. But in the copy which was endorsed to the petitioners, the Transport Commissioner mentioned that they shall discharge the duties of ARTOs. The Transport Commissioner, it must be noted, was not the appointing authority to the post of ARTO. The services of Regional Inspectors (Technical) on one hand and of ARTOs on the other are

governed by different set of rules. ARTOs are governed by the 1990 Rules and their appointing authority is the Governor. Under Rule 19 of the 1990 Rules, it is only the appointing authority which can make even a temporary or officiating appointment. The petitioners were not substantively appointed to the post of ARTO for the period during which they claim their salary. They were not appointed even in an officiating or temporary capacity by the appointing authority to the post of ARTO in accordance with the provisions of Rule 19.

18. Now, it is in this background that it would be necessary to advert to the provisions of Para 49 of Chapter VI of the Financial Handbook, Volume II (Parts II to IV). Para 49 reads as follows:

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

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

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

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

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

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

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

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

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

19. Para 49 provides that the Government may appoint a government servant already holding a post in a substantive or officiating capacity to officiate, as a temporary measure, in one or more of other independent posts at one time. Para 49 (i) deals with a situation where a government servant is formally appointed to hold full charge of the duties of a higher post in the same office as his own and in the same cadre or line of promotion, in addition to his ordinary duties. The important aspect to be emphasised in Para 49 (i) is the expression 'formally appointed'. In other words, there has to be a formal appointment of the government servant to hold full charge of the duties of a higher post. The formal appointment as contemplated by Para 49 (i) is obviously an appointment by the appointing authority which alone can issue an order of formal appointment to hold full charge of the duties of a higher post. In the present case, as the facts before the Court would disclose, the appointing authority under the 1990 Rules is the Governor. Rule 19 (4) contemplates expressly that it is the appointing authority who may make appointments in a temporary or officiating capacity. Even these appointments have to be from the lists mentioned in Rule 19 (1) and if no such person borne on those lists is available, appointments in such vacancies have to be made from amongst the persons eligible for appointment under the rules. The appointment cannot exceed a period of one year or till the next selection, whichever is earlier. In the present case, there was no appointment by the appointing authority as required by Rule 19 (4) in a temporary or officiating capacity. Para 49 (i) has clearly no application. As a matter of fact, Para 49 (iv) provides that no additional pay would be admissible to a government servant who is appointed to hold current charge of the routine duties of another post or posts irrespective of the duration of additional charge.

20. The referring order makes a reference to the proviso to Para 49 (iii) and one of the issues which was raised by the referring Bench was whether this would qualify only clause (iii). Prima facie, it is evident that several of the sub-clauses of Para 49 have separate provisos. But that, in our view, does not carry the case of the petitioners any further for the simple reason that for a claim to fall within the purview of Para 49 (i), as suggested by the petitioners, there has to be a formal appointment of a government servant for holding full charge of the duties of a higher post. In the present case, as we have indicated, there was no such appointment by the appointing authority as contemplated in Rule 19 (4) of the 1990 Rules. A mere endorsement by the Transport Commissioner who, it must be emphasized at the cost of repetition, was not the appointing authority, would not entitle the petitioners to the higher salary attached to the substantive post of ARTO merely because the petitioners discharged the duties of that post.

21. The view which we have taken is consistent with a body of precedent of the Supreme Court on the subject. In Ramakant Shripad Sinai Advalpalkar Vs. Union of India & Ors.10, the Supreme Court drew a distinction between a

substantive promotion to higher post of a government servant, and a situation where a person is merely required to discharge the duties of a higher post. The Supreme Court held as follows:

"...The distinction between a situation where a government servant is promoted to a higher post and one where he is merely asked to discharge the duties of the higher post is too clear to require any reiteration. Asking an officer who substantively holds a lower post merely to discharge the duties of a higher post cannot be treated as a promotion."

22. In a subsequent decision of the Supreme Court in State of Haryana Vs. S.M. Sharma & Ors.11, an employee was entrusted with the current duty charge of the post of Executive Engineer which was subsequently withdrawn. The employee challenged the withdrawal of charge on the ground that it amounted to reversion. The Supreme Court held that the employee was only given a current duty charge on the higher post of Executive Engineer and was neither promoted nor appointed to the post. The withdrawal of the charge was, therefore, held not to amount to a reversion.

23. These decisions were followed in a judgment of a Division Bench of this Court in Sheo Shanker Tripathi Vs. Director of Education (Sanskrit) U.P., Allahabad & Ors.12. The Division Bench held as follows:

"... Appointment to a post on ad hoc or officiating basis is different than mere discharge of duties of a higher post. In other word, the petitioner was only given current duty charge in addition to the substantive post he held. In our view, this arrangement did not result in promotion to the post of which the current duty charge was handed over to the petitioner unless an order of promotion is issued by the management in favour of the petitioner."

24. Consequently, the view of the Division Bench was that the petitioner was neither appointed on the post of Principal nor was his appointment an ad hoc appointment made in accordance with the U.P. Higher Education Services Commission Act, 1980 or the U.P. Higher Education Services Commission (Removal of Difficulties) Order, 1983 and, hence, he would not be entitled to a mandamus for the payment of salary on the post of Principal. The Division Bench held as follows:

"Since the petitioner was never appointed on the post of Principal, therefore, the question of payment of salary of the said post would not arise. Even otherwise, as we have already noticed, the management did not make any ad-hoc appointment in accordance with the procedure prescribed, i.e. 1980 Act read with 1983 Order and therefore, also, a mandamus for payment of salary to the petitioner for the post of Principal cannot be issued. Even if it is assumed that the petitioner was appointed by the management on officiating basis, the said appointment being inconsistent to the procedure prescribed, it would not result in conferring any right upon him to claim salary on the basis of such illegal appointment, if any."

25. The decision of the Division Bench of this Court at Lucknow in Subhash Chandra Kushwaha was rendered without the attention of the Court being drawn to the governing provisions of the 1990 Rules. The Division Bench was not

apprised of the position under the Rules framed under Article 309 that the appointing authority to the post of ARTO is the Governor, and to the relevant provisions of the rules including Rules 15 and 16 which provide for the procedure for recruitment and Rule 19 which deals with the power of appointment. The provisions of Rule 19 (4) which confer upon the appointing authority, namely the Governor, the power to make even temporary or officiating appointments have not been noticed in the judgment of the Division Bench. The decision in Subhash Chandra Kushwaha does not consider the governing rules framed under Article 309 of the Constitution and is hence, with respect, rendered without taking into account these rules. That apart and for the reasons which we have indicated, it is not possible to agree with the view taken by the Division Bench on the construction of Para 49 of Chapter VI of the Financial Handbook, Volume II (Parts II to IV). The view of the Division Bench is inconsistent with the principles enunciated in the judgments of the Supreme Court noted above. The petitioners cannot raise a plea of discrimination in the face of the Rules framed under Article 309 of the Constitution. Once there is no valid appointment by the appointing authority under the 1990 Rules during the period when the petitioners held charge of the duties of the post of ARTO, they would not be entitled to the salary of the post of ARTO prior to their substantive appointment. An illegality cannot give rise to an expectation of similar treatment under Article 14. The petitioners were not appointed even in an officiating capacity under Rule 19(4) by the Governor who is the appointing authority.

26. The issue, however, which falls for consideration is whether the Full Bench is precluded from taking this view on the ground that the decision in Subhash Chandra Kushwaha was followed in a subsequent decision of the Division Bench in Prem Chandra Srivastava against which a Special Leave Petition was filed before the Supreme Court where leave was granted and an order was passed by the Supreme Court dismissing the appeal subject to a reduction in the costs awarded.

27. The answer to this issue would have to be closely analysed, based on the doctrine of merger. The doctrine of merger postulates that when a decree or order of an inferior court or tribunal is subject to a remedy before a superior forum, the disposal of the lis by the superior forum - whether the decree or order in appeal is set aside, modified or confirmed - renders the decree or order of the superior court final and binding. The decree or order which was passed by the original court, tribunal or authority merges in the final and binding decree and order of the superior forum.

28. In Kunhayammed & Ors. State of Kerala & Anr.13 a Bench of three learned Judges of the Supreme Court, after adverting to the body of the precedent on the subject, held as follows:

"...In State of Madras Vs. Madurai Mills Co. Ltd., AIR 1967 SC 681 this Court held that the doctrine of merger is not a doctrine of rigid and universal application and it cannot be said that wherever there are two orders, one by the inferior authority and the other by a superior authority, passed in an appeal or revision there is a fusion or merger of two orders irrespective of the subject-matter of the appellate or revisional order and the scope of the appeal or revision contemplated by the particular statute.

The application of the doctrine depends on the nature of the appellate or revisional order in each case and the scope of the statutory provisions conferring the appellate or revisional jurisdiction."

While summing up its conclusion, the Supreme Court held thus:

"Doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger..."

29. The decision in Kunhayammed's case was considered in a subsequent judgment of a Bench of two learned Judges in S. Shanmugavel Nadar Vs. State of T.N. & Anr.14. In that case, the State Legislature had enacted the Madras City Tenants' Protection (Amendment) Act, 1960 to amend certain provisions of the Madras City Tenants' Protection Act, 1921. The constitutional validity of the Amending Act was challenged in writ petitions which were disposed of by the High Court in the case of M. Varadaraja Pillai Vs. Salem Municipal Council15. Against this decision of a Division Bench of the Madras High Court, appeals by special leave were filed before the Supreme Court. The Supreme Court by its order dated 10 September 1986 dismissed the appeals with the following observations:

"The constitutional validity of Act 13 of 1960 amending the Madras City Tenants' Protection Act, 1921 is under challenge in these appeals. The State of Tamil Nadu was not made a party before the Trial Court. However, the State was impleaded as a supplemental respondent in appeal as per orders of the High Court. When the appellants lost the appeal, they sought leave to appeal to this Court. The State of Tamil Nadu was not made a party in the said leave petition. In the SLP before this Court also the State of Tamil Nadu was not made a party. A challenge to the constitutional validity of the Act cannot be considered or determined, in the absence of the State concerned. The learned counsel now prays for time to implead the State of Tamil Nadu. This appeal is of the year 1973. In our view it is neither necessary nor proper to allow this prayer at this distance of time. No other point survives in these appeals. Therefore, we dismiss these appeals, but without any order as to costs."

30. Subsequently, the Madras City Tenants' Protection (Amendment) Act, 1994 (Tamil Nadu Act 2 of 1996) was enacted by the State Legislature. The constitutional validity was challenged before the Madras High Court in several writ petitions where reliance was placed on behalf of the State on the earlier decision in Varadaraja Pillai. The Division Bench, while entertaining a doubt about the correctness of the law laid down by the earlier Division Bench in Varadaraja Pillai, referred the matter to a Full Bench of three learned Judges. However, the Full Bench formed an opinion that since the appeals against the judgment of the Division Bench of the High Court in Varadaraja Pillai had been dismissed by the Supreme Court, the judgment of the Division Bench merged with the decision of the Supreme Court and, therefore, it was not open to the Full Bench to examine the correctness of the law laid down by the earlier Division

Bench in Varadaraja Pillai. In this background, while dealing with the doctrine of merger, the Supreme Court observed as follows:

"Firstly, the doctrine of merger. Though loosely an expression merger of judgment, order or decision of a court or forum into the judgment, order or decision of a superior forum is often employed, as a general rule the judgment or order having been dealt with by a superior forum and having resulted in confirmation, reversal or modification, what merges is the operative part i.e. the mandate or decree issued by the Court which may have been expressed in a positive or negative forum. For example, take a case where the subordinate forum passes an order and the same, having been dealt with by a superior forum, is confirmed for reasons different from the one assigned by the subordinate forum, what would merge in the order of the superior forum is the operative part of the order and not the reasoning of the subordinate forum; otherwise there would be an apparent contradiction. However, in certain cases, the reasons for decision can also be said to have merged in the order of the superior court if the superior court has, while formulating its own judgment or order, either adopted or reiterated the reasoning, or recorded an express approval of the reasoning, incorporated in the judgment or order of the subordinate forum."

31. The Supreme Court then referred to the decision in State of U.P. Vs. Mohd. Nooh16 and to a subsequent decision of three learned Judges of the Supreme Court in State of Madras Vs. Madurai Mills Co. Ltd.17, where it was held as follows:

"The doctrine of merger is not a doctrine of rigid and universal application and it cannot be said that wherever there are two orders, one by the inferior authority and the other by a superior authority, passed in an appeal or revision, there is a fusion or merger of two orders irrespective of the subject-matter of the appellate or revisional order and the scope of the appeal or revision contemplated by the particular statute. The application of the doctrine depends on the nature of the appellate or revisional order in each case and the scope of the statutory provisions conferring the appellate or revisional jurisdiction."

32. The earlier decision in Kunhayammed was also adverted to as having reiterated that the doctrine of merger is not of universal or unlimited application and, the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or which could have been laid, shall have to be kept in view. The Supreme Court consequently held that the decision which was rendered on 10 September 1986 by the Supreme Court in the appeal arising out of the judgment of the Division Bench of the Madras High Court did not result in the statement of law or the reasons recorded by the Division Bench of the High Court merging in the decision of the Supreme Court. This was because a reading of the order of the Supreme Court dated 10 September 1986 indicated that neither the merits of the order of the High Court nor the reasons which were reduced by the High Court or the law laid down therein had been gone into. The Supreme Court held thus:

"...In this view of the law, it cannot be said that the decision of this Court dated 10-9-1986 had the effect of resulting in merger into the order of this Court as regards the statement of law or

the reasons recorded by the Division Bench of the High Court in its impugned order. The contents of the order of this Court clearly reveal that neither the merits of the order of the High Court nor the reasons recorded therein nor the law laid down thereby were gone into nor could they have been gone into."

33. The observations which have been made in paragraphs 12, 13 and 14 of the judgment of the Supreme Court consider the matter from the perspective of Article 141 of the Constitution:

"...The issue ought to have been examined by the Full Bench in the light of Article 141 of the Constitution and not by applying the doctrine of merger. Article 141 speaks of declaration of law by the Supreme Court. For a declaration of law there should be a speech i.e. a speaking order. In Krishena Kumar v. Union of India, (1990) 4 SCC 207, this Court has held that the doctrine of precedents, that is being bound by a previous decision, is limited to the decision itself and as to what is necessarily involved in it. In State of U.P. v. Synthetics and Chemicals Ltd., (1991) 4 SCC 139, R.M. Sahai, J. (vide para 41) dealt with the issue in the light of the rule of sub-silentio. The question posed was: can the decision of an appellate court be treated as a binding decision of the appellate court on a conclusion of law which was neither raised nor preceded by any consideration or in other words can such conclusions be considered as declaration of law? His Lordship held that the rule of sub-silentio, is an exception to the rule of precedents. "A decision passes sub-silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind." A court is not bound by an earlier decision if it was rendered "without any argument, without reference to the crucial words of the rule and without any citation of the authority". A decision which is not express and is not founded on reasons, nor which proceeds on consideration of the issues, cannot be deemed to be a law declared, to have a binding effect as is contemplated by Article 141. His Lordship quoted the observation from B. Shama Rao v. Union Territory of Pondicherry, AIR 1967 SC 1480 "it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein". His Lordship tendered an advice of wisdom - "Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law." (SCC p. 163, para 41)

Rup Diamonds v. Union of India, (1989) 2 SCC 356 is an authority for the proposition that apart altogether from the merits of the grounds for rejection, the mere rejection by a superior forum, resulting in refusal of exercise of its jurisdiction which was invoked, could not by itself be construed as the imprimatur of the superior forum on the correctness of the decisions sought to be appealed against. In Supreme Court Employees' Welfare Association v. Union of India, (1989) 4 SCC 187, this Court observed that a summary dismissal, without laying down any law, is not a declaration of law envisaged by Article 141 of the Constitution. When reasons are given, the decision of the Supreme Court becomes one which attracts Article 141 of the Constitution which provides that the law declared by the Supreme Court shall be

binding on all the courts within the territory of India. When no reason are given, a dismissal simpliciter is not a declaration of law by the Supreme Court under Article 141 of the Constitution. In Indian Oil Corporation Ltd. v. State of Bihar, (1986) 4 SCC 146, this Court observed that the questions which can be said to have been decided by this Court expressly, implicitly or even constructively, cannot be re-opened in subsequent proceedings; but neither on the principle of res judicata nor on any principle of public policy analogous thereto, would the order of this Court bar the trial of identical issue in separate proceedings merely on the basis of an uncertain assumption that the issues must nave been decided by this Court at least by implication.

It follows from a review of several decisions of this Court that it is the speech, express or necessarily implied, which only is the declaration of law by this Court within the meaning of Article 141 of the Constitution."

34. In this view of the matter, the Supreme Court held that though the operative part of the order of the Division Bench merged in the decision of the Supreme Court, the reasons had not merged nor had the Supreme Court made any declaration of law under Article 141 of the Constitution. The statement of the law as contained in the judgment of the Division Bench of the High Court continued to remain the decision of the High Court, binding as a precedent on subsequent Benches of coordinate or lesser strength but open to reconsideration by a Full Bench:

"...The statement of law as contained in the Division Bench decision of the High Court in M. Varadaraja Pillai's, case would therefore continue to remain the decision of the High Court, binding as a precedent on subsequent Benches of coordinate or lesser strength but open to reconsideration by any Bench of the same High Court with a coram of Judges more than two."

35. These principles are clearly applicable here. The judgment of the Division Bench of this Court at Lucknow in Prem Chandra Srivastava was challenged before the Supreme Court by the State of U.P. which had filed a Special Leave Petition under Article 136 of the Constitution. The Supreme Court granted leave. The order of the Supreme Court dated 4 September 2013 indicates that the only aspect which was dealt with in the order was the costs of Rs. 2 lacs which had been imposed by the Division Bench of this Court. Finding the costs excessive, the quantum of costs was reduced to Rs.10,000/- and subject to the reduction of the quantum of costs awarded, the appeal was dismissed. The order dated 4 September 2013 of the Supreme Court did not result in a merger of the order passed by this Court as regards the statement of law or the reasons indicated in the judgment of the Division Bench at Lucknow. On the contrary, the contents of the order of the Supreme Court dated 4 September 2013 clearly indicate that the merits of the order of the High Court, the reasons recorded therein and the law laid down were not the subject matter of the decision. As the Supreme Court has held in a consistent line of authority, the doctrine of merger is not a doctrine of rigid and universal application. The doctrine depends upon the nature of the jurisdiction exercised by the superior forum and the content or subject-matter of

challenge laid or which could have been laid in a given case. What merges is the operative part, i.e. the mandate or decree issued by the superior court. However, in certain cases, the reasons for the decision may also be said to have merged in the order of the superior court, if the superior court, while formulating its judgment or order has adopted or reiterated the reasoning or recorded an express approval of the reasoning incorporated in the decision of the inferior forum. Considering the matter from this perspective, it is clear that the reasons which were indicated in the judgment of the Division Bench at Lucknow have not merged in the order of the Supreme Court for the simple reason that the order dated 4 September 2013 of the Supreme Court only dealt with the quantum of costs which were awarded by this Court. Considering the matter from a different perspective, it is also well settled that it is the speech, express or necessarily implied, which only is the declaration of law laid down under Article 141 of the Constitution.

36. For these reasons, we are of the view that the statement of the law which was contained in the judgment of the Division Bench in Prem Chandra Srivastava (as well as the earlier decision in Subbash Chandra Kushwaha) would be a binding precedent on subsequent Benches of a coordinate or lesser strength of the High Court but is open for reconsideration by a Full Bench of three Judges. This emerges as a clear position in law following the decisions of the Supreme Court including in Shanmugavel.

37. The learned Senior Counsel appearing on behalf of the petitioners placed reliance on a judgment of the Supreme Court in Omprakash Verma & Ors. Vs. State of Andhra Pradesh & Ors.18, where the following principle has been enunciated:

"It is well settled by a catena of decisions of this Court that once a decision of the High Court is set aside by this Court, it ceases to exist. It falls on all four corners and it is not open to contend subsequently that a particular aspect or argument was not considered by this Court or that it can be relied upon. In Kausalya Devi Bogra v. Land Acquisition Officer, (1984) 2 SCC 324, this Court held that once the Supreme Court sets aside a judgment of the High Court, the High Court judgment is a nullity and cannot be revived."

38. This is, indeed, a well settled principle of law. Once a decision of the High Court is set aside by the Supreme Court, the decision of the High Court ceases to exist and it is not open to urge that a particular submission was not considered by the Supreme Court. The issue in this case is, however, distinct. The issue in the present case is, whether on a plain reading of the judgment of the Supreme Court dated 4 September 2013, can it be held that the statement of law or the reasons which were contained in the judgment of the Division Bench of this Court in Subhash Chandra Kushwaha had merged in the decision of the Supreme Court. For the reasons which we have indicated, the answer is in the negative.

39. For these reasons, we have come to the conclusion that the view which has been taken in the earlier decisions of the Division Benches at Lucknow in Subhash Chandra Kushwaha and Prem Chandra

Srivastava is, with respect, erroneous and without considering the governing principles of the Rules framed under Article 309 of the Constitution and cannot be regarded as a binding precedent. The decisions have failed to notice the decisions of the Supreme Court and the principles laid down in those decisions, noted earlier.

40. We, accordingly, answer the questions referred to the Full Bench as follows:

(a) The law laid down by the Division Benches of this Court in Prem Chandra Srivastava and in Subhash Chandra Kushwaha, that an incumbent merely on holding an additional charge of a higher post would become entitled to the salary of a higher post, does not lay down the correct position in law;

(b) The dismissal of the appeal filed against the judgment of the Division Bench in Prem Chandra Srivastava, by the Supreme Court did not result in the merger of the reasons for the decision of the Division Benches of the Court nor did it amount to an approval by the Supreme Court, of the statement of law or the reasons contained in the decision of the Division Bench; and

(c) In the view which we have taken, the issue raised in the referring order in regard to the proviso to Para 49 (iii) of Chapter VI of the Financial Handbook, Volume II (Parts II to IV) will not survive.

41. The reference is answered accordingly. The proceedings shall now be placed before the appropriate Bench for disposal in the light of the present decision.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.08.2014

BEFORE
THE HON'BLE SUNEET KUMAR, J.

Civil Misc. Writ Petition No. 39852 of 2014

Ravindra Kumar Yadav ...Petitioner
Versus
Mukhya Abhiyanta (A-4) Vidyut Yantrik, Lucknow ...Respondent

Counsel for the Petitioner:
Sri Rajesh Yadav

Counsel for the Respondent:
Sri Q.H. Siddiqui

Constitution of India, Art.226- Compassionate appointment-petitioner being Inter mediate-after death of his father-appointed as post helper-now claiming appointment as class III employee-held once appointed on compassionate ground-claim lost its lien- appointment can not be claimed on higher post.

Held: Para-10
Applying the law on the facts of the case in hand, it is not disputed that the petitioner was appointed on Class-IV post under the Dying in Harness Rules to tide over the distress which the family was facing by the sudden death of his father. The appointment exhausted his claim, once right is consummated any further or second consideration for compassionate appointment would not arise. Compassionate appointment is not a vested right and if such a plea is accepted it would violate the principles enshrined in Article 14 and 16 of the Constitution of India.

Case Law discussed:
[(2007) 6 SCC 162]; [2007(2) SCALE 525]; [(1994) 6 SCC 560]; [(2003) 7 SCC 704]; 2014 (1) page 589; (2013) 11 SCC 178.

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

1. Heard learned counsel for the petitioner and Sri Q.S. Siddiqui, learned Chief Standing Counsel for the respondents.

2. The father of the petitioner was working with the respondent-Jal Nigam at Bareilly and was murdered on 9.12.2012, the petitioner being intermediate made an application for appointment under the dying in harness rules, accordingly, the petitioner was appointed on a substantive post of 'helper' but subsequently claimed appointment on the post of clerk, as per his qualifications.

3. It is contended by learned counsel for the petitioner that the respondents had assured the petitioner, that as and when vacancy would arise, the petitioner's case would be considered for appointment on the next higher post of clerk.

4. By means of the writ petition the petitioner is seeking a direction that the claim of the petitioner be considered for the post of clerk under the dying in harness rules.

5. Sri Siddiqui, learned Chief Standing Counsel appearing for the respondents submits that the petitioner had accepted the post of 'helper', which was available at the relevant time, the petitioner subsequently, cannot turn around and make a choice for appointment on a higher post. The claim of the petitioner stood exhausted on being appointed on Class-IV post.

6. Submissions fall for consideration.

7. Supreme Court in I.G. (Karmik) & others vs. Prahlad Mani [(2007) 6 SCC 162 held once the appointment on compassionate ground as per the scheme had been completed any further or second consideration for a higher post on the ground of compassion would not arise. Paras 7, 8, 9, 10 and 12 are as follows:-

"7. Public employment is considered to be a wealth. It in terms of the constitutional scheme cannot be given on descent. When such an exception has been carved out by this Court, the same must be strictly complied with. Appointment on compassionate ground is given only for meeting the immediate hardship which is faced by the family by reason of the death of the bread earner. When an appointment is made on compassionate ground, it should be kept confined only to the purpose it seeks to achieve, the idea being not to provide for endless compassion.

8. In National Institute of Technology & Ors. v. Niraj Kumar Singh [2007 (2) SCALE 525], this Court has stated the law in the following terms:-

"16. All public appointments must be in consonance with Article 16 of the Constitution of India. Exceptions carved out therefore are the cases where appointments are to be given to the widow or the dependent children of the employee who died in harness. Such an exception is carved out with a view to see that the family of the deceased employee who has died in harness does not become a destitute. No appointment, therefore, on compassionate ground can be granted to a person other than those for whose benefit the exception has been carved out. Other family members of the deceased employee would not derive any benefit thereunder."

9. In State of Rajasthan v. Umrao Singh [(1994) 6 SCC 560], this Court has categorically stated that once the right is consummated, any further or second consideration for higher post on the ground of compassion would not arise.

10. Again in State of Haryana and Another v. Ankur Gupta [(2003) 7 SCC 704], this Court held;

"6. As was observed in State of Haryana v. Rani Devi it need not be pointed out that the claim of the person concerned for appointment on compassionate ground is based on the premise that he was dependent on the deceased employee. Strictly, this claim cannot be upheld on the touchstone of Article 14 or 16 of the Constitution of India. However, such claim is considered as reasonable and permissible on the basis of sudden crisis occurring in the family of such employee who has served the State and dies while in service. That is why it is necessary for the authorities to frame rules, regulations or to issue such administrative orders which can stand the test of Articles 14 and 16. Appointment on compassionate ground cannot be claimed as a matter of right. Die- in-Harness Scheme cannot be made applicable to all types of posts irrespective of the nature of service rendered by the deceased employee. In Rani Devi case it was held that the scheme regarding appointment on compassionate ground if extended to all types of casual or ad hoc employees including those who worked as apprentices cannot be justified on constitutional grounds. In LIC of India v. Asha Ramchhandra Ambekar it was pointed out that the High Courts and Administrative Tribunals cannot confer benediction impelled by sympathetic considerations to make appointments on compassionate grounds when the regulations framed in respect thereof do not cover and contemplate such appointments. It was noted in Umesh Kumar Nagpal v. State of Haryana that as a rule, in public service appointments should be made strictly on the basis of open invitation of applications and merit. The appointment on compassionate ground is not another source of recruitment but merely an exception to the aforesaid requirement taking into consideration the fact of the death of the employee while in service leaving his family without any means of livelihood. In such cases the object is to enable the family to get over sudden financial crisis. But such appointments on compassionate ground have to be made in accordance with the rules, regulations or administrative instructions taking into consideration the financial condition of the family of the deceased."

See also Food Corporation of India & Anr. v Ram Kesh Yadav & Another [JT 2007 (4) SC 1].

12. Furthermore, Appellant accepted the said post without any demur whatsoever. He, therefore, upon obtaining appointment in a lower post could not have been permitted to turn round and contend that he was entitled for a higher post although not eligible therefor. A person cannot be appointed unless he fulfils the eligibility criteria."

8. Full Bench of this Court rendered in Shiv Kumar Dubey Vs. State Of U.P. & Others UPLBEC 2014 (1) page 589 inter alia held as follows:-

"(I) A provision for compassionate appointment is an exception to the principle that there must be an equality of opportunity in matters of public

employment. The exception to be constitutionally valid has to be carefully structured and implemented in order to confine compassionate appointment to only those situations which subserve the basic object and purpose which is sought to be achieved;

(ii) There is no general or vested right to compassionate appointment. Compassionate appointment can be claimed only where a scheme or rules provide for such appointment. Where such a provision is made in an administrative scheme or statutory rules, compassionate appointment must fall strictly within the scheme or, as the case may be, the rules;

(iii) The object and purpose of providing compassionate appointment is to enable the dependent members of the family of a deceased employee to tide over the immediate financial crisis caused by the death of the bread-earner;"

9. Supreme Court in State of Uttar Pradesh and others vs. Pankaj Kumar Vishnoi (2013) 11 SCC 178 held as follows:

"22. It is accepted position that the respondent appeared in the test and could not qualify. Once he did not qualify in the physical test, the High Court could not have asked the department to give him an opportunity to hold another test to extend him the benefit of compassionate appointment on the post of Sub-Inspector solely on the ground that there has been efflux of time. The respondent after being disqualified in the physical test could not have claimed as a matter of right and demand for an appointment in respect of a particular post and the High Court could not have granted further opportunity after the crisis was over".

10. Applying the law on the facts of the case in hand, it is not disputed that the petitioner was appointed on Class-IV post under the Dying in Harness Rules to tide over the distress which the family was facing by the sudden death of his father. The appointment exhausted his claim, once right is consummated any further or second consideration for compassionate appointment would not arise. Compassionate appointment is not a vested right and if such a plea is accepted it would violate the principles enshrined in Article 14 and 16 of the Constitution of India.

11. For the facts and reasons stated herein above, the writ petition is devoid of merit and is, accordingly, dismissed.

12. No order as to cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.08.2014

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

Civil Misc. Writ Petition No. 41279 of 2014

Isha Tyagi. ..Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Narendra Pratap Singh

Counsel for the Respondents:
C.S.C.

<u>Constitution of India, Art.-14, 15-</u> Discrimination benefit of reservation-being grand children of freedom fighters-denial on ground of gender being married grand daughter-not entitled held-unconstitutional-when

married grand son entitled-married grand daughter can not be excluded.

<u>Held: Para-8</u>

In the circumstances, we order and direct that the benefit of the horizontal reservation of 2% for descendants of freedom fighters shall extend both to descendants of a freedom fighter tracing their lineage through a son or through a daughter irrespective of the marital status of the daughter. Neither a married daughter nor her children would be disqualified from receiving the benefit of the reservation which is otherwise available to them in their capacity as descendants of a freedom fighter. Whether, in a given case including the present, an applicant is truly a descendant of a freedom fighter is undoubtedly for the authority to verify.

<u>Case Law discussed:</u>

(2014) 5 SCC 438

(Delivered by Hon'ble Dr. D.Y. Chandrachud, J.)

1. A brochure which has been issued by the State for entrance to medical courses in the State of Uttar Pradesh, described as CPMT 2014, prescribes the time lines and conditions of eligibility. The brochure envisages that candidates have to submit online applications. The petitioner claims to be a grand-daughter of a freedom fighter of Tehsil-Deoband, District Saharanpur, by the name of Buchha alias Dileep Singh Tyagi. The petitioner has annexed a copy of a certificate dated 26 September 1988 issued to her mother stating that she is the daughter of the above mentioned freedom fighter. The petitioner applied for admission in pursuance of the information brochure. Under the brochure, a reservation of 2% has been provided for descendants of freedom fighters on a horizontal basis. The condition stipulates that the reservation would enure to the benefit of actual descendants of freedom fighters which is defined to include sons, unmarried daughters and son's sons. The condition in the brochure specifies that the son of a freedom fighter is not required to be financially dependant.

2. The petitioner applied online for admission. The online code for the general category is ten and for the dependants of freedom fighters, it is fifteen. The petitioner submitted representations to the second, third and the fourth respondents on 14 July 2014 and 19 July 2014 seeking extension of the benefit of reservation in the quota set apart for dependants of freedom fighters. By an e-mail in response, the petitioner was directed to present her case at counselling. The grievance of the petitioner is that she has been treated as a general category candidate and assigned an overall rank of 20798 whereas her rank in the female category is 9469.

3. The petitioner is aggrieved by the discrimination which has been made in the quota of 2% set apart for descendants of freedom fighters; in that, the children of a daughter of a freedom fighter are excluded. This condition is postulated on the basis that only an unmarried daughter is entitled to the benefit of horizontal reservation and hence neither a married daughter nor her children would be entitled to receive the same benefit. This, it has been submitted, is contrary to Articles 14 and 15 of the Constitution.

4. By an order dated 12 August 2014, the State was directed to file a counter affidavit explaining in particular the basis for the decision to exclude the children of the daughter of a freedom

fighter from the benefit of horizontal reservation. The learned Standing Counsel appearing for the respondents informs the Court that despite a communication dated 13 August 2014, no instructions have been made available.

5. The State Government has taken a policy decision to grant a horizontal reservation of 2% to the descendants of freedom fighters. While doing so, the State Government has qualified the condition of eligibility by stipulating that a son or a daughter would be entitled to the benefit of the reservation. However, it has been stated in the relevant condition that the law department had opined that this benefit can be extended only to an unmarried daughter of a freedom fighter. Consequently, whereas the son's son would be eligible to apply for admission, the children of a daughter stand excluded. Exclusion of a grand daughter is plainly an act of hostile discrimination which is violative of the fundamental right guaranteed under Articles 14 and 15 of the Constitution. The condition which has been imposed by the State does not prescribe financial dependence. In fact, the clarification is to the effect that it is not necessary that the son of a freedom fighter should be financially dependant upon him. The basis and object of the horizontal reservation of 2% is to recognise the seminal role in the freedom struggle played by freedom fighters. It is in recognition of their contribution to the freedom struggle that a benefit of reservation is extended to descendants of freedom fighters. This being the rationale, there is no reason or justification to exclude a married daughter and consequently the children of a married daughter. Once a decision has been taken to extend the benefit of horizontal reservation to descendants of freedom fighters, whether the descendant is a son or a daughter should make no difference whatsoever. In fact, any discrimination against a daughter would be plainly a discrimination on grounds of gender. The guarantee under Article 15 of the Constitution is broad enough to encompass gender discrimination and any discrimination on grounds of gender fundamentally disregards the right to equality, which the Constitution guarantees.

6. In National Legal Services Authority Vs Union of India1, the Supreme Court held that any discrimination on the basis of gender identity would be contrary to Articles 14, 15 and 21 of the Constitution:

"82. Article 14 has used the expression "person" and Article 15 has used the expression "citizen" and "sex" so also Article 16. Article 19 has also used the expression "citizen". Article 21 has used the expression "person". All these expressions, which are "gender neutral" evidently refer to human beings. ...Gender identity as already indicated forms the core of one's personal self, based on self-identification, not on surgical or medical procedure. Gender identity, in our view, is an integral part of sex and no citizen can be discriminated on the ground of gender identity. ...

83. We, therefore, conclude that discrimination on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under our Constitution, ..."

7. It would be anachronistic to discriminate against married daughters by

confining the benefit of the horizontal reservation in this case only to sons (and their sons) and to unmarried daughters. If the marital status of a son does not make any difference in law to his entitlement or to his eligibility as a descendant, equally in our view, the marital status of a daughter should in terms of constitutional values make no difference. The notion that a married daughter ceases to be a part of the family of her parents upon her marriage must undergo a rethink in contemporary times. The law cannot make an assumption that married sons alone continue to be members of the family of their parents, and that a married daughter ceases to be a member of the family of her parents. Such an assumption is constitutionally impermissible because it is an invidious basis to discriminate against married daughters and their children. A benefit which this social welfare measure grants to a son of a freedom fighter, irrespective of marital status, cannot be denied to a married daughter of a freedom fighter. The progeny of the children of a freedom fighter cannot be be excluded on the grounds of gender. Grandchildren, irrespective of gender, must be treated on an equal footing. Whether grandchildren should at all be entitled to the benefit of a welfare scheme is a matter of policy for the State to decide. However, what is clearly not open to the State is to confine the benefit to grandchildren of a particular category, based on the gender of the parent or the gender of the child. Marriage does not have and should not have a proximate nexus with identity. The identity of a woman as a woman continues to subsist even after and notwithstanding her marital relationship. The time has, therefore, come for the Court to affirmatively emphasise that it is not open to the State, if it has to act in conformity with the fundamental principle of equality which is embodied in Articles 14 and 15 of the Constitution, to discriminate against married daughters by depriving them of the benefit of a horizontal reservation, which is made available to a son irrespective of his marital status. Consequently, in the present case, we are of the view that the opinion of the law department of the State, which forms the basis of the condition which is in question, is just not sustainable and is fundamentally contrary to basic constitutional norms.

8. In the circumstances, we order and direct that the benefit of the horizontal reservation of 2% for descendants of freedom fighters shall extend both to descendants of a freedom fighter tracing their lineage through a son or through a daughter irrespective of the marital status of the daughter. Neither a married daughter nor her children would be disqualified from receiving the benefit of the reservation which is otherwise available to them in their capacity as descendants of a freedom fighter. Whether, in a given case including the present, an applicant is truly a descendant of a freedom fighter is undoubtedly for the authority to verify.

9. In the present case, the learned counsel appearing for the petitioner has stated that the process of counselling is still going on. In the event that the counselling process is still underway, we direct that the claim of the petitioner shall, subject to due verification as regards its authenticity, be considered under the category of the horizontal reservation of 2% provided for descendants of a freedom fighter.

10. The writ petition is, accordingly, allowed in the aforesaid terms. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.08.2014

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

Civil Misc. Writ Petition No. 43917 of 2014

Zila Panchayat, Muzaffarnagar & Anr. ...Petitioners
Versus
District and Session Judge, Muzaffarnagar & Anr. ...Respondents

Counsel for the Petitioners:
Sri Ajay Kumar Singh, Sri Ashish Kumar Singh

Counsel for the Respondents:
Sri Manish Kumar Goyal

Constitution of India, Art.-226-read with General Rule Criminal-Rule 85-Claim by Zila Panchayat-whatsoever fine realized by court-be remitted in account of Zila Parishad-held-distinction between the fine realized in criminal prosecution shall go in treasury under Rule 72-but the Court not obliged to transmit in fund of local bodies-in absence of such provision in adhiniyam-claim of panchayat -not acceptable.

Held: Para-14
Learned counsel for the petitioner has been unable to show any such provision which may directly and specifically authorise the Zila Panchayat to receive the amount of penalty realised as fine in a criminal prosecution by a court of competent jurisdiction according to Rule 85 of General Rules Criminal. It is only such fines that can be credited as required by law. In the instant case in the absence of any such law having been pointed out which may authorise the Zila Panchayat to claim such fines to be deposited in its funds as a matter of right, the prayer made by the petitioner Zila Panchayat cannot be acknowledged or accepted in law.

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

1. Heard Sri Ashish Kumar Singh, learned counsel for the petitioner and Sri Manish Goyal for the respondents. This matter had been adjourned to enable the learned counsel for the petitioner to point out the provisions under which the Zila Panchayat is claiming its rights and powers to receive the amount of fine that is realised as penalty in criminal prosecutions by a court of competent jurisdiction.

2. The petitioner had earlier filed Writ Petition No. 24330 of 2014 and the same was permitted to be withdrawn to enable the learned counsel to file a better writ petition after explaining the powers and rights under which such payment is sought to be invoked by the petitioner to realise fine and seek deposit thereof with the Zila Panchayat. The judgment is quoted herein under:-

"Hon'ble Amreshwar Pratap Sahi, J.
Hon'ble Vivek Kumar Birla, J.

After the matter was heard and having perused Rules 72 and 85 of the General Rules (Criminal), we find that the writ petition appears to be for the purpose of claiming a substantive right to receive the amount of fine which is realized for violation of the bye-laws of the Zila Panchayat.

The writ as framed, in our opinion, does not take the point home and, therefore, learned counsel for the

petitioner prays that he may be permitted to withdraw the writ petition and file a better writ petition founded on such rights that may flow in favour of the Zila Panchayat as a local body as protected under Chapter IX-A of the Constitution of India.

Dimissed as withdrawn with the aforesaid liberty.

Order Date :- 15.7.2014"

3. This writ petition has therefore again been filed contending that on a perusal of Rule 85 readwith Rule 72 of the General Rules Criminal 1977, the fine which is deposited in courts in such proceedings has to be sent to the municipality concerned. Rule 72 and Rule 85 of the General Rules Criminal are extracted herein under:-

"72. Deposit of fine etc. paid into Court - when the amount of any fine, compensation or other sum, deposit, penalty or fee is paid into Court, the Presiding Officer shall, as soon as may be, send the money to the Nazir through the Criminal Ahalmad, for onward transmission to the nearest treasury or sub-treasury. The money so sent shall be accompanied by an invoice in duplicate in Form (Part IX, No. 74) signed by the Presiding Officer himself. In the case of any sum which is to be credited as a deposit the invoice shall be made out in triplicate. One copy of the invoice shall be returned by the officer-in-charge of the treasury or sub-treasury concerned with an endorsement showing receipt of the amount.

85. Statement of fine etc.- A monthly return of all amounts realised by criminal courts as fines and credited as required by law to a Municipal or Corporation fund, shall be transmitted to the Municipal Board for Corporation concerned.

The return shall be made in from (Part IX, No. 77)."

4. Learned counsel submits that Rule 85 extracted hereinabove clearly demonstrates that a monthly return of all amounts realised by criminal courts as fine have to be credited to a municipal corporation or board as the case may be.

5. The contention is that since the Zila Panchayat has now a constitutional status under Part - IX-A of the Constitution of India, the fines that are realised, form part of the corporate funds of the Zila Panchayat and it would be unconstitutional on the part of the respondents not to release the same in favour of the Zila Panchayat.

6. Learned counsel then has invited the attention of the Court to Sections 240 to 249 of the Uttar Pradesh Kshettra Panchayat and Zila Panchayat Adhiniyam, 1961 to contend that any infringement of the bye-laws invites prosecution and Section 247 empowers the Zila Panchayat to undertake such prosecution. Not only this, the power to compound offences is also applicable and consequently if a complaint is filed under the aforesaid provisions before a criminal court then any fine imposed and realised has to be deposited in the municipal funds account. The contention further is that Section 249 clearly takes care of the situation which runs as follows:-

"249. Compensation for damage to property vested in the Zila Panchayat.- If

through an act, neglect or default on account whereof a person has incurred a penalty imposed by or under this Act any damage to the property of the Zila Panchayat or any Kshettra Panchayat has been caused, the person incurring such penalty shall be liable to make good such damage as well as to pay such penalty and the amount of damage shall, in cause of dispute, be determined by the Magistrate by whom the person incurring such penalty is convicted, and on non-payment of such amount on demand the same shall be levied by distress; and such Magistrate shall issue his warrant accordingly."

7. The incurring of a penalty and damages under the aforesaid Section obliges the person against whom such penalty has been imposed to make good any damage caused to the Zila Panchayat and in the case of dispute the determination has to be done by the Magistrate and the penalty is to be determined accordingly. In the event of non-payment the Magistrate has been empowered to take coercive steps and realise the same by distress.

8. The question raised by the learned counsel for the petitioner is about the levy and deposit of such penalty in the shape of fines in such proceedings as per General Rules Criminal, 1977 referred to hereinabove with the Zila Panchayat.

9. He urges that even in relation to compounding of offences sub-section (3) of Section 248 authorises that where sums have been paid by way of composition the same shall be credited to the Zila Panchayat or the local body concerned.

10. Sri Goyal on the other hand submits that the statement of fine etc. as contained in Rule 85 of General Rules Criminal clearly visualizes the transmission of the amount realized as fine only "as required by law". He submits that whatever provisions for realisation have been pointed out by the learned counsel for the petitioner in respect of fines by compounding are in proceedings directly undertaken by the Zila Panchayat and not through courts.

11. The issue presently involved is with regard to fines realised in prosecutions through the criminal courts. He therefore contends that this clear distinction is already explained with the aid of Rule 85 itself which specifies that only such amounts shall be transmitted which are required by law to be done as such. He therefore submits that a fine realised in a criminal prosecution by courts have only to be deposited in the treasury as per Rule 72 of the 1977 Rules and the court is not obliged to transmit such amounts to the Zila Panchayat as claimed in the present writ petition.

12. Having considered the aforesaid submissions raised and having perused the provisions that have been pointed out, it is clear that there are two sets of proceedings, one that are conducted by the Zila Panchayat itself in relation whereto the realisation has to be made and the amount has to be deposited in the Zila Panchayat Funds.

13. However, where complaints are lodged in criminal courts then in that event the Uttar Pradesh Kshettra Panchayat and Zila Panchayat Adhiniyam, 1961 does not specify the procedure of such a fine realised by the court to be transmitted to the Zila Panchayat Funds. Where fiscal matters are

involved, the Court has to strictly construe the provisions and no addition or assumption of powers can be impliedly acknowledged.

14. Learned counsel for the petitioner has been unable to show any such provision which may directly and specifically authorise the Zila Panchayat to receive the amount of penalty realised as fine in a criminal prosecution by a court of competent jurisdiction according to Rule 85 of General Rules Criminal. It is only such fines that can be credited as required by law. In the instant case in the absence of any such law having been pointed out which may authorise the Zila Panchayat to claim such fines to be deposited in its funds as a matter of right, the prayer made by the petitioner Zila Panchayat cannot be acknowledged or accepted in law.

15. The writ petition lacks merit and is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.08.2014

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

Civil Misc. Writ Petition No. 44867 of 2014

Anubhav Jaiswal ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ashok Pandey

Counsel for the Respondents:
Sri Mahboob Ahmad

Electric Supply Code 2005-Clause 4.3-New electric connection-premises subjected to transfer-petitioner 4th purchaser-where the premises sub-divided-liability shall be fixed pro-rata basis-petitioner himself not provided complete information-order passed by authority can not be faulted-however if complete information furnished-after holding enquiry-liability to be fixed in terms of provision of code-petition disposed of.

Held: Para-11
We have perused the impugned order, and we do not find any such exercise having been undertaken presumably on account of the fact that the petitioner himself did not provide the entire information. In the circumstances the impugned order ex-facie cannot be faulted with, but in view of the provisions of Clause 4.3 of the Code, 2005, the matter requires a fresh determination after putting the original owner Shri Islam Beg as well to notice.

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

1. This case has certain peculiar facts with regard to the liability and apportionment of electricity dues in respect of a premise that came to be succeeded by several owners.

2. The original owner of the premise Shri Islam Beg sold part of the premises in favour of one Jitendra Kumar Srivastava in the year 2008. Shri Jitendra Kumar Srivastava in turn sold it to one Smt. Swati Chaurasiya in the year 2009, who in turn sold it to one Shri R.K. Malviya in the year 2011. The petitioner is the fourth purchaser of part of the said premises under a sale deed dated 12/4/2012. The petitioner wanted to absolve himself of any liability of electricity dues and obtain a new connection for the portion which he has purchased.

3. An inspection was carried out and a theft proceeding was initiated against the petitioner. The petitioner appears to have filed Writ Petition No.30684/2013 which was disposed of on 10/12/2013 by the following judgment:

"The grievance of the petitioner in the matter of new connection being provided in his name at the residential house No.64/1 Keedganj, Allahabad needs to be examined by the respondent no.2 at the first instance.

4. The writ petition is accordingly disposed of with a direction to the petitioner to approach the respondent no.2 along with certified copy of this order within a period of two weeks from today and the respondent no.2 shall look into the grievance of the petitioner and pass an appropriate order within a period of two weeks thereafter.

5. We make it clear that if there are any arrears of the previous connection it shall be necessary that these dues are cleared before new connection is provided."

6. Since the same was not being redressed, the petitioner filed Contempt Application No.2225/2014. On the issuance of the notice, the Chief Engineer has now disposed of the representation of the petitioner by the impugned communication dated 21/4/2014 which has been assailed in the present writ petition.

7. The contention of Shri Ashok Pandey, learned counsel for the petitioner is that the petitioner cannot be saddled with the liability of the entire premises and the dues against Shri Islam Beg have to be realised from him. He contends that Shri Islam Beg continues to enjoy the electricity connection without any proceeding for disconnection inspite of dues on him, and on the other hand the petitioner is being denied the new electricity connection. He further submits that the petitioner has made certain deposits yet the respondents have refused a new connection to the petitioner subject to deposit of the entire dues on the entire premises and payment of the other dues referred to in the order dated 21/4/2014.

8. Shri Mehboob Ahmad, learned counsel for the respondents submits that so far as the payments are concerned, unless it is cleared in terms of Clause 4.3 of the Electricity Supply Code, 2005, (hereinafter called the "Code, 2005") it will not be possible for the Electricity Department to grant a new connection to the petitioner as desired by him. He further submits that if such dues are cleared of then a decision can be taken by the licensor or its competent authority in the matter as per the aforesaid provisions. He further contends that processing can be done including fixing of any proportionate liability in the event of sale and purchase of a divided share of the property. The petitioner having not approached under the aforesaid provision, and there being no application to that effect nor any evidence to support the same, the representation of the petitioner had to be rejected. He submits that now the entire facts have been stated in the present writ petition and in the aforesaid background the claim of the petitioner can be decided keeping in view the aforesaid provision.

9. Having considered the submissions raised, Clause 4.3 of the Electricity Supply Code, 2005 is extracted herein:

"4.3. New Connections-General.-(a)The system of supply and voltage shall depend on the category of the consumer and the load as per details given in Chapter 3.

[(b) Application form for obtaining new connection and for enhancement/reduction of load shall be made available to the applicant free of charge at all offices of the Licensee. The Licensee shall also put them on its website for downloading photocopies of a blank form may be made by the applicant and shall be accepted by the Licensee. The Licensee shall endeavour to introduce systems facilitating electronic filing of the applications for release of connections through meters (all categories), or filing/processing for connections through prepaid meters provided commercially viable and sustainable technology is available.]

(c) The licensee/local authority shall designate Officers/authority for accepting applications in respect of sanction of load (for different categories of load) for new connection and releasing load by way of giving new connection. However the local authority for a rural area may frame it's own procedure for release of connection from time to time which shall as far as possible be in conformity to approved guidelines/specifications/costs specified by Commission.

(d) All information relating to procedure, fees, designated officers for releasing new connections may be displayed on the notice boards of sub-division office, Divisional offices and offices of DGM's/GM's/ office of licensee. Public information counters for new forms, filing, and disseminating information status in the above offices, with computerized facilities in all towns with a population greater than 10 lakhs may be made operational within a time frame of one year.

(e) The electronic filing of a new application, status of connection pending to be released, and tracking of status of a connection through IVRS facility may also be made possible in a phased manner in all cities, through use of information technology, on the internet website, centralized call centres, and proper linking with the sub-division/Division/DGM/GM offices.

[(f) (i) It will be the duty of the seller and of the purchaser to find out the outstanding electricity dues up to the date of sale, and further that both seller and purchaser will be either/or, jointly and severally liable to pay the outstanding electricity dues/obtain No dues certificate.

(ii) Before sale of a premise is made, the outstanding dues will be cleared and, in the alternative the deed to agreement/sale will specifically mention the outstanding dues and the method of its payment "Outstanding dues" means all dues pending on a premises including late payment surcharge.

(iii) In case the no-dues certificate is not obtained by the old owner, new owner before purchase of property may approach the licensee for no-dues certificate, by giving the reference of the connection in said premises. The licensee shall either intimate the pending dues, if any, on the premises or issue no dues certificate within 30 working days from the date of application.

(iv) The outstanding dues will be first charge on the assets of the company, and the licensee shall ensure that this is entered in an agreement with new applicant.

(v) The recovery proceedings against the defaulting consumer, and where the defaulting consumer is a company, from

the Directors of the company, shall be ensured. Where a financial institution has auctioned the property without consideration to licensees charge on assets, claims may be lodged with the concerned financial institution with diligent pursuance.

(vi) In case the electricity connection to the said premises was given with the consent of house owner, such person shall ensure the payment of all arrears/dues of electricity by the tenant before the tenant vacates the premises.

(vii) However the above conditions shall not apply if inconsistent with the provision of any higher Court order or an order as a consequence to it.

(viii) The application shall be processed by licensee on clearing of dues.]

(g) Where the property has been legally sub-divided, the outstanding dues for the consumption of energy on such premises, if any, shall be divided on pro-rata basis.

(h) A new connection to such sub-divided premises shall be given only after the share of outstanding dues attributed to such sub-divided premises, is duly paid by the applicant. Licensee shall not refuse connection to an applicant only on the ground that, dues on the other portion(s) of such premises have not been paid, nor shall the licensee demand record of last paid bills of other portion(s) from such applicants."

10. A perusal thereof leaves no room for doubt that the outstanding dues shall be the first charge on the premises itself and in the event the property has been legally sub-divided, the outstanding dues on account of purchase of such premises, if any, shall be divided on pro-rata basis.

11. We have perused the impugned order, and we do not find any such exercise having been undertaken presumably on account of the fact that the petitioner himself did not provide the entire information. In the circumstances the impugned order ex-facie cannot be faulted with, but in view of the provisions of Clause 4.3 of the Code, 2005, the matter requires a fresh determination after putting the original owner Shri Islam Beg as well to notice.

12. Consequently, we dispose of this writ petition with a direction to the Executive Engineer concerned to take stock of the situation and after making inquiry and considering all the objections if any, as well as the documents on which reliance has been placed by the petitioner proceed to pass appropriate orders expeditiously, preferably within a period of three months from the date of production of the certified copy of this order, provided the petitioner undertakes to deposit the amount which falls due in his share upon such determination.

13. A certified copy of the order shall be filed by the petitioner within ten days before the Executive Engineer along with an exhaustive representation, coupled with the documents on which reliance is being placed and the same shall be disposed of after putting Shri Islam Beg or any of the appropriate person to notice.

14. Shri Ashok Pandey, learned counsel for the petitioner submits that the Contempt Application No. 2225/2014 has

become infructuous and it may be directed to be consigned to records.

15. Accordingly, Contempt Application No. 2225/2014 shall be treated to have become infructuous and it shall be consigned to records for which a copy of this order shall be placed on the records of the contempt application.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.08.2014

BEFORE
THE HON'BLE SUNEET KUMAR, J.

Civil Misc. Writ Petition No. 69033 of 2010

Indra Kumar ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Siddharth Khare, Sri R.B. Singh

Counsel for the Respondents:
A.S.G.I. Sri Ashish Kumar Srivastava
Sri Tarun Verma

Constitution of India, Art.-226-compassionate appointment-scheme with ex-gratia payment of Rs. 9,50,000/-framed-petitioner opted compassionate appointment-petition after unreasonable delay of 12 years-held-no direction for appointment can be given-if petitioner claims for ex-gratia payment be considered as per existing scheme.

Held: Para-14
This petition was filed in the year 2010, whereas, the father of the petitioner died on 11.9.1998 thus is a belated petition. Considering the fact that the father of the petitioner had already died in 1998 and the application was kept pending would not attract the principle of legitimate expectation. The authorities of the bank kept corresponding with the petitioner and also gave a choice for compassionate appointment or ex-gratia payment would not create a vested right in the petitioner. The policy for compassionate appointment was scrapped and a new policy of ex-gratia payment in lieu of appointment on compassionate ground was formulated, the case of the petitioner can be considered as per the policy in force on the date on which the petitioner's application would be considered. The petitioner has not explained satisfactorily, as to why, the petitioner has approached the Court after twelve years. The petitioner is entitled to get his application for ex-gratia payment, considered as per the existing scheme.

Case Law discussed:
[(2010) 11 SCC 661]; Special Appeal No. 14 of 2007; (2004) 7 SCC 271; (2007) 7 SCC 265; (2008) 11 SCC 384; 2012 STPL(Web) 320 SC ; (2007) 4 SCC 778; (2007) 11 SCC 40; (1999) 7 SCC 314; (2006) 5 SCC 702; 2003 (7) SCC 270; [2006(5) SCC 702]; (2010)11 SCC 661; 2014(2) ADJ (FB).

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

1. Heard learned counsel for the petitioner and Sri Ashish Kumar Srivastava, learned counsel appearing for the respondents.

2. The father of the petitioner was working as a Class-IV employee with respondent-bank and died in harness on 11.9.1998. The mother of the petitioner made a request on 12.11.1998 for compassionate appointment. The matter was kept pending on one pretext or the other and no decision was taken, however, the petitioner received a letter on 3.2.2005 directing him to appear for interview on 14.2.2005 and by letter dated 30.7.2005 the petitioner was given an option either to accept Rs. 9,50,000/- towards ex-gratia payment or compassionate appointment.

The petitioner by his letter dated 19.11.2010 requested for compassionate appointment in lieu of compensation but no decision was taken on petitioner's application. Aggrieved the petitioner approached the Court by filing the present writ petition. In the meantime, the bank scraped the scheme for compassionate appointment and formulated a scheme for payment of ex-gratia amount in lieu of appointment on compassionate ground which came into force w.e.f. 18th December, 2004 and as such the petitioner's claim was not considered for compassionate appointment.

3. The submission of the learned counsel for the petitioner is that despite the scheme coming into force the respondents had invited the petitioner for interview and had also given him an option either to opt for compassionate appointment or for compensation. Hence on the principle of legitimate expectation the petitioner is entitled for compassionate appointment. In support of his submission learned counsel for the petitioner relied upon State Bank of India and another vs. Raj Kumar [(2010) 11 SCC 661].

4. In rebuttal Sri Srivastava submits that the scheme for compassionate appointment has since been scraped and as per policy decision a formula has been worked out for payment of ex-gratia amount in lieu of compassionate appointment. Till date the petitioner has not applied for ex-gratia payment under the new scheme, as and when the petitioner approaches the respondent-bank for ex-gratia amount, the same shall be considered as per the prevailing scheme. Since no decision was taken earlier, therefore, the petitioner is not entitled for compassionate appointment.

5. Rival submission fall for consideration.

6. A Division Bench of this Court in Special Appeal No. 14 of 2007 (State Bank of India Vs. Ajai Kumar) decided on 21.11.2013, after considering the judgments of the Supreme Court in (i) General Manager (D&PB) and Others Vs. Kunti Tiwary and Another; (2004) 7 SCC 271 (ii)Punjab National Bank and Others Vs. Ashwini Kumar Taneja; (2007) 7 SCC 265 (iii) Mumtaz Yunus Mulani (Smt.) Vs. State of Maharashtra and Others; (2008) 11 SCC 384 and (iv) Union of India & Anr. Vs. Shashank Goswami & another 2012 STPL (Web) 320 SC, held that terminal benefits, which have been given to the family of the deceased, have to be duly taken into account while considering the case of the petitioner for compassionate appointment.

7. The bank has in the circumstances duly considered the financial position of the family of the deceased employee and it is beyond the scope of judicial review under Article 226 of the Constitution of India for the High Court to undertake the exercise to decide as to what would be the reasonable income which would be sufficient for a family for its survival and whether it had not been left in penury or without any means of livelihood.

8. In State Bank of India Vs. Somveer Singh (2007) 4 SCC 778, the Supreme Court held that financial condition of the deceased employee's family should be the important criterion for eligibility of compassionate appointment. The High Court cannot undertake any exercise to decide as to what would the reasonable income, which would be sufficient for the family, for its survival and whether his family is in

penury or without any means of livelihood. The High Court can only advert to itself to review the decision making process.

9. It is settled principle of law that rules, regulation, scheme or policy as applicable on the date of passing of the order shall be applicable and not that was applicable on the date of filing of application. (Vide Commissioner Municipal Corporation, Shimla vs. Prem Lata Sood and others (2007) 11 SCC 40, Union of India and others vs. Indian Charge Chrome and Another (1999) 7 SCC 314, Kuldeep Singh vs. Govt. of NCT of Delhi (2006) 5 SCC 702).

10. In this context I may usefully refer to the decision of Supreme Court in Union of India vs. R. Padmanabhan 2003 (7) SCC 270, wherein this Court observed:

"That apart, being ex gratia, no right accrues to any sum as such till it is determined and awarded and, in such cases, normally it should not only be in terms of the Guidelines and Policy, in force, as on the date of consideration and actual grant but has to be necessarily with reference to any indications contained in this regard in the Scheme itself. The line of decisions relation to vested rights accrued being protected from any subsequent amendments may not be relevant for such a situation and it would be apposite to advert to the decision of this Court reported in State of Tamil Nadu vs. Hind Stone and Ors. - 1981 (2) SCC 205. That was a case wherein this Court had to consider the claims of lessees for renewal of the Tamil Nadu Minor Mineral Concession Rules, 1959. The High Court was of the view that it was not open to the State Government to keep the time and then depose them of on the basis of a rule which had come into force later. This Court, while reversing such view taken by the High Court, held that in the absence of any vested rights in anyone, an application for a lease has necessarily to be dealt with according to the rules in force on the date of the disposal of the application, despite the delay, if any, involved although it is desirable to dispose of the applications, expeditiously."

11. Reference may also be made to the decision of Supreme Court in Kuldeep Singh vs. Government of NCT of Delhi [2006 (5) SCC 702] which considered the question of grant of liquor vent licences. The Supreme Court held that where applications required processing and verification the policy which should be applicable is the one which is prevalent on the date of grant and not the one which was prevalent when the application was filed. The Apex Court clarified that the exception to the said rule is where a right had already accrued or vested in the applicant, before the change of policy.

12. The Supreme Court in State Bank of India and another Versus Raj Kumar (2010) 11 SCC 661 held that an appointment under the scheme can be made only if the scheme is in force and when a scheme is abolished, any pending application seeking appointment under the scheme will also cease to exist unless saved. The mere fact that the application was made when the scheme was in force, will not by itself create a right in favour of the applicant. Paragraph 6 is as follows:-

"6. It is now well settled that appointment on compassionate grounds is

not a source of recruitment. On the other hand it is an exception to the general rule that recruitment to public services should be on the basis of merit, by an open invitation providing equal opportunity to all eligible persons to participate in the selection process. The dependants of employees, who die in harness, do not have any special claim or right to employment, except by way of the concession that may be extended by the employer under the Rules or by a separate scheme, to enable the family of the deceased to get over the sudden financial crisis. The claim for compassionate appointment is therefore traceable only to the scheme framed by the employer for such employment and there is no right whatsoever outside such scheme. An appointment under the scheme can be made only if the scheme is in force and not after it is abolished/withdrawn. It follows therefore that when a scheme is abolished, any pending application seeking appointment under the scheme will also cease to exist, unless saved. The mere fact that an application was made when the scheme was in force, will not by itself create a right in favour of the applicant."

13. Full Bench of this Court in Anand Kr. Sharma versus State of U.P and others 2014(2) ADJ (FB) was considering whether application for freehold right would be considered as per the policy existing on the date of application or as per the amended policy while deciding the application. It was held that mere making of application one does not acquire any vested right and if there is change of policy, no question of legitimate expectation arises. Paras 30, 32, 37 are as follows:

"30. For the above it is clear that legitimate expectation may arise :

(a) if there is an express promise given by a public authority; or

(b) because of the existence of a regular practice which the claimant can reasonably expect to continue ; or

(c) Such an expectation must be reasonable.

However, if there is a change in policy or in public interest the position is altered by a rule or legislation, no question of legitimate expectation would arise."

32. A Three judges' bench in P.T.R. Exports (Madras) Pvt. Ltd. & Ors. Vs. Union of India & Ors, (1996) 5 SCC 268, had occasion to consider the concept of "legitimate expectation" in context of change of policy. In the above case, the petitioners before the Apex Court were exporters of ready-made garments to several countries. The Government of India, Ministry of Commerce had evolved Export and Import policy in the year 1992-93. New export policy w.e.f. 01/1/1996 was introduced withdrawing the previous policy. The petitioners challenged the change of policy in the High Court which challenge was negatived by the High Court. Before the Apex Court, the Special Leave Petitions were filed. In the above case, the Apex Court held that the applicant has no vested right in respect of import and export licences in terms of the policies in force on the date of making his application. It was further held that the Government is not barred by the promises or of legitimate expectations from evolving new policy. Following was laid down in paragraphs 3, 4 and 5 of the said judgment which are quoted below:

"3. In the light of the above policy question emerges whether the Government is bound by the previous policy of whether it can revise its policy in view of the changed potential foreign markets and the need for earning foreign exchange? It is true that in a given set of facts, the Government may in the appropriate case be hound by the doctrine of promissory estoppel evolved in Union of India v. Indo-Afghan Agencies Ltd.(1968) 2 SCR 366. But the question revolves upon the validity of the withdrawal of the previous policy and introduction of the new policy. The doctrine of legitimate expectations again requires to be angulated thus : whether it was revised by a policy in the public interest or the decision is based upon any abuse of the power? The power to lay policy by executive decision or by legislation includes power to withdraw the same unless in the former case, it is by mala fide exercise of power or the decision or action taken is in abuse of power. The doctrine of legitimate expectation plays no role when the appropriate authority is empowered to take a decision by an executive policy or under law. The Court leaves the authority to decide its full range of choice within the executive or legislative power. In matters of economic policy, it is a settled law that the Court gives the large leeway to the executive and the legislature. Granting licences for import or export is by executive or legislative policy. Government would take diverse factors for formulating the policy for import or export of the goods granting relatively greater priorities to various items in the overall larger interest of the economy of the country. It is, therefore, by exercise of the power given to the executive or as the case may be, the legislature is at liberty to evolve such policies.

4. An applicant has no vested right to have export or import licences in terms of the policies in force at the date of his making application. For obvious reasons, granting of licences depends upon the policy prevailing on the date of the grant of the licence or permit. The authority concerned may be in a better position to have the overall picture of diverse factors to grant permit or refuse to grant permission to import or export goods. The decision, therefore, would be taken from diverse economic perspectives which the executive is in a better informed position unless, as we have stated earlier, the refusal is mala fide or is an abuse of power in which event it is for the applicant to plead and prove to the satisfaction of the Court that the refusal was vitiated by the above factors. .

5. It would, therefore, be clear that grant of licence depends upon the policy prevailing as on the date of the grant of the licence. The Court, therefore, would not bind the Government with a policy which was existing on the date of application as per previous policy. A prior decision would not bind the Government for all times to come. When the Government are satisfied that change in the policy was necessary in the public interest, it would be entitled to revise the policy and lay down new policy. The Court, therefore, would prefer to allow free play to the Government to evolve fiscal policy in the public interest and to act upon the same. Equally, the Government is left free to determine priorities in the matters of allocations or allotments or utilisation of its finances in the public interest. It is equally entitled, therefore, to issue or withdraw or modify the export or import policy in accordance with the scheme evolved. We, therefore, hold that the petitioners have no vested or accrued right for the issuance of permits

on the MEE or NQE, nor the Government is bound by its previous policy. It would be open to the Government to evolve the new schemes and the petitioners would get their legitimate expectations accomplished in accordance with either of the two schemes subject to their satisfying the conditions required in the scheme. The High Court, therefore, was right in its conclusion that the Government are not barred by the promises or legitimate expectations from evolving new policy in the impugned notification."

37. A Division Bench of this Court in which one of us (Ashok Bhushan, J.) was a member in 2013 (2) ADJ 166 Nar Narain Misra Vs. State of U.P. and others, also considered the similar submissions in context of the U.P. Minor Minerals Concession Rules 1963. Applications were made by several applicants for grant of mining lease under Chapter II of the Rules. The applications remained pending. The State Government issued a Government Order dated 31.5.2012 by which all vacant area was notified under Chapter III i.e. for settlement of right by auction/tenders. The writ petitions were filed by the applicants seeking a mandamus that respondents may be directed to consider their applications for grant of mining lease and the Government Order dated 31.5.2012 declaring the area under Chapter II be not applied in their cases. Submission was made that Government Order dated 31.5.2012 at best shall apply to the area which fall vacant subsequent to the Government Order. Negativating the said submissions, following was laid down by the Division Bench in paragraph 46:

"46. In view of the above pronouncement of the apex Court, it is clear that the applicants whose application for renewal is pending cannot claim that their application for renewal be considered under Chapter II and those areas be kept out of purview of the Government order dated 31.5.2012. The areas having been declared under Rule 23(1), the provisions of Chapter II under which renewal of lease can be granted becomes inapplicable. The new state of affairs which have been brought into existence by declaration under Rule 23(1) has to be given its full effect and no rider or exception can be read specially when the Government Order dated 31.5.2012 does not contemplate any such exception. Thus, the submission of the applicants that their renewal applications which were pending at the time of issuance of declaration on 31.5.2012 shall be considered according to Chapter II cannot be accepted and the areas in respect of which the applications for renewal were pending on 31.5.2012, cannot be said to be not vacant."

14. This petition was filed in the year 2010, whereas, the father of the petitioner died on 11.9.1998 thus is a belated petition. Considering the fact that the father of the petitioner had already died in 1998 and the application was kept pending would not attract the principle of legitimate expectation. The authorities of the bank kept corresponding with the petitioner and also gave a choice for compassionate appointment or ex-gratia payment would not create a vested right in the petitioner. The policy for compassionate appointment was scrapped and a new policy of ex-gratia payment in lieu of appointment on compassionate ground was formulated, the case of the petitioner can be considered as per the policy in force on the date on which the petitioner's application would be considered. The petitioner has not explained

satisfactorily, as to why, the petitioner has approached the Court after twelve years. The petitioner is entitled to get his application for ex-gratia payment, considered as per the existing scheme.

15. In the facts and circumstances of the case, the petitioner is not entitled for compassionate appointment, as the scheme no longer exists, however, in event, the petitioner approaches the respondent-bank by making an application in the prescribed form for payment of ex-gratia amount in lieu of compassionate appointment, the respondent-bank shall consider the application and pass appropriate orders within three months from the date of filing of certified copy of this order along with the application form.

16. Subject to the above observations, the writ petition is disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.01.2014

BEFORE
THE HON'BLE RAN VIJAI SINGH, J.

Civil Misc. Writ Petition No. 70123 of 2013

Goharwa Kukkut Palan Sahkari Samiti Ltd. ...Petitioner
Versus
Board of Revenue & Ors. ...Respondents

Counsel for the Petitioner:
Sri L.P. Singh, Sri Brajesh Singh

Counsel for the Respondents:
C.S.C.

U.P. Z.A. & L.R. Rules 1952-Rule 172(i) read with U.P. Imposition of ceiling on Land Holding Act 1960-Section 27-cancellation of lease-relating to surplus land-can be only by the commissioner and not by S.D.O.-under Section 198(1) of U.P.Z.A Act-even order without following procedure contained Rule 172(1)-held-order without jurisdiction.

Held: Para-25
It is settled that when the statute provides to do a thing in a particular manner, then that thing has to be done in that very manner.Here sub-rule (1) of Rule 172 of the Rules of 1952 provides that before extinction of the right of a tenure holder, he has to be noticed and the notice part is missing.Therefore, the order impugned has been passed against the statute itself, under which power has been exercised.

Case Law discussed:
(2008 (1) Supreme 290).

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

1. Heard Sri L.P. Singh, learned counsel for the petitioner and Sri Sanjay Goswami, learned Additional Chief Standing Counsel appearing for the State-respondents.

2. Learned Additional Chief Standing Counsel does not propose to file any counter affidavit and states the this writ petition itself may be decided on its own merit on the basis of the existing facts.

3. the consent of learned counsel for the parties, the writ petition is taken up for final disposal.

4. By means of this writ petition, the petitioner has prayed for issuing a writ of certiorari quashing the order dated 20.7.2009 passed by the Sub Divisional Officer, Banda in case no. 1 of 2008-09 and order dated 14.1.2013 passed by the Board of Revenue, U.P. at Allahabad in revision no. 62 of 2008-09.

5. Vide order dated 20.7.2009, the Sub Divisional Officer, Banda has approved the report of the Tehsildar, Banda for expunging the name of the petitioner from the revenue record and recording the same in the ceiling khata, whereas by the subsequent order dated 14.11.2013, the revision filed by the petitioner against the order dated 20.7.2009 has been dismissed by the Board of Revenue, Allahabad.

6. The submission of learned counsel for the petitioner is that the order impugned is without jurisdiction for the simple reason that the lease was granted to the petitioner under the provisions of U.P. Imposition of Ceiling on Land Holdings Act, 1960 (hereinafter referred to as 'the Act of 1960'), therefore, the Sub Divisional Officer had no jurisdiction to pass the impugned order and the order, if any, could be passed either under section 27 of the Act of 1960 or under sub-rule (4) of Rule 59 of the U.P. Imposition of Ceiling on Land Holdings Rules, 1961 (hereinafter referred to as 'the Rules of 1961').

7. The facts giving rise to this case are that it appears, over the ceiling land, patta was granted to the petitioner's society on 1.3.1969 for running poultry farm over an area measuring about 136 bigha 15 biswa and 3 biswansi.The details of the plots have been given in annexure 2 to the writ petition (page 19 of the writ petition).

8. Later on, a case was initiated under section 33/39 of the U.P. Land Revenue Act, 1901 by the Lekhpal, which was numbered as case no. 81, before the Tehsildar, Banda for expunging the name of the Society from the revenue record on the ground that the Society is no more in existence as the President of the Society, Gajraj Singh has already died and there is no existence of the Society in the name of Goharwa Kukkut Palan Sahkari Samiti Ltd.Further, no work of poultry farming is being performed over the leased land and the said land is now being used by Sri Ram Pal Singh, S/o late Gajraj Singh.

9. The aforesaid case was later on registered under section 190 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 (hereinafter referred to as 'the Act of 1950'),and re-numbered as case no. 1 of 2008-09.In this case placing reliance upon the report Lekhpal, the Sub Divisional Officer has passed the impugned order dated 20.7.2009.

10. Aggrieved by the aforesaid order, the petitioner has filed revision stating therein that the Society is very well in existence and this order has been passed illegally without giving an opportunity of hearing to the petitioner, but the same has been dismissed.

11. Learned counsel for the petitioner contends that the order impugned is without jurisdiction as the same could not be passed by the Sub Divisional Officer either while exercising power under section 190 of the Act of 1950 or under section 33/39 of the U.P. Land Revenue Act, 1901.His further contention is that the proceeding is itself barred in view of sub-section (6) of section 27 of the Act of 1960.It is further contended that the valuable right was existing in favour of the Society and that has been taken away by the impugned order without affording an opportunity of hearing, therefore, the order impugned suffers from breach of principles of natural justice.

12. It is not in dispute that Goharwa Kukkut Palan Sahkari Samiti Ltd. was granted lease under the provisions of the Act of 1960.In the submission of learned counsel for the petitioner it could be cancelled under sub-section (4) of section 27 of the Act of 1960 and proceeding for cancellation could be initiated within the period provided under sub-section (6) of section 27 of the Act of 1960, which has now become time barred, therefore, the order impugned is without jurisdiction.

13. Refuting the submissions of learned counsel for the petitioner, learned Additional Chief Standing Counsel has contended that the provisions of section 27 of the Act of 1960 is not attracted in the present case for the simple reason that the lease has not been cancelled on the ground of any irregularity in the process of granting lease, therefore, there is no question of applicability of sub-section (6) of section 27 of the Act of 1960.

14. For appreciating the controversy, it would be appropriate to go through the provisions contained under sub-sections (1), (3), (4) and (6) of section 27 of the Act of 1960, which read as under:

"27. Settlement of surplus land- (1) The State Government shall settle out of the surplus land in a village in which no land is available for community purposes or in which the land as available is less that 15 acres with the Gaon sabha of that village so however that the total land in the village available for community purposes after such settlement does not exceed 15 acres.The land so settled with the Gaon Sabha shall be used for planting trees, grwoing fodder or for such other community purposes, as may be prescribed.

*(2) * * **

(3) Any remaining surplus land shall be settled by the Collector in accordance with the order of preference and subject to the limits, specified respectively in sub-sections (1) and (3) of Section 198 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950.

(4) The commissioner may of his own motion and shall, on the application of any aggrieved person, enquire into such settlement and if he is satisfied that the settlement is irregular he may after notice to the person in whose favour such settlement is made to show cause-

(i) cancel the settlement and the lease, if any and thereupon, notwithstanding anything contained in any other law or in any instrument, the rights, title and interest of the person in whose favour such settlement was made or lease executed or any person claiming through him in such land shall cease, and such land shall revert to the State Government; and

(ii) direct that every person holding or retaining possession thereof may be evicted, and may for that purpose use or cause to be used such force as may be necessary.

*(5) * * **

(6) The Commissioner acting of his own motion under sub-section (4) may issue notice, and an application under that sub-section may be made,-

(a) in the case of any settlement made or lease granted before November 10, 1980, before the expiry of a period of seven years.

(b) in the case of any settlement made or lease granted on from the said date, and or after the said date, before the expiry of a period of five years from the date of such settlement or lease or up to November 10, 1987, whichever be latter."

15. From the bare reading of sub-sections (1), (3), (4) and (6) of section 27 of the Act of 1960, it would transpire that the State Government shall settle out the surplus land in the village in which more land is available for community purposes or in which the land as available is less than 15 acres with the Gaon Sabha of that village and the land so settled with the Gaon Sabha shall be used for planting trees, growing fodder or for such other community purposes, as may be prescribed.In view of sub-section (3) of section 27 of the Act of 1960, any remaining surplus land shall be settled by the Collector in accordance with the order of preference and subject to the limits, specified respectively in sub-sections (1) and (3) of Section 198 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950.Sub-section (4) of section 27 of the Act of 1960 provides that the Commissioner may of his own motion and shall, on the application of any aggrieved person, enquire into such settlement and if he is satisfied that the settlement is irregular he may after notice to the person in whose favour such settlement is made, cancel the settlement.Sub-section (6) of section 27 of the Act of 1960 provides the limitation of seven years if the lease is of prior to 10.11.1980 and in remaining cases, five years.

16. The submissions of learned counsel for the petitioner is that the lease executed under the Act of 1960 could be cancelled only under sub-section (4) of section 27 of the Act of 1960 by the Commissioner, subject to, cancellation proceeding was initiated within the time limit prescribed under sub-section (6) of section 27 of the Act of 1960.In his submissions, since the lease was granted in the year 1969, therefore, the order impugned is without jurisdiction.

17. After going through the bare provisions contained under sub-section (4) of section 27 of the Act of 1960, it is apparent that the Commissioner may cancel the lease on his own motion or on the application of any aggrieved person, if he is satisfied that there was any irregularity while granting lease.The case in hand is not a case where lease has been cancelled on the ground of irregularity in the process of grant of lease,therefore, I do not find any force in the submissions of the learned counsel for the petitioner that action could be taken under sub-section (4) of section 27 of the Act of 1960.

18. Learned counsel for the petitioner further contended that the lease granted to the petitioner could neither be determined nor cancelled under the provisions of the Act of 1950 by the District Magistrate.

19. Here, from the perusal of the impugned order, it transpire that the case was registered under section 190 of the Act of 1950 on the basis of the reports of Lekhpal, Revenue Inspector and Tehsildar, who reported that the President of the Society, Gajraj Singh has already died and the Society, named as Goharwa Kukkut Palan Sahkari Samit Ltd., is no more in existence and the son of the President, Sri Ram Pal is in unauthorized possession over the land in dispute.

20. The question would be as to whether under the facts and circumstances of the case, the Collector was competent to initiate such proceeding and if initiated, whether the order impugned passed by him is in consonance with the provisions contained under section 190 of the Act of 1950.Section 190 of the Act of 1950 talks about the extinction of the interest of a Bhumidhar with non-transferable right in certain eventuality.The procedure for declaring the extinction of the interest of a Bhumidhar has been given under Rule 172 of the Rules of 1952 and the consequences of such extinction of right has been given under section 194 of the Act of 1950.for appreciating the controversy, these provisions are reproduced hereinunder:

Sections 190 and 194 of the Act of 1950

"190.Extinction of the interest of a bhumidhar with non-transferable rights: (1) Subject to the provisions of Section 172, the interest of a bhumidhar with non-transferable rights in a holding or any part thereof shall be extinguished -

(a) when he dies having no heir entitled to inherit in accordance with the provisions of this Act;

(b) when the holding has been declared as abandoned in accordance with the provisions of Section 186;

(c) when he surrenders his holding or part thereof;

(cc) when the holding or part thereof has been transferred, let out or used in contravention of the provisions of this Act;

(d) when the land comprised in the holding has been acquired under any law for the time being in force relating to the acquisition of land;

(e) when he has been ejected in accordance with the provisions of this Act; or

(f) when he has been deprived of possession of his right to recover possession is barred by limitation.

(2) The provisions of sub-section (1) shall apply mitatis mutandis to asamis also."

"194.Land Management Committee to take over land after extinction of interest therein- The Land Management Committee shall be entitled to take possession of land comprised in a holding or part thereof it -

(a) the land was held by a bhumidhar, and his interest in such land is extinguished under Clause (a) or Clause (aa) of Section 189 or Clause (a), Clause (b), Clause (c), Clause (cc) or Clause (e) of section 190;

*(b) * * **

(c) the land being land falling in any of the clases mentioned in Section 132, was held by an asami and the asami has been ejected or his interest therein have otherwise extinguished under the provisions of this Act."

21. Section 194 of the Act of 1950 talks about the taking of the possession by Land Management Committee after extinction of interest of bhumidhar.The procedure for having possession has been prescribed under Rule 172 of the U.P. Zamindari Abolition and Land Reforms

Rules, 1952 (hereinafter referred to as 'the Rules of 1952'), which reads as under:

Rule 172 of the the Rules of 1952.

"172.Section 230 (2)(i)- (1) An application under section 194 for declaration of the extinction of tenure-holder's rights shall be filed in the court of the Assistant Collector in charge of the Sub-Division by the Land Management Committee in whose local jurisdiction the extinction has occurred.Where on the application of the Land Management Committee or on facts coming to his notice otherwise, the Assistant Collector is satisfied that there is a prima facie, case for declaration of the extinction of the tenure-holder's rights under Section 194, he shall issue a proclamation in Z.A. Form 57 and where the tenure-holder is alive, a copy of the proclamation shall be served on him in person asking him to show cause why the declaration in question should not be granted.

(2) The Assistant Collector shall, on the date fixed in the proclamation, and after personal service, if required, has been effected, proceed to make such inquiry as he deems necessary.

(3) If after inquiry, he comes to the conclusion that a declaration in favour of the Land Management Committee should be made, he shall make a declaration to that effect and specify the numbers of the plots with their respective areas of which the Committee is entitled to take a possession.The possession shall then be delivered to the Committee on behalf of the Gaon Sabha in accordance with the procedure laid down in Rule 154."

22. From the bare reading of section 190 of the Act of 1950, it would transpire that subject to the provisions of Section 172, which talks about succession in the case of a woman holding of interest inherited as a widow, mother, daughter, etc., the interest of a bhumidhar with non-transferable rights in a holding or any part thereof shall be extinguished, when he dies having no heir entitled to inherit in accordance with the provisions of this Act, when holding has been declared abandoned in accordance with section 186, when he surrenders his holding or part thereof, when the holding or part thereof has been transferred, let out or used in contravention of the provisions of this Act, when the land comprised in the holding has been acquired under any law for the time being in force relating to the acquisition of land, when he has been ejected in accordance with the provisions of this Act, etc.

23. The procedure for declaring extinction of the interest of a Bhumidhar has been given in Rule 172 of the Rules of 1952, according to which, for declaration of extinction of the tenure holder's right, an application has to be filed in the court of Assistant Collector in-charge of the Sub Division by the Land Management Committee, in whose local jurisdiction, the extinction has occurred.On such application or on facts given to the Assistant Collector notice otherwise if he satisfied that there is a prima facie case for declaration of an extinction of the tenure holder's right under section 194, he shall issue a proclamation in ZA Form 57 and where the tenure-holder is alive, a copy of the proclamation shall be served on him in person asking him to show cause why the declaration in question should not be granted.

24. There are other requirements as detailed in sub-rules (2) and (3) of Rule 172 of the Rules of 1952, which need not be

discussed in detail for the simple reasons that in this case, every thing has been done only on the basis of the report of the revenue authorities without taking recourse as provided under sub-rule (1) of Rule 172 of the Rules of 1952, which empowers an Assistant Collector to declare extinction of a tenure holder's right, that too, on an application of the concerned gaon sabha or even in a suo motu proceeding.Assuming here the order impugned has been passed in a suo motu proceeding, in that eventuality too, the issuance of notice is lacking.

25. It is settled that when the statute provides to do a thing in a particular manner, then that thing has to be done in that very manner.Here sub-rule (1) of Rule 172 of the Rules of 1952 provides that before extinction of the right of a tenure holder, he has to be noticed and the notice part is missing.Therefore, the order impugned has been passed against the statute itself, under which power has been exercised.

26. The matter may be examined from another angle too.It is not in dispute that the Society was granted lease under the provisions of the Act of 1960, therefore, either cancellation of lease or determination of the lease on the breach of conditions of leasecould be done under the provisions of the said Act.Since the argument of learned counsel for the petitioner that lease could only be cancelled under sub-section (4) of section 27 of the Act of 1960 has already been repealed, the question would be, as to, for the desired action, on the allegations made against the petitioner, is there any other provision under the Act of 1960 to cancel or determine the lease.Sub-rule (4) of Rule 59 of the Rules of 1961 talks about the determination of the lease or the breach of conditions of the lease, which reads as under:

"(4) If the lessee commits a breach of any terms and conditions of the lease, the settlement or the lease shall determine and the land shall revert to the State Government."

27. Here, in this case, since the provisions for cancellation or determination of the lease has already been given under the Act of 1960, therefore, in my considered opinion, the procedure contained under the provisions of the Rules of 1952 for extinction of the interest of a Bhumidhar could not be invoked.

28. In view of the foregoing discussions, I am of the considered opinion that the order impugned is without jurisdiction.The view taken by me finds support from the judgment of the Apex Court in State of U.P. and Others Vs. Roshan Singh and Others (2008 (1) Supreme 290), where the Apex Court has observed as under:

".... the inherent powers of the Court are not to be used for the benefit of a litigant who has remedy under the CPC.Similar is the position vis-a-vis other statutes.The object of Section 151 CPC is to supplement and not to replace the remedies provided for in the CPC.Section 151 CPC will not be available when there is alternative remedy and same is accepted to be a well-settled ratio of law.The operative field of power being thus restricted, the same cannot be risen to inherent power.The inherent powers of the Court are in addition to the powers specifically conferred to it.If there are express provisions covering a particular topic, such power cannot be exercised in that regard. The section confers on the Court power of making such orders as may be necessary for the ends of justice of the Court.Section 151 CPC cannot be invoked when there is express

provision given under which relief can be claimed by the aggrieved party.The power can only be invoked to supplement the provisions of the Code and not to override or evade other express provisions.The position is not different so far as the other statutes are concerned.Undisputedly, an aggrieved person is not remediless under the Act."

29. Further, assuming the authority was competent to pass such order under the provisions of the Act of 1950, in that eventuality too, the order impugned is bad for non-compliance of the statutory provisions contained under sub-rule (1) of Rule 172 of the Rules of 1952.

30. In both the ways, the order impugned cannot be sustained in the eye of law.The writ petition succeeds and is allowed.The impugned order dated 20.7.2009 passed by the Sub Divisional Officer, Banda in case no. 1 of 2008-09 and order dated 14.1.2013 passed by the Board of Revenue, U.P. at Allahabad in revision no. 62 of 2008-09 are hereby quashed.However,the order passed by this Court in this writ petition will not preclude the respondents to proceed in accordance with law by initiating a fresh proceeding.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.02.2014

BEFORE
THE HON'BLE TARUN AGARWALA, J.
THE HON'BLE RAJAN ROY, J.

Civil Misc. Writ Petition No. 72869 of 2010

Mukesh Kumar Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Bharat Pratap Singh

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-Petitioner a contractor-done certain work-evaluated by concern engineer-bill of Rs. 15,24,164/--admitted in reply of 80 CPC notice-in the year 2010-raising technical objection-amount to defeat the claim-held entitled for claim with -10% interest with cost of Rs. 50,000/-.

Held: Para-9 & 10
9. In the light of the aforesaid, it is clear that the Irrigation Department is taking a technical ground for defeating the claim of the petitiioner. The court finds that the bills are admitted. The amount mentioned in the bills are also admitted but for reasons best known to the respondents, the bills are not being cleared.

10. This petition is consequently allowed and a writ of mandamus is issued directing the Engineer in Chief, Irrigation Department Lucknow to release the payment within a week from today along with interest at the rate of 10% per annum, failing which it would be open to the petitioner to move an appropriate application before this Court for recovery of the amount.

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

1. The petitioner executed certain works under the work orders issued by the Irrigation Department in the year 2005-06. It is alleged that the work orders were executed within the stipulated period to the satisfaction of the authority.

2. In para 5 of the writ petition it has been contended that the bills were prepared as per the contract which was evaluated by the Assistant Engineer and approved by other authorities. The bills amounting to Rs. 15,24,164/- have not

been paid till date inspite of every efforts made by the petitioner. In para 8, the petitioner contends that a legal notice under section 80 C.P.C. was given to the respondents, pursuant to which a reply was given wherein the respondents have admitted the liability to pay the said amount subject to the allocation of necessary budget. This reply was given in the year 2010, inspite of which the payments were not made. Consequently the present writ petition was filed.

3. A counter affidavit was filed by the Assistant Engineer on behalf of the Irrigation Department admitting the contents of paras 5,8 and 9 of the writ petition namely the amount as per the bills, but the respondents contended that the claim has now become barred by limitation and, therefore, the said amount cannot be paid to the petitioner.

4. Today the Engineer in Chief Sri Awadh Naresh Gupta has filed an affidavit taking fresh grounds while contesting the matter on merits. The said respondent contended that the bills were not sent as per Clause 6 of Form No. 111 nor any registered notice was sent to the Incharge relating to completion of work. Further Clause 7 of the condition of the agreement of Form 111 was also not complied with and consequently the bills of the petitioner could not be processed.

5. The court finds upon a perusal of the affidavits and after hearing the learned counsel for the State Government for the Irrigation Department that the stands taken by the Irrigation Department is untenable. Para 5 of the writ petition is admitted by the respondent in their counter affidavit, namely that the bills were presented by the petitioner which was processed and approved by the respondent authorities.

6. The legal notice given by the petitioner which has been stated in para 8 of the writ petition is also admitted by the respondents in their reply to the said notice in which they have categorically admitted that the bills would be cleared as and when budgetary allocation is made.

7. The stand of the respondent that the claim of the petitioner has become barred by limitation is only an afterthought to defeat the claim of the petitioner on technical grounds. The court is of the opinion that since the bills of the petitioner was presented within the period of limitation of 3 years. The non processing of these bills and non payment does not make these bills barred by limitation. By not processing the bills, the period of limitation does not come to an end nor does it become barred by limitation.

8. The contention of the respondents that certain clause of the agreement/form orders were not complied by the petitioner is again an afterthought and cannot be considered at this belated stage. Such grounds had not been indicated while replying to the legal notice or while filing the counter affidavit. At this stage new grounds cannot be allowed to be taken in a supplementary affidavit. Such contention appears to be patently erroneous especially when the respondents have admitted that the bills of the petitioner was duly processed and approved by the respondent authorities.

9. In the light of the aforesaid, it is clear that the Irrigation Department is taking a technical ground for defeating the claim of the petitiioner. The court finds that the bills are admitted. The amount mentioned in the bills are also admitted but for reasons best known to the respondents, the bills are not being cleared.

10. This petition is consequently allowed and a writ of mandamus is issued directing the Engineer in Chief, Irrigation Department Lucknow to release the payment within a week from today along with interest at the rate of 10% per annum, failing which it would be open to the petitioner to move an appropriate application before this Court for recovery of the amount.

11. Since a clear case is made out where the respondents are responsible, the court hereby imposes a cost of Rs. 50,000/- which shall also be paid by the Engineer in Chief. Rs. 25,000/- shall be paid to the petitioner and balance Rs. 25,000/- shall be paid to the High Court Legal Services Cell Committee.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.01.2014

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 73255 of 2011 Alongwith W.P. No. 49356 of 2011, W.P. No. 60376 of 2011, W.P. No. 11341 of 2012, W.P. NO. 11343 of 2012W.P. No. 71329 of 2011

Vijay Shankar Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ashok Khare, Sri Siddharth Khare, Sri Nisheeth Yadav

Counsel for the Respondents:
C.S.C.

U.P. Sub Inspectors and Inspector(Civil Police) Service Rules 2008-Rule 15(e)- **Appendix-2-Constitution of Selection Committee-contrary to Rule-entire selection vitiated objection regarding participation in selection without protest-being unsuccessful-can not challenge-not available-behind the back of selected candidate-cancellation of selection-confined with respect of petitioner-with consequential-direction-petition allowed with cost of Rs. 2000/-.**

Held: Para-22 & 23
22. This submission is also thoroughly misconceived. Here is a case where respondents have conducted selection through a Selection Committee which is patently illegal, having not been constituted in accordance with rules. There cannot be any estoppel against law. When something has been done by a body, not legally constituted, such action would be void ab initio. In such a case, principle that once you have participated in the selection, you cannot challenge rules of the game will not apply for the reason that, here, petitioners are not challenging rules of the game, but their grievance is that rules say something while respondents have played the game in complete defiance thereof and therefore, their action is illegal and void ab initio.

23. In my view, since petitioners have not been tested for physical efficiency test/physical standard test, by a Committee, validly constituted, in accordance with rules, their rejection by an unauthorised and illegally constituted committee is patently illegal.

Case Law discussed:
JT 2013 (11) SC 408; AIR 1936 PC 253; 2001 (4) SCC 9; 2002(1) SCC 633; 2004 (6) SCC 440; 2005(13) SCC 477; 2005(1) SCC 368; 2008(2) ESC 1220.

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

1. Heard Sri Ashok Khare, Senior Advocte, assisted by Sri Siddharth Khare, learned counsel for the petitioners and learned Standing Counsel for the respondents.

2. In all these writ petitions, common questions of law are involved and therefore,

they have been heard together and are being decided by this common judgment. However, for the purpose of brevity, facts and pleadings from Writ Petition No.73255 of 2011 have been taken and counsel for the parties in other matters stated at the bar that facts in all other matters are more or less similar and issue in fact is the same, therefore, whatever is said in respect of the leading writ petition, that would equally apply to other matters and, hence, I proceed accordingly.

3. The result of physical efficiency test declaring petitioners unqualified, and, communicated by order dated 2.11.2011 of Deputy Superintendent of Police, Establishment on behalf of Deputy Inspector General of Police, (Establishment) U.P., has been challenged in this writ petition on various grounds. It is said that appropriate electronic gadget was not attached to the legs of candidates which would have recorded the number of rounds completed by a candidate correctly and instead rounds were sought to be counted by a few persons present though number of candidates running was quite large. A more serious issue has been raised regarding constitution of Selection Committee and it is said that Selection Committee was not constituted as per the rule 15(e) read with Appendix 2 of U.P. Sub-Inspector and Inspector (Civil Police) Service Rules, 2008 (hereinafter referred to as "Rules, 2008") and petitioners have been examined by a body, which was not lawfully constituted. It is argued that Selection Committee, who conducted "Physical Efficiency Test" consisted of Sri Ashutosh Pandey, Deputy Inspector General of Police, Special Inquirey, U.P. Lucknow as Chairman, Sri D.C. Mishra, Commandant, 35th Battalion, P.A.C., Lucknow and as Members, Smt. Geeta, Additional Superintendent of Police, C.B.C.I.D., U.P. Lucknow, Sri Shahab Rasheed Khan, Addl. Superintendent of Police, S.T.F., U.P. Lucknow and Sri Ram Badan Singh, Assistant Commandant, 35 Battalion, P.A.C., U.P., Lucknow, which is not as per the requirement of the rules.

4. 248 male and 48 female candidates were called for participation in Physical Efficiency Test between 25.7.2011 to 27.7.2011. 30 male and 48 female candidates were to participate on 25.7.2011, 168 male candidates in four batches were required to participate in the above test on 26.7.2011 and 50 male candidates, in two batches, were to participate on 27.7.2011.

5. It is worthy to notice that above Physical Efficiency Test was specially convened for making compassionate appointments on the post of Sub Inspector and all the petitioners, in the writ petitions, are candidates seeking compassionate appointment on the post of Sub-Inspector, who have been found unsuccessful in physical efficiency test having not completed requisite distance of running in the prescribed time.

6. Sri Ashok Khare, learned counsel for the petitioners drew attention of this Court to Appendix-2 read with Rule 15(e) of Rules, 2008 and contended that for conducting physical efficiency test for direct recruitment with reference to rule 15(e), three members team is required to be constituted comprising of following:

1. Sub Divisional Magistrate/Deputy Collector ;
2. Doctor/Sports Officer/National Cadet Corps, Officer;
3. Deputy Superintendent of Police.

7. He also pointed out that for physical standard test/physical efficiency

test under Rule 15(c), the Committee, which is to be constituted under Appendix-1, is also a three members team with the same composition, as is contemplated in Appendix-2 with reference to Physical Efficiency Test under Rule 15(e). In the present case, since the team, which has conducted the test in question, is not the one as provided in the Rules, the physical efficiency test/physical standard test is illegal. Since the test has been conducted by a Committee constituted de hors the rules, it is no test in the eyes of law and deserves to be quashed, Sri Khare pleaded.

8. The respondents have contested the writ petition by filing counter affidavit in which applicability of Rules, 2008 is not disputed. In para 6, it is said that in order to claim appointment on the post of Sub-Inspector, candidates must satisfy physical standard of completion of 10 kilometers runs in 60 minutes (for male) and 5 kilometers in 35 minutes (for female). The scope of any mistake in manual counting of completed rounds has been denied in para 7. It is urged that Selection Committee, headed by Sri Ashutosh Pandey, examined petitioners and once they have failed in physical standard test, no further opportunity can be given to them and, instead, they may apply for any other post. It is argued that no candidate seeking compassionate appointment has a right to claim appointment against a particular post. The respondents have also relied on the decision in State of U.P. & Ors. Vs. Pankaj Kumar Vishnoi, JT 2013(11) SC 408.

9. Having gone through the decision cited at the Bar by learned Standing Counsel in State of U.P. & Ors. Vs. Pankaj Kumar Vishnoi (supra), I find that it has no application in the case in hand. Therein, physical test was conducted from 27.6.2005 to 29.6.2005 for the post of Sub-Inspector (Civil Police), wherein petitioner participated but returned unsuccessful. Challenging his non selection, he preferred Writ Petition No.63596 of 2006 with a prayer that he should be allowed compassionate appointment on the post of Sub-Inspector (Civil Police) but did not disclose in the writ petition that he was already subjected to physical test for appointment on the said post but failed. The writ petition was dismissed by learned Single Judge vide judgment dated 23.11.2006 on the ground that earlier writ petition with the same prayer was filed and was dismissed as withdrawn without any liberty to file another writ petition, therefore, second writ petition was not maintainable for the same relief and second prayer that he should be offered post of Sub-Inspector (Civil Police) without subjecting him to undergo physical efficiency test is misconceived. This judgment of learned Single Judge was assailed in intra Court appeal i.e. Special Appeal No.1602 of 2006 under Chapter VIII, Rule 5 of the Rules of the Court, which was allowed by Division Bench and judgment of learned Single Judge was set aside. The Division Bench observed that dismissal of earlier petition would not come in the way of second petition since with the passage of time, the petitioner may have become more fit or may be unfit. The Court, therefore, directed the State to test Pankaj Kumar Vishnoi again. It is this judgment of Division Bench, which was taken in appeal by State. The Apex Court has reversed Division Bench judgment observing that compassionate appointment is not a matter of right. If applicant does not conform to the physical efficiency required under the rules or as decided by appointing authority, such applicant cannot claim appointment on compassionate basis as a matter of right ignoring such efficiency or suitability test as

prescribed. The Court further held that in the present case petitioner Pankaj Kumar Vishnoi was already subjected to test for appointment on the post of Sub-Inspector (Civil Police) but he did not qualify and in these circumstances, High Court was not justified to direct Department to give him another opportunity only on the ground that there has been efflux of time. The Court said:

"The respondent being disqualified in the physical test could not have claimed as a matter of right and demand for an appointment in respect of a particular post and the High Court could not have granted further opportunity after the crisis was over."

10. Here, petitioners-candidates are not claiming any second opportunity but they have challenged the test, already conducted by respondents, on the ground that it has been conducted by a Selection Committee, which was not constituted in accordance with rules and have tried to buttressed their argument by observing that an illegally constituted Committee having all the department officials as Chairman and Members has subjected the petitioners to test in a biased atmosphere. The submission is that in any case when selection has not been made strictly in accordance with rules, it is illegal and void ab initio and mere fact that petitioners have appeared in such test would not validate an otherwise illegal selection.

11. Thus, proposition in general that no candidate seeking compassionate appointment has a right to claim such appointment against a particular post, raised by respondents in the counter affidavit, is well established but in the present set of writ petitions, it has no application at all.

12. The question up for consideration in these writ petitions is, whether physical efficiency test conducted in the case in hand has been done in accordance with statutory rules, which learned Standing Counsel also admits are applicable and binding.

13. Selection Committee, which has to conduct test, is a statutory body. It cannot be altered, changed, modified or substituted by a committee of a different constitution and composition at the whims of employer i.e. Government. The kind of composition of Committee provided in the rules shows that rule framing authority contemplates that Selection Committee must consist of officials not only from Police department but from other departments also so that there may be lessor scope of any plea of bias etc. The scope of independent objective consideration by members of Selection Committee from different departments would be more emphatic and the reason as to why aforesaid Selection Committee did not hold Physical Efficiency Test in the case in hand has not been explained.

14. Learned Standing Counsel, when confronted with Rules, 2008 could not dispute that Committee, which conducted Physical Efficiency Test in the case in hand is entirely different than what is contemplated in the Rules. It is not a case where petitioners are claiming any relaxation or concession in respect of application of statutory rules but what they are contending is, "when something is required to be done in a particular manner, respondents cannot proceed to do the same in any other manner" as that would be illegal. They are bound and obliged to follow rules, strictly, in words and

spirit. Any deviation therefrom would vitiate their action. The principle was recognized in Nazir Ahmad Vs. King-Emperor AIR 1936 PC 253 and, thereafter, it has been reiterated and followed consistently by Apex Court in a catena of judgements, which I do not propose to refer all but would like to refer a few recent one.

15. In Dhananjaya Reddy Vs. State of Karnataka 2001 (4) SCC 9 in para 23 of the judgment the Court held :

"It is a settled principle of law that where a power is given to do a certain thing in a certain manner, the thing must be done in that way or not at all."

16. In Commissioner of Income Tax, Mumbai Vs. Anjum M.H. Ghaswala 2002 (1) SCC 633, it was held :

"It is a normal rule of construction 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 statute itself."

17. The judgments in Anjum M.H. Ghaswala (supra) and Dhananjaya Reddy (supra) laying down the aforesaid principle have been followed in Captain Sube Singh & others Vs. Lt. Governor of Delhi & others 2004 (6) SCC 440.

18. In Competent Authority Vs. Barangore Jute Factory & others 2005 (13) SCC 477, it was held :

"It is settled law that where a statute requires a particular act to be done in a particular manner, the act has to be done in that manner alone. Every word of the statute has to be given its due meaning."

19. In State of Jharkhand & others Vs. Ambay Cements & another 2005 (1) SCC 368 in para 26 of the judgment, the Court held :

"It is the cardinal rule of interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way."

20. In fact a similar question was considered by Division Bench of this Court [in which I was also a member with Hon'ble S.R. Alam, J., (as His Lordship then was)] in Daya Shankar Singh Vs. State of U.P. and others, 2008(2) ESC 1220 and this Court has observed:

"A modification, amendment etc., therefore, is permissible by exercising the power in the like manner and subject to like sanction and conditions in which the main provision was made initially. Since, Staff Regulations were framed admittedly with the previous sanction of the State Government and by publication in the official Gazette, same can be amended only following the same procedure and not otherwise. Therefore, the proposal/resolution passed by the Board of Directors, UPSWC by no stretch of imagination can be said to have the effect of either amending Regulation 12 of Staff Regulations or to bind UPSWC and its employees to be governed by such resolution/proposal which are inconsistent with the existing provisions contained in Staff Regulations."

21. Learned Standing Counsel feebly sought to argue that petitioners having participated in the selection before the Committee constituted by respondents cannot be allowed to subsequently

challenge the very constitution of Committee and therefore, this Court should decline to interfere.

22. This submission is also thoroughly misconceived. Here is a case where respondents have conducted selection through a Selection Committee which is patently illegal, having not been constituted in accordance with rules. There cannot be any estoppel against law. When something has been done by a body, not legally constituted, such action would be void ab initio. In such a case, principle that once you have participated in the selection, you cannot challenge rules of the game will not apply for the reason that, here, petitioners are not challenging rules of the game, but their grievance is that rules say something while respondents have played the game in complete defiance thereof and therefore, their action is illegal and void ab initio.

23. In my view, since petitioners have not been tested for physical efficiency test/physical standard test, by a Committee, validly constituted, in accordance with rules, their rejection by an unauthorised and illegally constituted committee is patently illegal.

24. The view, this Court is taking with respect to aforesaid selection, is bound to render entire selection and result declared by the aforesaid committee, illegal. However, candidates, who have been declared successful are not party before this Court. It is stated at the bar that most of those candidates may have already been appointed in service. In their absence, therefore, it will not be appropriate for this Court to pass an order affecting their interest adversely. In these facts and circumstances I am confining consequence of this judgment only to the extent of result of present petitioners and make it clear that declaration of result of petitioners only would stand set aside. The petitioners shall be allowed Physical Efficiency Test, afresh, in accordance with rules, through a team consisting of members as provided in Rules, 2008. The respondents shall proceed accordingly. This exercise shall be completed expeditiously and in any case, within three months from the date of communication of this judgment.

25. The writ petitions are allowed, in the manner, as aforesaid.

26. The petitioners shall also be entitled to cost, which I quantify to Rs.2000/- for each set of writ petitions.